

**GENERAL STATUTES
OF
NORTH CAROLINA**



THE MICHIE COMPANY

NORTH CAROLINA GENERAL STATUTES
1987 CONTENTS CARD

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CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED BY THE GENERAL ASSEMBLY

DEC 6 1981

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A. D. KOWALSKY, S. C. WILLARD, W. L. JACKSON,
K. S. MAWYER, P. R. ROANE, AND T. R. TROXELL

Volume 1A

Part I

THE MICHIE COMPANY

Law Publishers

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Preface

This volume of the General Statutes of North Carolina is designed to facilitate frequent changes in the laws of North Carolina by providing a method to add new material and substitute amended material without large pocket part supplements and frequent replacement of bound volumes. Each chapter of the General Statutes is set out in a separate pamphlet. This enables the replacement of individual chapters only as needed and the insertion of new chapters in their proper place within the volume. Provision has been made within the volume for supplements, but these supplements will remain relatively small, as the larger groupings of material will be added directly to the volume.

A ready reference index is included in this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations 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.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to the Michie Company, Law Publishers, Charlottesville, Virginia.

LACY H. THORNBURG
Attorney General

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

Original Preface

It has been customary for the publication of each official revision of the North Carolina statutes to contain, in its preface, a reference to the authority for the revision and the general procedure for the execution of this authority. Read together, these prefaces form a continuous history of the North Carolina codes through the last official code, the Consolidated Statutes. As a projection of that history, the steps which have led to the preparation and adoption of the General Statutes of 1943 are hereinafter set forth.

The Act of the General Assembly creating the North Carolina Department of Justice, Chapter 315, Public Laws 1939, authorized the Attorney General to set up therein a division to be designated as the Division of Legislative Drafting and Codification of Statutes.

This Division was assigned two principal duties by the statute: (1) to prepare bills to be presented to the General Assembly at the request of the Governor, State officials and departments, and members of the General Assembly, and to advise and assist counties, cities and towns in drafting legislation to be submitted to the General Assembly; (2) to supervise the recodification of the general public statutes and to keep such recodification current.

With respect to the latter duty, the General Assembly authorized the Division to arrange with any publisher or publishers for doing the necessary editorial work and publication of the recodification, with annotations, appendixes, and index, under the supervision and direction of the Division and subject to the final approval and acceptance by the General Assembly. Acting upon this legislative authority, the Attorney General contracted with The Michie Company, Law Publishers of Charlottesville, Virginia, for publication of this recodification. It should be pointed out that The Michie Company, for over fifteen years, had published the unofficial codes and supplements in the State, and its Code of 1939 was used as a basis upon which to prepare the new codification.

This Division was set up on July 1, 1939, with W.J. Adams, Jr., as the director of the staff employed to carry on the work.

At the request of the Attorney General, Honorable Kingsland Van Winkle, President of the North Carolina Bar Association, and Honorable Fred S. Hutchins, President of the North Carolina State Bar, appointed a committee of able lawyers to assist in planning the new code. For the North Carolina Bar Association the following were named: Bennett H. Perry, Henderson; H. G. Hedrick, Durham; H. Gardner Hudson, Winston-Salem; Clifford Frazier, Greensboro; and Bryan Grimes, Washington. For the North Carolina State Bar the following were named: C. W. Tillett, Charlotte; Jack Joyner, Statesville; H. J. Hatcher, Morganton; Frank E. Winslow, Rocky Mount; and William T. Joyner, Raleigh.

At the request of the Attorney General, the following named persons also served as a part of this committee: Honorable A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. Van Hecke, of the University Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; and Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian.

Full acknowledgment is made of the valuable assistance given by this committee in formulating the plans for the new code. The members of the committee very generously responded to the call for this service, giving a great deal of their valuable time to it without compensation or even reimbursement for their travel expenses.

In keeping with the procedure in prior revisions, the General Assembly of 1941 (Public Laws, Chapter 35) authorized the preparation and printing of a Legislative Edition of the proposed code for submission to the General Assembly of 1943.

The General Assembly of 1941 also adopted Joint Resolution No. 33, providing for a Commission on Recodification to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes, naming on this Commission the following persons:

Representatives F. E. Wallace, J. A. Pritchett, Hubert C. Jarvis, Irving Carlyle, Rupert T. Pickens, Julian R. Allsbrook, J. Q. LeGrand, O. L. Richardson, Arch T. Allen, John Kerr, Jr., George R. Uzzell, W. Frank Taylor, S. O. Worthington, J. T. Pritchett, Forrest A. Pollard, and T. E. Story; Senators Jeff D. Johnson, Jr., E. T. Sanders, J. C. Pittman, Wade B. Matheny, John W. Wallace, John D. Larkins, Jr., Thomas J. Gold, Archie C. Gay, Herbert Leary, and Hugh G. Horton.

The Commission organized shortly after the adjournment of the Legislature and elected Mr. F. E. Wallace as Chairman.

The members of this Commission have cooperated to the fullest possible extent in the manner provided by the Statute. Every chapter and every section of the new code has been checked and approved by the Commission. This has involved an enormous amount of work as must be evident. The cooperation and approval of this Commission affords assurance that the work has been properly done and errors reduced to a minimum. A detailed statement of the methods used in preparing the new code may be found in the Preface to the Legislative Edition.

The Act revising and consolidating the General Statutes of the State of North Carolina was ratified on February 4, 1943. Chapter 15 of the Session Laws of 1943 provided that this Act should not be printed in the Session Laws of 1943.

Chapter 15 of the Session Laws of 1943 provided that the Division, under the direction of the Attorney General, should complete and perfect the recodification, which should be designated "General Statutes", by inserting 1943 Acts in their proper places, deleting repealed statutes and making other necessary corrections and rearrangements. This Act specifically provided that "after the completion of such codification of the general and public laws of one thousand nine hundred and forty-three, such laws, as they appear in the printed volumes of the General Statutes, shall be deemed an accurate codification of the statutes of one thousand nine hundred and forty-three contained therein."

Chapter 543 of the Session Laws of 1943 enacted many of the recommendations of the Attorney General and the Legislative Commission, and Legislative Committees, designed to clarify various statutes, and correct other defects, and these changes are reflected in the General Statutes.

VOLUME AND CHAPTER ARRANGEMENT

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great

increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and additional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

Once the idea of a one-volume code was abandoned, it became necessary to devise a new classification and arrangement of statutes since the arrangement used in the Consolidated Statutes would require in many instances that all volumes be consulted in the study of certain related statutes in different chapters. In order to avoid this inconvenience as much as possible, an effort was made to group related chapters in larger "divisions" and to place related divisions together. At the same time, it was necessary to maintain a balance so that all four volumes would be as nearly uniform in size as would be conveniently possible.

It is believed that the adopted chapter arrangement will be convenient and also allow for an expansion of the code within a basic framework.

NUMBERING SYSTEM

The enactment of thousands of new laws since adoption of the Consolidated Statutes of 1919 made it necessary to change the section numbers in the new code. The numbering system of the Consolidated Statutes had grown unwieldy through much sub-numbering. Furthermore, adherence to the old system forestalled any improvement in the arrangement of the statutes.

The choice of a satisfactory numbering system for the new code was carefully studied. After a consideration of various systems, it was finally decided that a modified form of consecutive numbering would be the most satisfactory system to adopt, and such a system was approved by the Legislative Commission on Recodification. This system consists of: (1) numbering the chapters of the code consecutively, (2) using the chapter number as the first part of each code section number, and (3) numbering the sections in each chapter consecutively from "one" on through the end of the chapter. The code section number consists of the chapter number, a dash, and the number of the section in the chapter. This system will have two advantages. New sections may be added indefinitely at the end of each chapter without necessitating sub-numbering and disturbing the numbering system. This numbering system will readily permit the insertions of new chapters with a minimum of inconvenience and confusion in the numbering of the new sections. The old Consolidated Statutes section number has been carried forward in the citations at the end of the statutes as has been the practice heretofore in noting prior official code references. Comparative tables translating the Consolidating Statutes and Michie Code section numbers to the new code numbers are included in an appendix.

LOCAL LAWS

The recodification has been made of the "general public statutes." North Carolina has enacted a great volume of private, special and local legislation. The problem of local legislation seems to be more serious in North Carolina than in most states. The problem of the proper disposition of these laws has harassed the preparation of the

General Statutes to an even greater degree than prior revisions, which have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and complexity of legislation, it was clearly apparent that to continue to include in the code statutes which are essentially local in nature (except for necessary exceptions) would result in an overbulky code and greatly complicate the search for the general laws.

The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924. Thus, the main basis for the present work is that revision and subsequent public session laws. However, many of the statutes in the "public laws" volumes are of local application, and it was necessary to make a decision as to which statutes should be codified. It was finally decided that any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code. All portions of the statutes or direct amendments to statutes affecting 9 counties or less have merely been cited in the first annotation paragraph following the statute and entitled "Local Modification." Under this heading the affected counties, together with the appropriate session law or Consolidated Statutes citation, have been listed alphabetically without any attempt to summarize the provisions of the local laws modifying the general law. It was found that any attempt to analyze the exact effect of particular local provisions would often be not only misleading but inaccurate in the absence of a comprehensive study of all the vast body of local legislation appearing in the Public-Local and Private Law volumes since the vast majority of local laws do alter the general law without making direct references.

A great deal of attention has been devoted to the index in a section-by-section analysis, designed (1) to delete inapplicable index references, (2) to correct inaccurate index references, and (3) to add new index references where sections or portions of sections are found to be indexed inadequately or not at all. At the same time, index lines have been repeated as often as the limitations of space and utility permit, to the end that "Cross References" or "See" references (some of which are absolutely necessary in a code index) may be reduced to a minimum, and where they cannot be entirely eliminated, the inclusive section numbers have been listed along with the Cross Reference.

As will be noted, the index type has been increased from six point to eight point, and set in a two-column page.

ANNOTATIONS

The work of preparing the annotations rested largely with the editorial staff of the publishers. The editors, in co-operation with the Division's Codification Staff, have made an effort to provide annotations which are as complete and accurate as are necessary for an understanding of the statutes. It is believed that the proper function of the code annotations is to aid in the construction of the statutes and that the annotations should not take the scope of a general digest of case law. In an effort to provide effective annotations, various sources have been checked, including the citators, the annotations of the Consolidated Statutes of 1919, and the annota-

tions in Pell's Revisal of 1908. Annotations in the General Statutes begin with Volume 1 and extend through Volume 222 of the North Carolina Reports.

ADDITIONAL FEATURES

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

THE PUBLISHER'S EDITORIAL STAFF

The publisher's editorial staff, headed by A. Hewson Michie, the Company's President, and Chas. W. Sublett, Editor-in-Chief, specially assisted by Beirne Stedman and Robert H. Davis, Jr., has cooperated fully in the preparation of this code, and, notwithstanding difficulties brought on by war conditions, has ably carried its responsibilities associated with this publication.

THE CODIFICATION STAFF

The staff of the Division has varied from two to five lawyers, including the director, and one secretary. The calls of the military and naval services and the opportunities for advancement elsewhere have resulted in many changes in personnel since the work was first begun. During this time the following persons have served on the legal staff: Moses B. Gillam, Jr., Cornelia McKimmon Trott, James E. Tucker, Garmon Stuart, John Lawrence, Harry W. McGalliard, James B. McMillan, Kemp Yarborough, J. B. Bilisoly, Sarah Starr Gillam, Junius D. Grimes, Jr., Joseph B. Cheshire, IV, Catherine Paschal and Joel Denton; and the following persons have served as secretaries: Minerva Coppage, Marjorie Mann and Effie McLean English. All of them have given loyal and diligent service. Grateful acknowledgment is made to them for their labors which were both extensive and difficult.

When W. J. Adams, Jr., was named Assistant Attorney General in October, 1941, Harry W. McGalliard was appointed Director of the Division. Mr. Adams continued to assist in the supervision of the recodification work. Mr. McGalliard has continued to serve as Director until the present. He has personally done the important job of revising the index.

CONTINUOUS REVISION

The General Assembly of 1943 enacted Chapter 382 of the Session Laws, which provides in part as follows:

"In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

"1. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected.

"2. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

"3. Prepare for submission to the General Assembly from time to time bills to correct such defects in the statutes as its research discloses."

By Joint Resolution No. 23, the General Assembly of 1943 created a Commission on Statutory Revision, consisting of Senators Irving E. Carlyle, Brandon P. Hodges, D. E. Hudgins, Wade B. Matheny and K. A. Pittman; and Representatives Oscar G. Barker, Frank W. Hancock, Jr., A. I. Ferree, Bryan Grimes, W. I. Halstead, Robert Moseley and Kerr Craige Ramsey, "to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes in the study of the recommendations of the Division with respect to desirable clarifying statutes and the preparation of such proposed statutes for submission to the General Assembly of 1945."

The General Assembly, by this Act and Resolution, laid the foundation for a system of continuous statutory revision in North Carolina similar to systems that have been inaugurated in some of the other states with much success.

The purpose of this system is to provide an agency which will continuously study the statutory law of the State, and prepare recommendations to successive General Assemblies in the form of revision bills for the elimination of statutory defects as soon as possible after their appearance, and thus to avoid, or at least postpone, the necessity of the periodical bulk revisions that have heretofore been necessary.

SUPPLEMENTS

Under the contract with the publishers, the General Statutes will be kept current by use of cumulative pocket supplements for as long as possible and a minimum period of eight years, before any other edition can be published. The publishers will issue these supplements within six months of each regular or extra session of the General Assembly, and they will contain complete annotations and indexes. Each six months after the publication of the General Statutes, the publishers have agreed to issue interim annotation supplements, containing all pertinent annotations since the publica-

tion of the General Statutes or the last supplement, all of which will be done under the supervision of the Department of Justice.

HARRY McMULLAN,
Attorney General.

August 15, 1943

User's Guide

The following guide contains comments on a few of the features found in the North Carolina General Statutes. These comments are made to increase the usefulness of the General Statutes to its users.

If you have any questions or suggestions concerning the General Statutes of North Carolina, please write or call toll free 1-800-446-3410. Direct written inquiries to:

The Michie Company
Law Publishers
Attn: General Statutes of North Carolina
P.O. Box 7587
Charlottesville, Virginia 22906-7587

This guide is designed to help both the lawyer and the layman get the most out of the General Statutes of North Carolina. It gives brief information on how to use each of the following features most effectively:

- Amendment Notes
- Analyses
- Attorney General's Opinions
- Case Notes
- Comments
- Constitutional History and Amendments
- Cross References
- Editor's Notes
- Historical Citations
- Indexes
- Legal Periodicals
- Local Modifications
- Numbering and Structure
- Postponed and Contingent Effective Dates
- Repealed, Recodified and Transferred Sections
- Retention of Obsolete Material
- Tables

AMENDMENT NOTES

Amendment notes show, without editorial comment, changes made in a statute by the legislature. If the changes are extensive and a detailed comparison would be impractical or confusing, the note may simply indicate that the amendment "rewrote the section." In those instances, the user should consult the Session Laws to determine the changes made by the amendment.

Amendment notes are generally retained in the main volumes for those sections which have been amended within the previous two years. The Cumulative and Interim Supplements contain amendment notes covering the period between publication of the main volume and publication of the supplements.

ANALYSES

In addition to the table of contents in the preliminary pages of each main volume, each chapter of the General Statutes is preceded by an analysis, which enables the user to see its contents at a glance. Use of the chapter analyses can reduce the need to use the general index and can also provide a quick understanding of the scope of the chapter.

ATTORNEY GENERAL'S OPINIONS

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. These may be found under the section in question under the heading "Opinions of Attorney General."

CASE NOTES

All reported state and federal cases which arise in North Carolina and construe North Carolina law have been read and fully annotated under pertinent statutes and rules. These annotations may be found under the heading "Case Notes." All case notes have been read and edited to assure their continuing accuracy. Where a decision has undergone subsequent review, the reviewing court's action is noted in the case citation if it affects the annotated point. Where two or more decisions apply to the same section or rule in essentially identical terms, their citations are cumulated under the case note.

In the supplements, a case which essentially repeats the same language as an earlier case appearing in the main volume is referred to by repeating all or part of the catchline found in the main volume and indicating the location of the full text, using the words "In accord with..."

The terms "applied," "quoted," "stated" and "cited" are used in the case notes to refer the user to cases which apply, quote from, paraphrase or otherwise refer to a given section or rule, but which, in the editor's view, do not lend themselves to a substantive paragraph under the section or rule in question.

Where a section or rule has been substantially amended or repealed and the subject matter is reenacted in a new section rule, the editor has retained those case notes which, while construing the former law, may also construe or contribute to the user's understanding of the new provision.

All annotations are intended as source material, and the user is urged to review the actual case itself rather than relying wholly on an annotation.

For scope of annotations, the preliminary pages in the front of the main volume and the Cumulative and Interim Supplements should be consulted.

COMMENTS

Certain chapters of the General Statutes contain official commentaries to the material therein. These are shown under the head-

ing "Official Comment," "Amended Official Comment," or the like, as appropriate. These commentaries are not prepared by the publisher, but are included as an additional feature for the user.

CONSTITUTIONAL HISTORY AND AMENDMENTS

Provisions of the Constitution of 1868, as amended through 1969, are noted under the catchline "History" under the corresponding sections of the current Constitution of 1970.

Proposed amendments to the Constitution are noted under the affected section under the heading "Proposed Amendment(s)." Amendments to the Constitution which have been approved by a vote of the people are shown under the "Effect of Amendments" heading. Amendments to the Constitution which have been defeated are shown under the heading "Defeated Amendment Proposals."

CROSS REFERENCES

Cross references refer the user to other statutes or rules of court that may modify or supplement a statutory provision or place it in context. They are not included for sections immediately preceding or following the section at hand within the same chapter and do not cite all related statutes. The general index should be used to locate all of the law on a subject.

EDITOR'S NOTES

These notes inform the user about special circumstances connected with the section, such as noncodified material affecting the interpretation or operation of the section, effective dates of new provisions, etc. In addition, editor's notes may explain additions or corrections made by the editors in the text, under the direction of the Revisor of Statutes, and other matters of interest to the user.

HISTORICAL CITATIONS

The material appearing in parentheses immediately following the text of a section is the historical citation. The citation includes, in chronological order, all session laws, by year, chapter and, where appropriate, section, that enact or amend that Code section. The historical citation also indicates the citation of the section in the various codes prior to the General Statutes of 1943.

INDEXES

The general index for the North Carolina General Statutes is published in two volumes in binder format, which are updated and replaced every odd-numbered year. In even-numbered years, an index is printed at the back of the interim supplement. In addition, a "Ready Reference Index" is included in each main volume in the binder format. This index gives a brief description of the contents of the volume, along with the section numbers of the described material.

For some basic principles concerning index use, consult the Foreword to the Indexes in the first volume of the general index.

LEGAL PERIODICALS

Legal periodicals published in North Carolina have been exam-

ined for relevancy to General Statutes sections and rules, and are cited when some relationship is found.

LOCAL MODIFICATIONS

An act which expressly amends a General Statutes section, but which is applicable to fewer than ten localities, or an act applicable to fewer than ten localities which makes some express exception to or modification of a General Statutes section, is shown under the heading "Local Modification" following the affected section.

NUMBERING AND STRUCTURE

The General Statutes are organized by chapters, which are numbered consecutively. New chapters inserted between two preexisting chapters utilize the number of the chapter which will immediately precede the new chapter, with a letter of the alphabet added at the end of the number, beginning with the letter "A." (Thus the chapters immediately following Chapter 115 are Chapters 115A, 115B, 115C, etc.) Many of the chapters are subdivided into articles and parts.

For the most part the chapters utilize a two-part numbering system, with the chapter number as the first part of the code section number and the sections of the chapter numbered consecutively thereafter (usually but not always from "one" to the end of the chapter). A dash separates the chapter number and section number. Additional sections are inserted between preexisting sections in a chapter by use of a period, followed by consecutive numbers starting with "one."

Some of the chapters in the General Statutes utilize a three-part numbering scheme, with the chapter number as the first part of the code section number, the article number as the second part, and the sections of the chapter numbered consecutively as the final part. (See, e.g., Chapter 25.)

POSTPONED AND CONTINGENT EFFECTIVE DATES

Legislation which is effective later than January 1 of the year following the year of the legislative session is considered postponed. Legislation which is effective only upon the happening of some event that may or may not take place is considered contingent.

Postponed and contingent legislation is generally set out with the postponed effective date or other explanatory information in parentheses in the section catchline. The section or portion of section affected may be set out twice in the main volume or supplement to show the current and postponed or contingent versions thereof.

In addition, boldface lines are carried in the bottom margins of those pages on which sections with postponed or contingent effective dates appear.

REPEALED, RECODIFIED AND TRANSFERRED SECTIONS

Where a section or group of sections has been repealed, recodified or transferred, its section number has been retained in its former

location, and an indication of the action has been included. Editor's notes and cross references may follow explaining the action and referring the user to new or present provisions, if any.

RETENTION OF OBSOLETE MATERIAL

It is strongly suggested that users retain obsolete main volumes and supplements after they are replaced, for reference purposes and for a verbatim representation of the exact wording of each section as it read from year to year.

TABLES

Volume 4A of the North Carolina General Statutes contains five sets of tables: (1) Table comparing the 1868 Constitution, as amended through 1969, to the 1970 Constitution; (2) Table comparing the Revisal of 1905 and Pell's Revisal of 1908 to the Consolidated Statutes of 1919; (3) Table comparing the Consolidated Statutes of 1919 to the General Statutes; (4) Table of sections appearing in the Consolidated Statutes of 1919 but deleted from the General Statutes; (5) Table of Laws codified subsequent to 1919, arranged by year and act number.

The Table of Laws Codified is updated in each Cumulative Supplement and Interim Supplement for Volume 4A.

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GENERAL STATUTES OF NORTH CAROLINA

Chapter 1 Civil Procedure

NOVEMBER 1983

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1983

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the attached recompilation of Chapter 1 of 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.

RUFUS L. EDMISTEN

Attorney General of North Carolina

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Chapter 1.

Civil Procedure.

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- 1-568.1 to 1-568.27. [Repealed.]
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Sec.

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SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

ARTICLE 1.

Definitions.

§ 1-1. Remedies.

Remedies in the courts of justice are divided into —

- (1) Actions.
- (2) Special proceedings. (C.C.P., s. 1; Code, s. 125; Rev., s. 346; C.S., s. 391.)

Cross References. — For Rules of Civil Procedure, see Chapter 1A.

CASE NOTES

References to Superior Court Deemed to Refer Also to District Court. — Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. *Boston v. Freeman*, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Admission of Patient to Hospital

for Mentally Ill. — A proceeding in accordance with the provisions of § 122-36 et seq., in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding this section. *In re Cook*, 218 N.C. 384, 11 S.E.2d 142 (1940).

Stated in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 1-2. Actions.

An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (C.C.P., s. 2; 1868-9, c. 277, s. 2; Code, s. 126; Rev., s. 347; C.S., s. 392.)

CASE NOTES

An inquisition of lunacy is not a civil action as defined in this section. *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).

Quoted in *Gillikin v. Gillikin*, 248

N.C. 710, 104 S.E.2d 861 (1958); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

Cited in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 1-3. Special proceedings.

Every other remedy is a special proceeding. (C.C.P., s. 3; Code, s. 127; Rev., s. 348; C.S., s. 393.)

Cross References. — As to special proceedings generally, see § 1-393. As to special proceeding for partition of real

estate, see § 46-1. As to special proceeding in allotment of year's allowance, see § 30-27 et seq.

CASE NOTES

What Are Special Proceedings. — Any proceedings which prior to the Code of Civil Procedure might have been commenced by petition or by motion on notice, such as proceedings for dower, partition and year's allowance, are special proceedings under this section. *Tate v. Powe*, 64 N.C. 644 (1870); *Felton v. Elliott*, 66 N.C. 195 (1872).

One test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. *Woodley v. Gilliam*, 64 N.C. 649 (1870).

Proceedings in bastardy are special proceedings. *State v. McIntosh*, 64 N.C. 607 (1870).

Proceedings to obtain damages for

injuries to land caused by erection of a mill are special proceedings because made so by the statute creating a statutory remedy. *Sumner v. Miller*, 64 N.C. 688 (1870).

A petition by an administrator to sell lands for the payments of debts is a special proceeding. *Hyman v. Jarnigan*, 65 N.C. 96 (1871); *Badger v. Jones*, 66 N.C. 305 (1872).

An action to recover the possession of land, such as ejectment, is not a special proceeding. *Woodley v. Gilliam*, 64 N.C. 649 (1870).

Mandamus to try title to an office is not a special proceeding. *State ex rel. Howerton v. Tate*, 66 N.C. 231 (1872).

An inquisition of lunacy is not a special proceeding under this section. *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).

Quoted in *N. Jacobi Hdwe. Co. v. Jones Cotton Co.*, 188 N.C. 442, 124 S.E.

756 (1924); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

Cited in *Gillikin v. Gillikin*, 248 N.C. 710, 104 S.E.2d 861 (1958); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 1-4. Kinds of actions.

Actions are of two kinds —

(1) Civil.

(2) Criminal. (C.C.P., s. 4; Code, s. 128; Rev., s. 349; C.S., s. 394.)

CASE NOTES

Cited in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

§ 1-5. Criminal action.

A criminal action is —

(1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof.

(2) An action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property. (Const., art. 4, s. 1; C.C.P., s. 5; Code, s. 129; Rev., s. 350; C.S., s. 395.)

CASE NOTES

History. — This section worked a significant change in the law of the State with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the State were not necessarily criminal suits as distinguished from civil suits — the true test being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the State, it was a civil suit." *State v. Pate*, 44 N.C. 244 (1853). Hence, a warrant to keep the peace was a civil action though brought in the name of the State. See *State v. Locust*, 63 N.C. 574 (1869). But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the State at the instance of an individual to prevent an apprehended crime against the person or property of the individual; in either case the action being a criminal proceeding. See *State v. Oates*, 88 N.C. 668 (1883); *State v. Lyon*, 93 N.C. 575 (1885).

An inquisition of lunacy is not a criminal action within the meaning of this section. *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).

Private Individuals as Prosecutors. — No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. *State v. Lupton*, 63 N.C. 483 (1869).

Section as Remedy for Defendant's Criminal Acts. — Where alleged acts of defendant are criminal, plaintiff is not entitled to equitable relief in the nature of an injunction, but is furnished an adequate remedy by this section. *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Remedy against Alleged Unconstitutional Discrimination in Statutes. — By prosecuting, under this section, persons doing acts allowed by a statute, a remedy against alleged unconstitutional discrimination of such statute is afforded. *Newman v. Watkins*, 208 N.C. 675, 182 S.E. 453 (1935).

As to proper titles of criminal cases, see *Larkins v. Murphy*, 68 N.C. 381 (1873).

Cited in *State v. Rumfelt*, 241 N.C. 375, 85 S.E.2d 398 (1955).

§ 1-6. Civil action.

Every other is a civil action. (C.C.P., s. 6; Code, s. 130; Rev., s. 351; C.S., s. 396.)

Cross References. — As to form of action, see Rule 2 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

Cited in *Gillikin v. Gillikin*, 248 N.C. 710, 104 S.E.2d 861 (1958).

§ 1-7. When court means clerk.

In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which cases the judge of the court alone is meant. (C.C.P., s. 9; Code, s. 132; Rev., s. 352; C.S., s. 397; 1971, c. 381, s. 12.)

Cross References. — As to jurisdiction of the clerk, see § 1-13.

Legal Periodicals. — For discussion

of this section and its history, see 1 N.C.L. Rev. 15 and 1 N.C.L. Rev. 199.

CASE NOTES

History. — It was pointed out in *Brittain v. Mull*, 91 N.C. 498 (1884), that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp Act in 1919 the rule is otherwise. See 1 N.C.L. Rev. 199. See also the "History" note to § 1-13.

As to the power of the legislature to confer jurisdiction upon the clerk, see *Bank of N. Wilkesboro v. Wilkesboro Hotel Co.*, 147 N.C. 594, 61 S.E. 570 (1908).

Clerk Acts for Court. — Although the terms "court" and "superior court," as used in this section, mean the clerk of the court as indicated, the clerk is given

no separate jurisdiction apart from the court itself. Insofar as civil procedure is concerned, at least, the clerk acts as and for the court in the instances specified. His acts are performed by the court through him and stand as those of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole procedure is in the court and has its sanction. *Jones v. Desern*, 94 N.C. 32 (1886).

In special proceedings the clerk acts for the court in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein, unless his action is revised or modified by the judge upon appeal. *Jones v. Desern*, 94 N.C. 32 (1886); *Adams v. Howards*, 110 N.C. 15, 14 S.E. 648 (1892).

The clerk represents and is the court

and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed, the clerk implies the court in cases like this. *Tillett v. Aydlett*, 90 N.C. 551 (1884).

This section gives the clerk power to enter a judgment for the recovery of money. *Bank of N. Wilkesboro v. Wilkesboro Hotel Co.*, 147 N.C. 594, 61 S.E. 570 (1908).

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. *Thigpen v. Piver*, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Jurisdiction under § 26-3 is conferred upon the clerk by virtue of this section. *Bank of N. Wilkesboro v. Wilkesboro Hotel Co.*, 147 N.C. 594, 61 S.E. 570 (1908).

The term "superior court," as used in former § 28-81, means clerk of the superior court. *Pelletier v. Saunders*, 67 N.C. 261 (1872).

Summary Remedy against Railroad. — Under statute providing that a summary remedy by landowners against a railroad for damages caused by construction may be begun either in or out of term by service of petition, it is proper for the judge to appoint commissioners as provided if the proceeding is begun in term, but where the proceeding is begun in vacation the clerk may act for the court. *Click v. Western N.C.R.R.*, 98 N.C. 390, 4 S.E. 183 (1887).

Execution in Garnishment Proceedings. — In view of this section, when the judgment in garnishment proceedings under former § 1-461 was entered up, the execution, which was awarded as a matter of course, could be issued by the clerk without application to the judge. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

ARTICLE 2.

General Provisions.

§ 1-8. Remedies not merged.

Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (C.C.P., s. 7; Code, s. 131; Rev., s. 353; C.S., s. 398.)

CASE NOTES

Propriety of Summons Upheld. — In view of this section, it was proper to serve a summons and order of arrest upon defendant while he was confined in jail upon his failure to give an appearance bond to answer for a secret

criminal assault. *White v. Underwood*, 125 N.C. 25, 34 S.E. 104 (1899).

Cited in *Scales v. Wachovia Bank & Trust Co.*, 195 N.C. 772, 143 S.E. 868 (1928).

§ 1-9: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section, see Rule 2 of the Rules of Civil Procedure (§ 1A-1).

§ 1-10. Plaintiff and defendant.

In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (C.C.P., s. 13; Code, s. 134; Rev., s. 355; C.S., s. 400.)

§ 1-11. How party may appear.

A party may appear either in person or by attorney in actions or proceedings in which he is interested. (C.C.P., s. 423; Code, s. 109; Rev., s. 356; C.S., s. 401.)

Legal Periodicals. — For note on the right to defend pro se, see 48 N.C.L. Rev. 678 (1970).

CASE NOTES

The right to appear in actions either in person or by attorney is alternative, and a party has no right to "appear" both by himself and by counsel. *Hamlin v. Hamlin*, 302 N.C. 478, 276 S.E.2d 381 (1981).

A party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981).

A party has the right to appear in propria persona or by counsel, but this right is alternative. *State v. Phillip*, 261 N.C. 263, 134 S.E.2d 386, cert. denied, 377 U.S. 1003, 84 S. Ct. 1939, 12 L. Ed. 2d 1052, rehearing denied, 379 U.S. 874, 85 S. Ct. 27, 13 L. Ed. 2d 83 (1964).

This right is alternative. A party has no right to appear both by himself and by counsel, nor should he be permitted ex gratia to do so. *Abernethy v. Burns*, 206 N.C. 370, 173 S.E. 899 (1934). See also, *McClamroch v. Colonial Ice Co.*, 217 N.C. 106, 6 S.E.2d 850 (1940).

No Right to Appear in Person and by Counsel at Same Time. — This section simply means that a litigant may not appear both in propria persona and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later appear through counsel. Thus, a litigant who elects to employ counsel at any stage of the proceedings may not be deprived of his counsel's services for the reason that he theretofore appeared in person. *New Hanover County v. Sidbury*, 225 N.C. 679, 36 S.E.2d 242 (1945).

A party may not actively participate in trial proceedings when he is represented by counsel. *Moorefield v. Garrison*, 464 F. Supp. 892 (W.D.N.C. 1979).

No Sixth Amendment Right to Serve as Co-Counsel. — While defendant had the right to appear either in

propria persona or by counsel, defendant had no Sixth Amendment right to serve as co-counsel with his court-appointed attorney. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981).

Counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. *State v. Alston*, 272 N.C. 278, 158 S.E.2d 52 (1967).

The constitutional right to counsel does not justify forcing counsel upon an accused who wants none. *State v. Alston*, 272 N.C. 278, 158 S.E.2d 52 (1967).

Pro Se Appearance of Defendant in Criminal Case. — A party is entitled to appear in propria persona; hence, when a defendant insisted upon this right, notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it could not be successfully argued on appeal that he was prejudiced by the actions of the trial court in failing to provide him with counsel and in permitting him wide latitude in the introduction of evidence. *State v. Pritchard*, 227 N.C. 168, 41 S.E.2d 287 (1947).

Effect of Appearance Pro Se on Admission of Evidence, etc. — Where defendant appeared pro se, the trial court did not err in allowing the admission of evidence to which defendant offered no objection at the time of its admission and in failing to warn defendant of his right against self-incrimination when defendant offered to testify in his own behalf. *State v. Lashley*, 21 N.C. App. 83, 203 S.E.2d 71 (1974).

Absent Court Order Party to Civil Action Not Required to Appear. — No statute, rule of court or decision mandates the presence of a party to a civil action or proceeding at the trial or at a hearing in connection with the action or proceeding, unless the party is specifically ordered to appear. *Hamlin v.*

Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Stated in Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Cited in County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934); In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948).

§ 1-12: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-13. Jurisdiction of clerk.

The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular session is expressly referred to. (C.C.P., s. 108; Code, s. 251; Rev., s. 358; C.S., s. 403; 1971, c. 381, s. 12.)

Cross References. — As to construction of references to the superior court to refer to the clerk thereof, see § 1-7.

Legal Periodicals. — For discussion of this section and its history, see 1 N.C.L. Rev. 199.

CASE NOTES

History. — This section was passed in 1868 as a part of the Code of Civil Procedure. It was a part of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the Civil War, the people were not desirous of a more speedy system of procedure, for the reason that in actions for debts the unfortunate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act," which suspended the operation of certain portions of the Code of Civil Procedure temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise provided. The suspension act became Chapter 18 of Battle's revisal, was incorporated in the Code of 1883 as Chapter 10 of the Code of Civil Procedure, was carried forward in subsequent revisals (see Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887)), and remained in force until 1919, when the legislature passed what is known as the "Crisp Act," restoring the suspended provisions of the Code of Civil Procedure. See Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920); 1 N.C.L. Rev. 199.

The suspension act was chiefly directed at the portions of the Code of Civil Procedure which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and procedure should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings, and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. *Brittain v. Mull*, 91 N.C. 498 (1884); *Jones v. Desern*, 94 N.C. 32 (1886); *Warden v. McKinnon*, 94 N.C. 378 (1886).

With the passage of the Crisp Act this section is in full force and effect. See *Campbell v. Campbell*, 179 N.C. 413, 102 S.E. 737 (1920).

Constitutionality of Suspension Act. — The constitutionality of the suspension act was attacked in *McAdoo v. Benbow*, 63 N.C. 461 (1869), upon the ground that the Constitution required the clerk to hear and decide all questions of practice and procedure, but it was held

that the Constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became universally recognized as the law until the Crisp Act of 1919. *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170 (1887).

Nature of Clerk's Power. — In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. *Brittain v. Mull*, 91 N.C. 498 (1884); *Maxwell v. Blair*, 95 N.C. 317 (1886); *Turner v. Holden*, 109 N.C. 182, 13 S.E. 731 (1891).

Jurisdiction is conferred upon the court, and not upon the clerk, who is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and the judge, but they both function as officials of the same court exercising but one jurisdiction. *McAdoo v. Benbow*, 63 N.C. 461 (1869); *Jones v. Desern*, 94 N.C. 32 (1886).

Power as to Equitable Relief. — The Code of Civil Procedure does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the answer as a defense and then the clerk has power to hear all questions herein permitted. See *Bragg v. Lyon*, 93 N.C. 151 (1885); *Vance v. Vance*, 118 N.C. 864, 24 S.E. 768 (1896).

Duties of Clerk. — Regularly, in special proceedings (and since the act of 1919 in all proceedings) the pleadings should be made up and perfected by the clerk, acting as and for the court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. *Brittain v. Mull*, 91 N.C. 498 (1884); *Wharton v. Wilkerson*, 92 N.C. 407 (1885); *Loftin v. Rouse*, 94 N.C. 508 (1886).

The court in term should not do more than to direct the clerk to perfect the pleadings and to allow or disallow amendment according to law. If the clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the judge would become that of the court. It was the duty of the clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such

respect, an appeal might be taken as indicated above. *Loftin v. Rouse*, 94 N.C. 508 (1886).

It was not the duty of the judge in term, after the issues were tried, there being no question of law to be decided, to direct the clerk what to do, or to make an order remanding the case to the clerk. The latter ought to have proceeded without an order and heard and determined the case upon its merits, subject to the right of appeal to the judge. *Brittain v. Mull*, 94 N.C. 595 (1886).

Effect of Failure of Clerk to Decide Questions. — The Supreme Court was not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury where they had not been decided by the clerk, acting for the court, and, upon appeal, by the judge, as it was the duty of the clerk, acting for the court, to decide whatever question might be presented, and to make all proper orders. *Brittain v. Mull*, 94 N.C. 595 (1886).

De Novo Appeal of Clerk's Rulings. — Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not derivative; rather, the judge hears the matter de novo. *Cody v. Hovey*, 219 N.C. 369, 14 S.E.2d 30 (1941).

Amendments after Joinder of Issues. — Where, in special proceedings, the pleadings are made up before the clerk, and upon joinder of issues are transferred to the court in term, the judge has power to allow amendments, or he may stay the trial and remand the papers to the clerk in order that he may consider a motion to amend. *Loftin v. Rouse*, 94 N.C. 508 (1886).

Order of Remand Not Appealable. — An order remanding the papers to the clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right; hence, it cannot be appealed from. *Loftin v. Rouse*, 94 N.C. 508 (1886).

Proceedings to obtain partition, dower and the like are special proceedings. *Jones v. Desern*, 94 N.C. 32 (1886).

A proceeding by creditors to compel an administrator to an account and payment of the debts of the estate is a special proceeding. *Brittain v. Mull*, 91 N.C. 498 (1884); *Warden v. McKinnon*, 94 N.C. 378 (1886).

The granting of a warrant of attachment was a special proceeding. *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889).

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-14: Repealed by Session Laws 1967, c. 954, s. 4.

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

(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Repealed by Session Laws 1979, c. 654, s. 3.

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action. (C.C.P., s. 17; Code, s. 138; Rev., s. 360; C.S., s. 405; 1967, c. 954, s. 3; 1971, c. 1157, s. 1; 1975, 2nd Sess., c. 977, ss. 1, 2; 1979, c. 654, s. 3.)

Cross References. — For provision covering subject matter similar to that of repealed subsection (b) of this section, relating to accrual of causes of action for personal injury or physical damage to property in cases other than those covered by subsection (c) of this section, see § 1-52(16). As to pleading of affirmative defenses, including statute of limitations, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — Session Laws 1979, c. 654, which deleted subsection (b), relating to accrual of causes of action in

cases having as an essential element bodily injury or a defect in or damage to property, where the injury was latent, provides in s. 6: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."

Legal Periodicals. — For caselaw survey as to replies and pleadings of statute of limitations, see 45 N.C.L. Rev. 829 (1967).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For comment, "Medical Malpractice in

North Carolina," see 54 N.C.L. Rev. 1214 (1976).

For survey of 1976 case law on torts, see 55 N.C.L. Rev. 1088 (1977).

For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For note on when a cause of action accrues for limitations purposes in medical malpractice — the discovery rule, see

6 Wake Forest Intra. L. Rev. 532 (1970).

For note on the interaction between North Carolina's wrongful death statute and its statute of limitations for not readily apparent personal injuries or product defects, see 13 Wake Forest L. Rev. 543 (1977).

CASE NOTES

- I. In General.
- II. Malpractice.

I. IN GENERAL.

Editor's Note. — Some of the cases cited below were decided prior to enactment of former subsection (b) of this section, now replaced by § 1-52(16), and subsection (c) of this section.

Retroactivity of Section. — This section did not affect litigation pending when it was ratified. *Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co.*, 18 N.C. App. 689, 198 S.E.2d 88 (1973).

The 1971 amendment, adding former subsection (b) of this section, and the 1975 amendment, adding subsection (c) of this section, did not apply retroactively to revive actions already barred at common law, nor affect pending litigation. They would, however, apply to those cases which had not yet accrued, or which accrued within three years immediately preceding the effective date of the amendments. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale. In re *Gibbs*, 205 N.C. 312, 171 S.E. 55 (1933).

"Special Cases" where Different Limitation Prescribed. — The only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute, § 1-52. This "different limitation" relates only to actions grounded on allegations of fraud or mistake. *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952).

Section Not Statute of Presumptions. — Now we have no statute of presumptions. This section prescribes a statute of limitations only. *George W. Helm Co. v. Griffin*, 112 N.C. 356, 16 S.E. 1023 (1893).

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Vested Right to Rely on Statute. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The court has no discretion when considering whether a claim is barred by the statute of limitations. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Necessity of Pleading Statute. — A statute of limitations is not available as a defense or bar to an action unless it is pleaded, nor can it be raised, ordinarily, by motion to dismiss. *Iredell County v. Crawford*, 262 N.C. 720, 138 S.E.2d 539 (1964).

Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

As to necessity of pleading the statute of limitations, see also *Pegram v. Stoltz*, 67 N.C. 144 (1872); *Guthrie v. Bacon*, 107 N.C. 337, 12 S.E. 204 (1890); *Randolph v. Randolph*, 107 N.C. 506, 12 S.E. 374 (1890); *Albertson v. Terry*, 109

N.C. 8, 13 S.E. 713 (1891); *King v. Powell*, 127 N.C. 10, 37 S.E. 62 (1900); *Pipes v. North Carolina Mica Mineral & Lumber Co.*, 132 N.C. 612, 44 S.E. 114 (1903); *Brannock v. Fletcher*, 271 N.C. 65, 155 S.E.2d 532 (1967).

For cases holding that the statute of limitations must be raised in the answer, see *Green v. North Carolina R.R.*, 73 N.C. 524 (1875); *Kahnweiler v. Anderson*, 78 N.C. 133 (1878); *Long v. Bank of Yanceyville*, 81 N.C. 41 (1879); *Bacon v. Berry*, 85 N.C. 124 (1881); *King v. Powell*, 127 N.C. 10, 37 S.E. 62 (1900); *Oldham v. Rieger*, 145 N.C. 254, 58 S.E. 1091 (1907); *Moody v. Wike*, 170 N.C. 541, 87 S.E. 350 (1915); *Logan v. Griffith*, 205 N.C. 580, 172 S.E. 348 (1934); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952); *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955); *Stamey v. Rutherfordton Elec. Membership Corp.*, 249 N.C. 90, 105 S.E.2d 282 (1958); *Elliott v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959); *Iredell County v. Crawford*, 262 N.C. 720, 138 S.E.2d 539 (1964).

Burden of Proof on Plaintiff when Statute Pleaded. — Where the statute of limitations has been pleaded, the burden is on plaintiff to show that his cause of action against defendant accrued within three years prior to the institution of the suit. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970).

In general a cause of action accrues as soon as the right to institute and maintain a suit arises. *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E.2d 413 (1962); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977), *aff'd*, 294 N.C. 73, 240 S.E.2d 345 (1978).

The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. *Williams v. GMC*, 393 F. Supp. 387 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976); *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

A cause of action generally accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute an action. *City of Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967).

In no event can a statute of limitations begin to run until plaintiff is entitled to institute an action. Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188 (1981), modified on other grounds, 306 N.C. 364, 293 S.E.2d 415 (1982).

The cause of action ordinarily accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976); *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188 (1981), modified on other grounds, 306 N.C. 364, 293 S.E.2d 415 (1982).

Exception for Fraud or Mistake. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967).

If there is no claim or cause of action, the statute will not run. This principle is recognized by this section and there is nothing in § 1-49 which conflicts with it. *Miller v. Shoaf*, 110 N.C. 319, 14 S.E. 800 (1892).

When the statute starts to run, it continues until stopped by appropriate judicial process. *Speas v. Ford*, 253 N.C. 770, 117 S.E.2d 784 (1961); *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966).

Running of Statute Not Postponed by Mere Lack of Knowledge. — Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of facts by the tort-feasor, does not postpone the running of the statute. *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952).

When Statute Begins to Run against Remainderman. — Ordinarily

the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of land until after the expiration of the life estate. However, a remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. *Walston v. Applewhite & Co.*, 237 N.C. 419, 75 S.E.2d 138 (1953).

Continuing or Recurring Damages. — When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967).

Accrual of Cause of Action for Negligent Injury. — Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong giving rise to the right to sue is committed, even though the damages at that time are nominal, without regard to the time when consequential injuries are discovered or should have been discovered. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Ford Motor Credit Co. v. Minges*, 473 F.2d 918 (4th Cir. 1973).

Promissory Note Payable on Demand. — The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note. *Wells v. Barefoot*, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Effect of Partial Payment on Promissory Note. — The limitations period on an action on a promissory note will begin anew when a partial payment is made by the debtor before the limitations period has expired, nothing else appearing. *Wells v. Barefoot*, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Agreement to Make Refund. — Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. *Falls v. McKnight*, 14 N.C. 421 (1832).

Where a party dies pending action, the statute of limitations begins to run from the date of the appointment of the

administrator, and the plea of the statute must be set up in the answer. *Lynn v. Lowe*, 88 N.C. 478 (1883).

Defendant administrator, assuming to act as plaintiff's agent in collection and application of rents, cannot plead the statute of limitations unless there was a demand and a refusal, and then only from the time thereof. *Shuffler v. Turner*, 111 N.C. 297, 16 S.E. 417 (1892).

Cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. *Hall v. Hood*, 208 N.C. 59, 179 S.E. 27 (1935).

Overflowing Sewage. — Where a municipal corporation constructed a sewer system which emptied quantities of raw sewage into a stream, which matter was periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land all damages to the land based on trespass occurring prior to three years before the institution of the action were barred by the three-year statute of limitations under this section and § 1-52. *Lightner v. City of Raleigh*, 206 N.C. 496, 174 S.E. 272 (1934).

Where plaintiff alleged that a truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition and failed to warn plaintiff thereof, plaintiff suffered injury and his rights were invaded immediately upon the sale and delivery of the truck-tractor to plaintiff, and a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E.2d 413 (1962).

In action to recover damages from dust and dirt injected into house by gas furnace and air conditioner purchased from defendant, where plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look, it was held that plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs were not entitled

to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing. *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967).

When personal services are rendered with understanding that compensation is to be made in will of recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E.2d 764 (1947).

As to the effect of former subsection (b), relating to accrual of causes of action in cases involving bodily injury or a defect in or damage to property, where the injury was latent, see *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980).

Actions for fraud were not subject to the 10-year limitation of former subsection (b) of this section, since § 1-52(9) is a statute that "otherwise provides" as to the time of accrual of an action for fraud, and under § 1-52(9) the three-year limitation for an action for fraud accrues at the time of discovery, regardless of the length of time between the fraudulent act or mistake and discovery of it. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

A suit does not involve an "injury to the person or rights of another" until plaintiff is hurt. *Stell v. Firestone Tire & Rubber Co.*, 306 F. Supp. 17 (W.D.N.C. 1969).

Liability of a manufacturer in a wrongful death case is not limited to 10 years. *Williams v. GMC*, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976).

Applied in *Davis v. E.I. DuPont DeNemours & Co.*, 400 F. Supp. 1347 (W.D.N.C. 1974); *Simpson v. Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977); *Shields v. Prendergast*, 36 N.C. App. 633, 244 S.E.2d 475 (1978); *Stanley v. Brown*, 43 N.C. App. 503, 259 S.E.2d 408 (1979); *Flippin v. Jarrell*, 44 N.C. App. 518, 261 S.E.2d 257 (1980); *Haislip v. Riggs*, 534 F. Supp. 95 (W.D.N.C. 1981).

Quoted in *Hager v. Brewer Equip.*

Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

Cited in *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N.C. 116, 32 S.E. 404 (1899); *McNeill v. Suggs*, 199 N.C. 477, 154 S.E. 729 (1930); *J.G. Dudley Co. v. Commissioner of Internal Revenue*, 298 F.2d 750 (4th Cir. 1962); *Bradley v. Lewis Motors, Inc.*, 12 N.C. App. 685, 184 S.E.2d 397 (1971); *Employers Commercial Union Co. of Am. v. Westinghouse Elec. Corp.*, 15 N.C. App. 406, 190 S.E.2d 364 (1972); *Raftery v. Wm. C. Vick Constr. Co.*, 29 N.C. App. 495, 224 S.E.2d 706 (1976); *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978); *Troy's Stereo Center, Inc. v. Hodson*, 39 N.C. App. 591, 251 S.E.2d 673 (1979); *Feibus & Co. v. Godley Constr. Co.*, 44 N.C. App. 133, 260 S.E.2d 665 (1979); *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780 (1981); *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

II. MALPRACTICE.

Constitutionality of Subsection (c).

— Even if subsection (c) of this section may be vague as to certain classes of occupations because it fails to define "malpractice" or "professional services," it was not vague as to defendant doctor and hospital. Where a term such as "malpractice" or "professional service" has been used over such a lengthy period of time that its usage has given the term well-defined contours, such a term will not be found inadequate. *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982), aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).

Subsection (c) of this section does not violate the federal constitutional guarantees of equal protection and the North Carolina Constitution's equal protection provision prohibiting exclusive emoluments contained in Article 1, § 32, because it is rationally related to maintaining sufficient medical treatment in this State. *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982), aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).

Purpose of Subsection (c). — Subsection (c) of this section was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims. *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982).

Effect of Subsection (c). — Subsection (c) of this section significantly altered the law of limitations applicable to professional malpractice actions. It changed the time of accrual of such actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Applicability of Subsection (c) to Actions Already Accrued on Effective Date. — If a new statute, such as subsection (c) of this section, shortens the period of limitation, it must, to comport with due process, provide a reasonable time for filing sections which have accrued but which have not been filed when the new statute takes effect. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subsection (c) of this section, which changed the time of accrual of malpractice actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action and shortened the limitation period from 10 years to four years for latent nonforeign object claims discovered two or more years after defendant's last negligent act, could not constitutionally be applied to bar plaintiff's claim for medical expenses and loss of services of her child, where the child's injury was discovered on November 22, 1976, and subsection (c) of this section became effective on January 1, 1977, as plaintiff's claim as it existed before January 1, 1977, did not accrue until November 22, 1976, and the statute thus provided plaintiff only 39 days in which to file her claim after she discovered it, and the statute as applied to plaintiff would thus not afford her a reasonable time within which to bring her action. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Where the four-year period of limitation contained in subsection (c) of this section could not constitutionally be applied to plaintiff's claim for medical malpractice, the one-year-from-discovery clause of the statute which qualifies the limitation period could not be applied to the claim either, since the one-year qualification clause is not an independent, separable provision but must stand or fall with the time limitation which it qualifies. *Flippin v.*

Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

As to retroactivity of subsection (c) of this section, see also *Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co.*, 18 N.C. App. 689, 198 S.E.2d 88 (1973) and *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978), cited above.

Failure to make a proper disclosure of risks involved in medical procedure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

For case holding the continuing course of treatment exception applicable in a medical malpractice action alleging that defendant negligently caused and continued plaintiff's addiction to narcotics, see *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

Malpractice Claim Barred. — Plaintiff's claim based on medical malpractice was barred by the three-year statute of limitations of subsection (c) of this section and by the provisions of § 1-17(b) requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the full age of 19, where the last act of negligence by defendants allegedly occurred in 1962 when plaintiff was four years old and plaintiff filed his claim one day before his twentieth birthday, and there was no merit to plaintiffs' contention that § 1-17(b) did not apply to an action brought by a plaintiff in his own behalf. *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Nonsuit Upheld. — Where there was no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in his body at the conclusion of an operation, but to the contrary the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit was properly entered in an action for malpractice instituted more than three years after the operation. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957), decided prior to enactment of subsection (c).

For case holding that evidence negated fraudulent concealment of cause of action against surgeon for technical assault in performing an oper-

ation beyond the scope of the one authorized, see *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952), decided prior to enactment of subsection (c).

For application of subsection (c) in action against attorney for negligence in advising plaintiff to transfer his property to his children to avoid his second wife's claim against him for alimony, see *Clodfelter v. Bates*, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

Failure of Attorney to File Financing Statement. — An attorney who represents a party in the sale of

some of its assets under a security agreement has a duty to file the financing statement after the transaction is closed, which duty continues so long as the filing of the financing statement would protect some interest of his client, and where the attorney fails to file such statement and his client therefore loses his lien upon debtor's bankruptcy, the statute of limitations begins to run on the date the petition in bankruptcy is filed. *Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 294 S.E.2d 409, cert. denied, 307 N.C. 272, 299 S.E.2d 219 (1982).

§ 1-16: Repealed by Session Laws 1967, c. 954, s. 4.

§ 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; or
- (2) Insane;

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.

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years. (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.)

Cross References. — As to the effect of lowering the age of majority from 21 to 18 upon the applicability of statute of limitations which has been tolled for infancy, see § 48A-3.

Legal Periodicals. — For article

"Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

CASE NOTES

History. — In 1899 the legislature struck the provisions which made coverture a disability on a par with the others enumerated in this section. *Weathers v. Borders*, 124 N.C. 610, 32 S.E. 881 (1899); *Berry v. Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906). See also, *Lafferty v. Young*, 125 N.C. 296, 34 S.E. 444 (1899); *Swift v. Dixon*, 131 N.C. 42, 42 S.E. 458 (1902).

Constitutionality of Subsection (b). — The statute requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the age of 19 when the three-year limitation of § 1-15(c) expires before the minor attains the age of 19 does not violate the equal protection clauses of the North Carolina or United States Constitutions on the ground that a person has three years after reaching the age of 18 in which to bring other types of tort actions, since there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims. *Hohn v. Slate*, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. *Frederick v. Williams*, 103 N.C. 189, 9 S.E. 298 (1889).

Section Relates to True Title. — Adverse possession relates only to the true title, and the exemptions in the statute as to disability can apply only to one having, by virtue of this title, a right of entry or of action. *Berry v. Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906).

Imprisonment Not Included. — This section, which enumerates the disabilities which delay the running of a limitations period, does not include imprisonment. *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982).

Detention in Asylum by Defendant's Wrongful Act. — Where plaintiff's cause of action was based upon alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, as to defendant plaintiff was non sui juris for the period during which he was detained, and the statute of limitations did not run against plaintiff's cause of action during that period. *Jackson v. Parks*, 216 N.C. 329, 4 S.E.2d 873 (1939).

Disability Beginning after Commencement of Running of Statute. — Where the statute of limitations begins to run in favor of one in adverse possession against owner, and the owner thereafter dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to commencement of the running of the statute. *Battle v. Battle*, 235 N.C. 499, 70 S.E.2d 492 (1952).

Once the period of limitation begins to run, the subsequent accession of a minor to a right of action cannot toll its running. *Davis v. E.I. DuPont DeNemours & Co.*, 400 F. Supp. 1347 (W.D.N.C. 1974).

Effect of Disability Continuing through Life. — If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. *Ellington v. Ellington*, 103 N.C. 54, 9 S.E. 208 (1889).

Effect of Failure of Guardian to Sue. — Failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

The statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962).

It is the rule in this State that, except in suits for realty where the legal title is in the ward, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring at the time the cause of action accrues. *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964).

As to effect of failure of guardian having right to sue to do so, see also

Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897).

If an infant or insane person has no guardian at the time the cause of action accrues, then the statute begins to run upon the appointment of a guardian or upon the removal of the disability as provided by this section, whichever shall occur first. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Effect of Mother's Suit as Next Friend for Daughter. — For purposes of the North Carolina law of limitations, the filing of a complaint in federal district court in West Virginia by mother as next friend for her minor daughter did not constitute the appointment of the mother as a guardian ad litem charged with the duty of bringing the suit, and therefore did not start the running of the statute of limitations. Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979).

Running of Statute where No Final Account Filed. — When no final account has been filed, the statute begins to run from the arrival of the ward at age. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Adverse Possession. — Seven years' adverse possession under color of title is no bar to an action of ejectment where the person entitled to commence the same is an infant at the time the title to the land descends to him and sues within three years next after full age. Clayton v. Rose, 87 N.C. 106 (1882).

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, or their rights to recover will be

barred. Warlick v. Plonk, 103 N.C. 81, 9 S.E. 190 (1889).

Action on Judgment Secured during Infancy. — This section permits an individual to bring an action on a judgment secured during his infancy by a next friend within the time limited by § 1-47(1), i.e., ten years after he becomes twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Plaintiff's claim based on medical malpractice was barred by the three-year statute of limitations of § 1-15(c) and the provisions of subsection (b) of this section where the last act of negligence by defendants allegedly occurred in 1962 when plaintiff was four years old and plaintiff filed his claim one day before his twentieth birthday, there being no merit to plaintiffs' contention that subsection (b) does not apply to an action brought by a plaintiff in his own behalf. Hohn v. Slate, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Applied in Simpson v. Hurst Performance, Inc., 437 F. Supp. 445 (M.D.N.C. 1977); Gibbs v. Gibbs, 59 N.C. App. 530, 297 S.E.2d 159 (1982).

Quoted in Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Stated in Franklin County v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957); Lane v. Aetna Cas. & Sur. Co., 48 N.C. App. 634, 269 S.E.2d 711 (1980).

Cited in Campbell v. Crater, 95 N.C. 156 (1886); County of Johnston v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1946); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965); Hanes Dye & Finishing Co. v. Caisson Corp., 309 F. Supp. 237 (M.D.N.C. 1970); Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

§ 1-18. Disability of marriage.

In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine. (1899, c. 78, ss. 2, 3; Rev., s. 363; C.S., s. 408.)

Cross References. — For constitutional provision concerning property of married women, see N. C. Const., Art. X, § 6. As to status of married women in civil actions and with

reference to property in general, see § 52-1.

Legal Periodicals. — For discussion of this section, see 2 N.C.L. Rev. 181.

CASE NOTES

Effect of Section. — Under the provisions of this section, and § 52-1 et seq., passed in pursuance of Const. 1868, Art. X, § 6, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions, as if they were unmarried. *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923).

Section Contemplates True Owner. — A possession cannot be adverse, within the meaning of this section, to anyone who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right which may be barred by such a possession. It has sole reference to the owner of the title. *Berry v. Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906).

Since passage of this section coverture is not a defense in bar of the running of the statute of limitations. *Carter v. Reaves*, 167 N.C. 131, 83 S.E. 248 (1914).

Since passage of this section, if feme

covert's right of entry and title were defeated by defendants' adverse possession for seven years under color of title before her action was commenced, the plea of coverture would not avail her. *Bond v. Beverly*, 152 N.C. 56, 67 S.E. 55 (1910).

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, under which deeds defendant in possession claimed title by adverse possession under color, coverture of plaintiff would not avail her to repel the bar of the statute of limitations which had run in favor of defendant's title. *Butler v. Bell*, 181 N.C. 85, 106 S.E. 217 (1921).

Effect of Statute upon Proof. — Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. *Holmes v. Carr*, 172 N.C. 213, 90 S.E. 152 (1916).

§ 1-19. Cumulative disabilities.

When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (C.C.P., ss. 28, 49; Code, ss. 149, 170; Rev., s. 364; C.S., s. 409.)

CASE NOTES

Cumulative disabilities will only prevent running of statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest its operation. *Holmes v. Carr*, 172 N.C. 213, 90 S.E. 152 (1916).

This section can have no application when there is a clear running of the statute for the period fixed after the disability is removed, as when an infant attains his majority. *Campbell v. Crater*, 95 N.C. 156 (1886).

Length of Time of Disabilities

Immaterial. — The length of time elapsing during cumulative disabilities, so long as the disabilities are continuous, is immaterial. *Epps v. Flowers*, 101 N.C. 158, 7 S.E. 680 (1888).

For cases in which the former disability of coverture supervened upon the disability of infancy, see *Clayton v. Rose*, 87 N.C. 106 (1882); *Epps v. Flowers*, 101 N.C. 158, 7 S.E. 680 (1888); *Cross v. Craven*, 120 N.C. 331, 26 S.E. 940 (1897); *Lafferty v. Young*, 125 N.C. 296, 34 S.E. 444 (1899).

§ 1-20. Disability must exist when right of action accrues.

No person may avail himself of a disability except as authorized in G.S. 1-19, unless it existed when his right of action accrued. (C.C.P., s. 48; Code, s. 169; Rev., s. 365; C.S., s. 410.)

CASE NOTES

Once the statute begins to run nothing stops it. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

When the statute of limitations commences to run, nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. *Frederick v. Williams*, 103 N.C. 189, 9 S.E. 298 (1889). See also,

Asbury v. Fair, 111 N.C. 251, 16 S.E. 467 (1892); *Clendenin v. Clendenin*, 181 N.C. 465, 107 S.E. 458 (1921).

The principle of this section applies where defendant leaves the State after the cause of action accrues. *Blue v. Gilchrist*, 84 N.C. 239 (1881). But see § 1-21.

Cited in *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957).

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

If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4. (C.C.P., s. 41; 1881, c. 258, ss. 1, 2; Code, s. 162; Rev., s. 366; C.S., s. 411; 1955, c. 544; 1979, c. 525, s. 1.)

Editor's Note. — Session Laws 1979, c. 525, which added the second paragraph, provides in s. 12 that the amendment shall not apply to causes of action arising prior to January 1, 1980.

Legal Periodicals. — For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 531 (1955).

For caselaw survey as to the North Carolina "borrowing statute," see 45 N.C.L. Rev. 845 (1967).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1976 caselaw on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment discussing perceived conflict between § 1-75.4 and this section prior to enactment of the second paragraph thereof, see 12 Wake Forest L. Rev. 1041 (1976).

CASE NOTES

- I. In General.
- II. Causes of Action Arising Outside State.

I. IN GENERAL.

Purpose of Section. — One of the purposes of this section is to prevent

defendants from having the benefit of the lapse of time, i.e., the statute of limitations, while they remain beyond the limits of the State and allow their debts

to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976).

The purpose of this section is to prevent defendants from having the benefit of the statute of limitation while they permit past due debts to remain unpaid or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, thus preventing the person having the right to sue from doing so. *Merchants & Planters Nat'l Bank v. Appleyard*, 238 N.C. 145, 77 S.E.2d 783 (1953).

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887).

The words "any person," are employed to designate the person to be affected and embraced by the section; they are very comprehensive, and there is nothing in the section's scope or purpose that excludes nonresidents. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887); *Merchants & Planters Nat'l Bank v. Appleyard*, 238 N.C. 145, 77 S.E.2d 783 (1953).

"The times herein limited" means the time prescribed elsewhere in the Code or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887); *Williams v. Iron Belt Bldg. & Loan Ass'n*, 131 N.C. 267, 42 S.E. 607 (1902); *Hill v. Lindsay*, 210 N.C. 694, 188 S.E. 406 (1936).

This statutory provision prescribes three distinct cases in which the statute will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued or judgment was rendered or docketed: (1) Where the debtor was out of the State at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In such a case time does not begin to lapse in his favor until he returns to the State, not

simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he departs from the State for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor, either a resident or nonresident of the State, departs from and resides out of it, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment. (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor departs from the State, and remains continually absent for the space of one year or more, the time of his absence shall not be allowed in his favor. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887); *Arthur v. Henry*, 157 N.C. 393, 73 S.E. 206 (1911).

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remains continuously absent for a year or occasionally visits the State; (2) When such person retains his residence, but is absent from the State continuously for one year or more. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Effect of Absence of Debtor before Accrual of Action. — Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887).

Nature of Return to State. — The "return to the State" specified by this section as necessary to put the statute in motion is a return with a view to residence, not a casual appearance in the State, passing through it, or even making a visit here. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

When a person becomes a nonresident it is not necessary that he remain continuously out of the State one year to stop the running of the statute, nor would occasional visits to the State put the statute in motion. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Short Annual Visits Held Insufficient to Start Statute. — Where debtor

was a nonresident of this State but was here on a visit of a day or two each year, such visits would not have the effect of putting the statute in motion. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887).

This section is applicable to actions in rem as well as actions in personam, no exception being made. *Love v. West*, 169 N.C. 13, 84 S.E. 1048 (1915).

Fact that nonresident debtor has property within the State will not affect this section, which suspends the operation of the statute of limitations for the period during which the person against whom the demand is made is out of the State. *Grist v. Williams*, 111 N.C. 53, 15 S.E. 889 (1892).

This section is not applicable after the statute of limitation has run. *Southern Ry. v. Mayes*, 113 F. 84 (4th Cir.), cert. denied, 186 U.S. 483, 22 S. Ct. 942, 46 L. Ed. 2d 1260 (1902).

When a nonresident defendant is amenable to process there is no need for a tolling statute. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

Application of a tolling statute such as this section when defendant has at all times been subject to the service of process under § 1-75.4(5) is inimical to the general purposes of statutes of limitations. Such statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

No Conflict with Long-Arm Statute. — Fact that there is little need to give effect to a tolling statute when a nonresident is amenable to service that will confer personal jurisdiction over him does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

Sections 1-105 and 1-105.1 Not in Conflict with Section. — Sections 1-105 and 1-105.1, providing for substitute service of a nonresident motorist by

service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal this section, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

Right of Foreign Corporations to Plead Statute. — As to right of foreign corporations to plead the statute of limitations when required by statute to maintain an agent in the State for service of process, see *Volivar v. Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910).

A corporation can actually be present in the State by continuously doing business in North Carolina through its agents, even though place of incorporation and principal place of business are in foreign states. *Bobbitt v. Tannewitz*, 538 F. Supp. 654 (M.D.N.C. 1982).

Where the seller has continuously done business in North Carolina since plaintiff's claims accrued, the seller has been sufficiently "present" in the State to warrant the protection of the statutes of limitations. *Bobbitt v. Tannewitz*, 538 F. Supp. 654 (M.D.N.C. 1982).

As to general rule regarding application of statutes of this character to actions pending at the time they take effect, provided the actions have not been barred by a previous limitation, see *Cox v. Brown*, 51 N.C. 100 (1858).

Burden of proof is upon plaintiff to show that defendant comes within the purview of this section. *Burkheimer v. Gealy*, 39 N.C. App. 450, 250 S.E.2d 678, cert. denied, 297 N.C. 298, 254 S.E.2d 918 (1979). See also, *Savage v. Currin*, 207 N.C. 222, 176 S.E. 569 (1934).

Suspension of Operation of § 1-53. — The existence of the conditions enumerated in this section will suspend the operation of § 1-53. *Williams v. Iron Belt Bldg. & Loan Ass'n*, 131 N.C. 267, 42 S.E. 607 (1902).

Enforcement of Resulting Trust. — Where a cause of action to enforce a resulting trust existed for more than 10 years, but after subtracting the length of time the trustee thereof had been out of the State the elapsed time was less than 10 years, then under this section the cause of action was not barred by the 10-year statute. *Miller v. Miller*, 200 N.C. 458, 157 S.E. 604 (1931).

Proceedings against bail in civil actions are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. *Albemarle Steam Nav. Co. v. Williams*, 111 N.C. 35, 15 S.E. 877 (1892).

Stated in *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980).

Cited in *Williams v. Iron Belt Bldg. & Loan Ass'n*, 131 N.C. 267, 42 S.E. 607 (1902); *Love v. West*, 169 N.C. 13, 84 S.E. 1048 (1915); *Bridger v. Mitchell*, 187 N.C. 374, 121 S.E. 661 (1924); *Osborne v. Board of Educ. ex rel. State*, 207 N.C. 503, 177 S.E. 642 (1935); *Miller v. Perry*, 456 F.2d 63 (4th Cir 1972); *Joyner v. Lucas*, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

II. CAUSES OF ACTION ARISING OUTSIDE STATE.

Purpose of Proviso in First Paragraph. — The legislature intended the proviso added by the 1955 amendment to be a limited borrowing statute, operating to bar prosecution in this State of all claims barred either in the state of their origin or in this State. *Little v. Stevens*, 267 N.C. 328, 148 S.E.2d 201 (1966).

The proviso in this section is not a limitation upon the tolling provisions of the statute, but is a limited borrowing statute, operating to bar prosecution in this State of all claims barred either in the state of their origin or in this State. *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967).

The 1955 amendment was designed (1) to clarify the law and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation on the tolling portion of the statute would accomplish neither of these purposes. Giving the language of the proviso its ordinary meaning, it is a limited borrowing statute which bars all stale foreign claims. *Little v. Stevens*, 267 N.C. 328, 148 S.E.2d 201 (1966).

Certain Claims Barred by Proviso. — Treating the proviso as a limited borrowing statute, no action barred in the state of origin may be litigated here. *Little v. Stevens*, 267 N.C. 328, 148 S.E.2d 201 (1966).

Unless They Originally Accrued in Favor of Resident. — This section now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina. *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967).

Ancillary Administrator Is Not Resident to Whom Wrongful Death Claim Accrues. — The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not make the action one accruing to a resident of this State within the meaning of the proviso to this section. *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967).

Wrongful Death Claim Barred where It Arose Is Also Barred in this State. — Where, at the time a wrongful death action was instituted here, it was barred in Pennsylvania where it arose, it was also barred in North Carolina. *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967).

Right of Nonresident to Litigate Claim Not Barred where It Arose. — The courts of this State are open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. This section tolls the statute in such cases where neither the plaintiff nor the defendant is a resident of this State at the time of the institution of the action and never was, as well as where the obligation arose out of the State and the debtor has not resided in the State for a time sufficient to bar the action by the law of this State. *Merchants & Planters Nat'l Bank v. Appleyard*, 238 N.C. 145, 77 S.E.2d 783 (1953), decided prior to addition of proviso in 1955.

Action Based on Foreign Statute which Itself Contains Limitation. — When an action is based on a foreign statute which creates a cause or right of action and the statute itself contains a limitation on the time within which the action may be brought, the life of the right of action is limited by that provision and not by local statutes of limitation. *Rios v. Drennan*, 209 F. Supp. 927 (E.D.N.C. 1962).

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative or collector after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3. If the claim upon which the cause of action is based is filed with the personal representative or collector within the time above specified, and its validity is admitted in writing by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative or collector upon such claim after his final settlement. (C.C.P., s. 43; 1881, c. 80; Code, s. 164; Rev., s. 367; C.S., s. 412; 1977, c. 446, s. 2.)

Cross References. — As to substitution of parties to action upon death of a party where the cause of action survives, see Rule 25 of the Rules of Civil Procedure (§ 1A-1). As to survival of actions to and against personal representatives, see § 28A-18-1.

Editor's Note. — Session Laws 1977, c. 446, which rewrote this section, provides in s. 5: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

CASE NOTES

- I. In General.
- II. Claims in Favor of Estate.
- III. Claims against Estate.
- IV. Filing and Admission of Claim.

I. IN GENERAL.

Section as Exception to General Rule. — This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. *Winslow v. Benton*, 130 N.C. 58, 40 S.E. 840 (1902); *Matthews v. Peterson*, 150 N.C. 134, 63 S.E. 721 (1909); *Hodge v. Perry*, 255 N.C. 695, 122 S.E.2d 677 (1961).

This section is an enabling and not a disabling statute, and applies only in those cases where, but for its interposition, a claim would be barred. *Benson v. Bennett*, 112 N.C. 505, 17 S.E. 432 (1893); *Redmond v. Pippen*, 113 N.C. 90, 18 S.E. 50 (1893); *Geitner v. Jones*, 176 N.C. 542, 97 S.E. 494 (1918);

Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

And Enlarges Time for Bringing Action. — This section is intended to enlarge and extend the time within which an action may be brought, and not to suspend the operation of the statute, which continues to run. *Irvin v. Harris*, 184 N.C. 547, 114 S.E. 818 (1922). See also, *Coppersmith v. Wilson*, 107 N.C. 31, 12 S.E. 77 (1890); *Benson v. Bennett*, 112 N.C. 505, 17 S.E. 432 (1893).

But this section has no application where the bar attached before death. *Daniel v. Laughlin*, 87 N.C. 433 (1882); *Vaughan v. Hines*, 87 N.C. 445 (1882); *Hughes v. Boone*, 114 N.C. 54, 19 S.E. 63 (1894); *Grady v. Wilson*, 115 N.C. 344, 20 S.E. 518 (1894); *Parker v. Harden*, 121 N.C. 57, 28 S.E. 20 (1897); *Copeland v.*

Collins, 122 N.C. 619, 30 S.E. 315 (1898); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

This section makes a distinction between claims in favor of a decedent's estate and claims against a decedent's estate. Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

To what Limitations Section Is Applicable. — The section only applies to the limitations prescribed in the Code of Civil Procedure. Hall v. Gibbs, 87 N.C. 4 (1882).

Application to Wrongful Death Action. — This section is of no avail to a plaintiff in a wrongful death action where she does not qualify and file suit within that time limit. Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974).

Contract as to Time for Suit Not Suspended by Section. — A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods as to the time wherein suit might be brought for loss or damage was a part of the contract between the parties, and being made without exception, was not suspended by this section. Thigpen v. East Carolina Ry., 184 N.C. 33, 113 S.E. 562 (1922).

As to former practice under which there was no extension of time to prevent the bar of the statutes from becoming complete as is provided in this section, see Hawkins v. Savage, 75 N.C. 133 (1876); Bruner v. Threadgill, 88 N.C. 361 (1883); Patterson v. Wadsworth, 89 N.C. 407 (1883).

Applied in Robertson v. Dunn, 87 N.C. 191 (1882).

Quoted in Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981).

Cited in Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Harris v. Davenport, 132 N.C. 697, 44 S.E. 406 (1903); Gertner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918); Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921); Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).

II. CLAIMS IN FAVOR OF ESTATE.

Effect of this section, following death of judgment creditor, was to give one year's time from such death to the decedent's representative to bring an action,

if otherwise it would have been barred before such year had expired. Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893).

Where there was more than one year after death of creditor before time for the bringing of suit expired, this section had no place. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

Time of Administrator's Appointment Is Immaterial. — Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890).

Reason for Counting Time Period from Death of Decedent. — Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Ingram v. Garner, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

III. CLAIMS AGAINST ESTATE.

Editor's Note. — The cases cited below were decided prior to the 1977 amendment to this section, which substituted the proviso in the second sentence for language therein limiting suit to a period within one year after the issuing of letters testamentary or of administration, provided the letters were issued within ten years of the death of decedent.

As to construction and application of former provisions of the second sentence of this section prior to its amendment in 1977, see Mauney v. Holmes, 87 N.C. 428 (1882); Dunlap v. Hendley, 92 N.C. 115 (1885); Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888); Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889); Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891); Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893); Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909); Fisher v. Ballard, 164 N.C. 326, 80 S.E. 239 (1913); Irvin v. Harris, 182 N.C. 656, 109 S.E. 871 (1921), modified on rehearing, 184 N.C. 547, 114 S.E. 818 (1922); Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

A county's general claim against the estate of a recipient of old age assistance to recover for such assistance is governed by this section. *Mecklenburg County v. Lee*, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

IV. FILING AND ADMISSION OF CLAIM.

Editor's Note. — The cases cited below were decided prior to enactment of the 1977 amendment to the final sentence of this section, which substituted "its validity is admitted in writing by him" for "admitted by him."

Last Sentence of Section Not Retroactive. — The last sentence of this section (which was added in 1881) applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. *Whitehurst v. Dey*, 90 N.C. 542 (1884).

Meaning of "Filed". — The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. *Hinton v. Pritchard*, 126 N.C. 8, 35 S.E. 127 (1900).

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed, and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. *Hinton v. Pritchard*, 126 N.C. 8, 35 S.E. 127 (1900).

Filing of Claim as Protection against Running of Statute. — If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Application to Heirs. — Since the amendment of 1881, the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative as he would be by the latter submitting to a judgment. *Hall v. Gibbs*, 87 N.C. 4 (1882); *Woodlief v. Bragg*, 108 N.C. 571, 13 S.E. 211 (1891).

What Constitutes Sufficient Filing. — It is a sufficient "filing" when the claim is presented within the proper time to the personal representative and he

acknowledges the validity of the debt. The creditor has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt. *Stonestreet v. Frost*, 123 N.C. 640, 31 S.E. 836 (1898); *Justice v. Gallert*, 131 N.C. 393, 42 S.E. 850 (1902).

Silence as Admission. — Where a claim was presented in the form of a bill of particulars, and the representative refused an explicit admission or denial, plaintiff had the right to deem its acceptance without remark as arresting the running of the statute. *Flemming v. Flemming*, 85 N.C. 127 (1881).

Filing of Petition to Make Assets as Indicative of Admission. — Where personal representative did not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this was strong proof that he admitted it. *Woodlief v. Bragg*, 108 N.C. 571, 13 S.E. 211 (1891).

Partial payment by the personal representative, without objection was an unequivocal act from which an admission of the justice of the claim could be inferred. *Hinton v. Pritchard*, 126 N.C. 8, 35 S.E. 127 (1900).

Where plaintiff never presents his claim or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. *Flemming v. Flemming*, 85 N.C. 127 (1881).

Effect of Admission. — The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. *Justice v. Gallert*, 131 N.C. 393, 42 S.E. 850 (1902).

Claims which are not barred and are presented to the administrator and admitted by him pursuant to this section need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. *Turner v. Shuffler*, 108 N.C. 642, 13 S.E. 243 (1891).

Where notes matured less than three years prior to the date of death of the maker, so that an action on the notes was not then barred by the three-year statute of limitation, the filing of claim and the admission of it, in accordance with this section, prevented the claim from being barred. *Lister v. Lister*, 222 N.C. 555, 24 S.E.2d 342 (1943).

Filing and Admission of Claim Held Sufficient. — Where an admin-

istrator, knowing that his appointment was at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigated and ascertained that the judgment had not been paid, and thereafter instituted proceedings to sell the lands of intestate to pay the judgment, claim on the judgment was filed and admitted by the administrator within the meaning of this section. *Rodman v. Stillman*, 220 N.C. 361, 17 S.E.2d 336 (1941).

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, was not a filing of the claim within the meaning of this section, but

where, after such notice, the executor carried the item as a debt on the books of the estate and reported it to the clerk as a debt owed by the estate, the executor's approval would be inferred, and the statute would not operate as a bar. *Ashley Horne Corp. v. Creech*, 205 N.C. 55, 169 S.E. 794 (1933).

Exhibition to the administrator by the sheriff, within one year of the date of administration, of an execution issued in favor of the county against the intestate, which the administrator admitted was correct but did not pay for want of assets, was a sufficient "filing" under this section, rendering unnecessary an action to prevent the bar of statute of limitations. *Stonestreet v. Frost*, 123 N.C. 640, 31 S.E. 836 (1898).

§ 1-23. Time of stay by injunction or prohibition.

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (C.C.P., s. 46; Code, s. 167; Rev., s. 368; C.S., s. 413.)

CASE NOTES

This section affects only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. *Gatewood v. Fry*, 183 N.C. 415, 111 S.E. 712 (1922).

Effect of Irregularity in Granting Injunction. — Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent suspension of the statute of limitations under this section during the pendency of the injunction. *Walton v. Pearson*, 85 N.C. 34 (1881).

Evidence Held Sufficient to Overrule Motion to Nonsuit. — Where plaintiff showed that shortly after defen-

dant's steamship collided with bridge, proceedings were instituted in federal district court, which ordered that all suits arising out of the collision be stayed, and that immediately after plaintiff's claim was dismissed in that court for want of jurisdiction it instituted the present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 226 N.C. 371, 38 S.E.2d 214 (1946).

Applied in *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

Cited in *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282 (1967).

§ 1-24. Time during controversy on probate of will or granting letters.

In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (C.C.P., s. 47; Code, s. 168; Rev., s. 369; C.S., s. 414.)

CASE NOTES

This section applies only where there is no administrator or collector during the contest. *Hughes v. Boone*, 114 N.C. 54, 19 S.E. 63 (1894).

This section has no application where an administrator has been appointed. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. *Stelges v. Simmons*, 170 N.C. 42, 86 S.E. 801 (1915).

This section does not apply to the heirs at law or devisees to nullify the protection given everyone in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee determining that the title to the property is in another. *Stelges v. Simmons*, 170 N.C. 42, 86 S.E. 801 (1915).

Cited in *Frederick v. Williams*, 103 N.C. 189, 9 S.E. 298 (1889); *Ex parte Smith*, 134 N.C. 495, 47 S.E. 16 (1904).

§ 1-25: Repealed by Session Laws 1967, c. 954, s. 4.

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

No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (C.C.P., s. 51; Code, s. 172; Rev., s. 371; C.S., s. 416.)

Cross References. — As to particular contracts requiring writing, see § 22-1 et seq.

Legal Periodicals. — For comment on this section, see 13 N.C.L. Rev. 57.

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

CASE NOTES

- I. In General.
- II. Acknowledgment or New Promise.
- III. Effect of Partial Payment.
- IV. Effect of Request Not to Sue.

I. IN GENERAL.

The English Statute. — The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. *Royster v. Farrell*, 115 N.C. 306, 20 S.E. 475 (1894).

This section is mandatory. *Fleming v. Staton*, 74 N.C. 203 (1876).

Effect upon Prior Law. — This section does not change the character or quality of the acknowledgment or new promise theretofore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged."

Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918); *Peoples Bank & Trust Co. v. Tar River Lumber Co.*, 221 N.C. 89, 19 S.E.2d 138 (1942).

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Retroactive Effect. — This section has no application where the cause of action had accrued upon the new as well as the old cause. *Faison v. Bowden*, 74 N.C. 43 (1876).

This section is merely a rule of evidence enacted to prevent fraud and perjury. *Royster v. Farrell*, 115 N.C. 306, 20 S.E. 475 (1894).

A judgment is not a "contract" within the meaning of this section, because a cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Hence This Section Is Not Applicable to Judgments. — The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and are not applicable to judgments. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Stated in *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Cited in *Taylor v. Hunt*, 118 N.C. 168, 24 S.E. 359 (1896); *Whitley's Elec. Serv., Inc. v. Sherrod*, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

II. ACKNOWLEDGMENT OR NEW PROMISE.

Statute Not Tolled without a Writing. — The running of the statute of limitations is not tolled by the promise of defendant to pay where there is neither allegation nor evidence of any writing as is required by this section to repel the bar of the statute of limitations in an action on a contract. *Lattimore v. Powell*, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

A new promise to pay fixes a new date from which the statute of limitations runs, but such promise, to be binding, must be in writing as required by this section. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960).

A new promise to pay, if not in writing, cannot defeat the operation of the statute of limitation. *Raby v. Stuman*, 127 N.C. 463, 37 S.E. 476 (1900).

Absent Partial Payment. — The bar of the statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise is one that the law implies from a part payment. *Hill v. Hilliard & Co.*, 103 N.C. 34, 9 S.E. 639 (1889); *Royster v. Farrell*, 115 N.C. 306, 20 S.E. 475 (1894).

Oral Assertion of Claim Is Ineffectual. — The oral assertion of a claim to an administrator who remains silent, even if the silence should be construed an admission, is ineffectual because it is not in writing. *Flemming v. Flemming*, 85 N.C. 127 (1881).

As to exclusion of parol evidence that a new promise was made, see

Christmas v. Haywood, 119 N.C. 130, 25 S.E. 861 (1896).

Elements Necessary for a Valid Promise. — The promise (1) Must be in writing; (2) Extend to the whole debt (but see *Pope v. Andrews*, 90 N.C. 401 (1884)); (3) Must be to pay money and not something else of value; and (4) Must be unconditional. *Greenleaf v. Norfolk S.R.R.*, 91 N.C. 33 (1884); *Edwin Bates & Co. v. E.B. Herren & Co.*, 95 N.C. 388 (1886); *Taylor v. Miller*, 113 N.C. 340, 18 S.E. 504 (1893); *Wells v. Hill*, 118 N.C. 900, 24 S.E. 771 (1896); *Bryant v. Kellum*, 209 N.C. 112, 182 S.E. 708 (1935).

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same, in writing, or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. *Phillips v. Giles*, 175 N.C. 409, 95 S.E. 772 (1918).

The promise must be identical and must be between the original parties, by the same man; further, when the original contract is made with one person and the promise relied on to repel the statute is made with another, the plaintiff in the action, the cause of action is the new promise, and it must be declared on, and this new promise must be in writing. *Fleming v. Staton*, 74 N.C. 203 (1876); *Pool v. Bledsoe*, 85 N.C. 1 (1881).

The promise must be made to the creditor himself. *Parker v. Shuford*, 76 N.C. 219 (1877); *Faison v. Bowden*, 76 N.C. 425 (1877).

Or to an attorney or agent for the creditor. *Kirby v. Mills*, 78 N.C. 124 (1878); *Hussey v. Kirkman*, 95 N.C. 63 (1886).

The promise must be express. *Cooper v. Jones*, 128 N.C. 40, 38 S.E. 28 (1901).

And must be clear and positive. *Hussey v. Kirkman*, 95 N.C. 63 (1886).

And certain in its terms. *Long v. Oxford*, 104 N.C. 408, 10 S.E. 525 (1889).

Promise Must Amount to New or Continuing Contract. — This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." *George W. Helm Co. v. Griffin*, 112 N.C. 356, 16 S.E. 1023 (1893).

Acknowledgment of Debt Is Insufficient. — The new promise must be distinct and specific, and a mere

acknowledgment of the debt, though implying a promise to pay, is not sufficient. *Faison v. Bowden*, 76 N.C. 425 (1877); *Riggs v. Roberts*, 85 N.C. 152 (1881).

Intention to Renew Debt Must Be Manifest. — There must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. *Simonton v. Clark*, 65 N.C. 525 (1871); *Wells v. Hill*, 118 N.C. 900, 24 S.E. 771 (1896).

Promise Must Be Made within Statutory Limit. — The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. *Smith v. Gordon*, 204 N.C. 695, 169 S.E. 634 (1933).

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations, unless there is something in the writing to repel such implication. *Phillips v. Giles*, 175 N.C. 409, 95 S.E. 772 (1918). See also, *Smith v. Leeper*, 32 N.C. 86 (1849); *McRae v. Leary*, 46 N.C. 91 (1853); *Cecil v. Henderson*, 121 N.C. 244, 28 S.E. 481 (1897).

Instances in Which Promise Not Implied. — An unaccepted offer to pay a debt by a conveyance of land is not such a recognition of subsisting liabilities as in law will imply a promise to pay. *Wells v. Hill*, 118 N.C. 900, 24 S.E. 771 (1896).

An unaccepted offer to discharge a bond by a conveyance of land will not be held to imply a promise to pay. *Riggs v. Roberts*, 85 N.C. 152 (1881).

A promissory note that was barred by the statute of limitations would not be revived by an offer to pay in Confederate currency or bank bills. *Simonton v. Clark*, 65 N.C. 525 (1871).

Section Inapplicable to Action Based on Failure of Equipment to Conform to Original Warranty. — The statute providing that a new promise must be in writing and signed by the

party to be charged in order to start the running of the statute of limitations was inapplicable where plaintiff's action was based upon failure of equipment to conform with original warranty and not upon any new promise by seller. *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969).

Acknowledgment or Promise Held Sufficient to Remove Bar of Statute.

— A written acknowledgment, or a new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, without reference to anything that could make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained" would be. *Long v. Oxford*, 104 N.C. 408, 10 S.E. 525 (1889).

The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amounted to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. *Taylor v. Miller*, 113 N.C. 340, 18 S.E. 504 (1893).

Where a suit had already been commenced to recover an amount alleged to be due upon account, and defendant set up the statutory bar as a defense, but wrote a letter to plaintiff's attorney stating that, if he would take \$500.00 in satisfaction, judgment might go against him at court, the letter was an admission and assumption of the debt in the specified amount of \$500.00, and operated to remove the bar to recovery. *Pope v. Andrews*, 90 N.C. 401 (1884). But see, *Wells v. Hill*, 118 N.C. 900, 24 S.E. 771 (1896).

A paper-writing signed by a parent, certifying that she owed her daughter a sum of money, in a stated amount, for moneys she had borrowed from her at various times, and stating that the daughter was to have a certain sum of money from her estate, giving her reasons, was sufficiently definite to imply a promise to pay the amount of the debt and to repel the bar of the statute of limitations. *Phillips v. Giles*, 175 N.C. 409, 95 S.E. 772 (1918).

A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the

operation of this section. *Irvin v. Harris*, 182 N.C. 647, 109 S.E. 867, *aff'd*, 182 N.C. 656, 109 S.E. 871 (1921), modified on rehearing, 184 N.C. 547, 114 S.E. 818 (1922).

Acknowledgment or Promise Held Insufficient. — Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them, which was barred by the statute, but expressing his confidence in his ability to pay whatever he might contract for in the future, the bar of the statute was not removed. *George W. Helm Co. v. Griffin*, 112 N.C. 356, 16 S.E. 1023 (1893).

A writing stating "I am going to pay it as soon as I can" was conditioned upon ability to pay and was therefore insufficient. *Cooper v. Jones*, 128 N.C. 40, 38 S.E. 28 (1901).

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation; and a letter acknowledging the debt at the time defendant left plaintiff's city, but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, was not such an acknowledgment of a subsisting obligation as would repel the statutory bar. *Smith v. Gordon*, 204 N.C. 695, 169 S.E. 634 (1933).

As to former law, see *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 6 L. Ed. 142 (1824); *McBride v. Gray*, 44 N.C. 420 (1853); *Brown v. Becknall*, 58 N.C. 423 (1860); *Faison v. Bowden*, 72 N.C. 405 (1875); *Ray v. Pearce*, 84 N.C. 485 (1881); *Riggs v. Roberts*, 85 N.C. 152 (1881); *Simmons v. Ballard*, 102 N.C. 105, 9 S.E. 495 (1889).

III. EFFECT OF PARTIAL PAYMENT.

History. — It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I and 9 Geo. IV did nothing more than recognize the common-law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely recognizes the right, leaving the application of the principles to the courts as has always been the case. See *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895).

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. See *State Nat'l Bank v. Harris*, 96 N.C. 118, 1 S.E. 459 (1887); *Kilpatrick v. Kilpatrick*, 187 N.C. 520, 122 S.E. 377 (1924).

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. *McDonald v. Dickson*, 87 N.C. 404 (1882).

But Debtor Must Intend Thereby to Acknowledge Debt. — The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. *Cashmar-King Supply Co. v. Dowd*, 146 N.C. 191, 59 S.E. 685 (1907).

Partial payment starts the statute running anew only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness, or at least his obligation, to pay the balance. *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895). See also, *Lester Piano Co. v. Loven*, 207 N.C. 96, 176 S.E. 290 (1934).

Payment made in contemplation of an agreed compromise will not repel the bar of the statute of limitations as to the balance of the debt. *Cashmar-King Supply Co. v. Dowd*, 146 N.C. 191, 59 S.E. 685 (1907).

Partial payment voluntarily made on judgment does not remove statutory bar. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Application of Existing Liability to Debt. — The fact that the maker of a note had a claim against the holder, which the holder endorsed as a credit on

the note without the assent of the maker, would not be such a partial payment as would rebut the statute of limitations, but an agreement to apply one existing liability to another would be such a partial payment as would stop the operation of the statute, even though the endorsement was never actually made on the note. *State Nat'l Bank v. Harris*, 96 N.C. 118, 1 S.E. 459 (1887).

An account of transactions between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. *Cashmar-King Supply Co. v. Dowd*, 146 N.C. 191, 59 S.E. 685 (1907).

Where an assignment for the benefit of creditors conferred no power on the trustee, as agent of the debtor, to do any act to waive the statute or to express a willingness or intention to pay the debt after it became otherwise barred, a partial payment made by the trustee on a note of the debtor would not arrest the running or remove the bar of the statute of limitations. *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895).

Burden of Proving Payment. — The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. *Riggs v. Roberts*, 85 N.C. 152 (1881).

Instruction Held Erroneous. — Where the running of the statute of limitations would have otherwise barred an action upon an account, and there was evidence tending to show that a credit thereon was agreed to by the creditor and debtor within the three-year period, the effect of this credit to repel the bar related to the time of the agreement made and effected, and an instruction that made it depend upon the time of the debt incurred for which the credit was given was reversible error to the plaintiff's prejudice. *Kilpatrick v. Kilpatrick*, 187 N.C. 520, 122 S.E. 377 (1924).

As to time for which statute starts anew, see *Riggs v. Roberts*, 85 N.C. 152 (1881); *State Nat'l Bank v. Harris*, 96 N.C. 118, 1 S.E. 459 (1887); *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895); *Cashmar-King Supply Co. v. Dowd*, 146 N.C. 191, 59 S.E. 685 (1907); *Kilpatrick v. Kilpatrick*, 187 N.C. 520, 122 S.E. 377 (1924).

IV. EFFECT OF REQUEST NOT TO SUE.

Plea of Limitations Precluded after

Delay Caused by Debtor's Request and Promise. — Where delay in bringing suit is caused by a request of defendant or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. *Joyner v. Massey*, 97 N.C. 148, 1 S.E. 702 (1887). See also, *Barcroft & Co. v. Roberts & Co.*, 91 N.C. 363 (1884), *aff'd on rehearing*, 92 N.C. 249 (1885).

Notwithstanding this section, when a creditor has delayed action at the request of the debtor, under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time, and the creditor may bring his action within the statutory time after such promise and request for delay even though they were not in writing. *Cecil v. Henderson*, 121 N.C. 244, 28 S.E. 481 (1897).

If plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea. *Tomlinson v. Bennett*, 145 N.C. 279, 59 S.E. 37 (1907); *State ex rel. Oliver v. United States Fid. & Guar. Co.*, 176 N.C. 598, 97 S.E. 490 (1918).

On Grounds of Equitable Estoppel. — In giving effect to requests not to sue and promises not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action. *Daniel v. Board of Comm'rs*, 74 N.C. 494 (1876); *Haymore v. Commissioners of Yadkin*, 85 N.C. 268 (1881).

Request without Promise Not to Plead Insufficient. — It is essential not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. *Hill v. Hilliard & Co.*, 103 N.C. 34, 9 S.E. 639 (1889); *Cecil v. Henderson*, 121 N.C. 244, 28 S.E. 481 (1897).

A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. *Raby v. Stuman*, 127 N.C. 463, 37 S.E. 476 (1900).

But Request and Promise Need Not Be in Writing. — The request not to sue and promises not to plead the statute of limitations need not be in writing. *Cecil v. Henderson*, 121 N.C. 244, 28 S.E. 481 (1897); *State v. United States Fid. & Guar. Co.*, 176 N.C. 598, 97 S.E. 490 (1918).

Running of Statute Not Arrested. —

A simple admission by executor of the correctness of a claim against testator's estate, and a verbal promise to pay same out of the assets, prior to the 1881 amendment of § 1-22, would not arrest the running of the statute of limitations, where there was no proof that the creditor refrained from suing at the request of the executor or that there was any agreement for indulgence. *Whitehurst v. Dey*, 90 N.C. 542 (1884).

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

(a) After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation or guarantor thereof, which removes the bar of the statute of limitations or causes the statute to begin running anew, has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same.

(b) Nothing in this section shall be construed as applying to or affecting rights or obligations of partnerships or individual members thereof, due to acts, admissions or acknowledgments of any one partner but rights as between partners shall be governed by G.S. 59-39.1. (C.C.P., s. 50; Code, s. 171; Rev., s. 372; C.S., s. 417; 1953, c. 1076, s. 1.)

Legal Periodicals. — For comment on 1953 amendment, see 31 N.C.L. Rev. 397 (1953).

For comment on application of statute

of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

CASE NOTES

Effect of Partial Payment on Promissory Note by One Defendant. — In an action to recover the balance due on a promissory note, a payment on the note by one defendant did not fix the date of payment as a new date from which the statute of limitations began to run against the second defendant unless such

partial payment was agreed to, authorized or ratified by the second defendant. *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

Quoted in *Wells v. Barefoot*, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

§ 1-28. Undisclosed partner.

The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (1893, c. 151; Rev., s. 373; C.S., s. 418.)

§ 1-29. Cotenants.

If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (C.C.P., s. 52; Code, s. 173; Rev., s. 374; C.S., s. 419; 1921, c. 106.)

CASE NOTES

This section changes the rule in regard to personalty. It does not affect the law as to real property. *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906).

As to elements of tenancy in common, see *Powell v. Malone*, 22 F. Supp. 300 (M.D.N.C. 1938).

§ 1-30. Applicable to actions by State.

The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (C.C.P., s. 38; Code, s. 159; Rev., s. 375; C.S., s. 420.)

CASE NOTES

Effect of Section on Common Law. — This section abrogated the common-law maxim "nullum tempus occurrit regi" protecting public property from the negligence of public officers. *Furman v. Timberlake*, 93 N.C. 66 (1885).

The maxim "nullum tempus occurrit regi" no longer obtains in this State, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provides otherwise. *City of Wilmington v. Cronly*, 122 N.C. 388, 30 S.E. 9 (1898); *Threadgill v. Town v. Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916); *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E.2d 606 (1945).

Applicability of Limitations to State Is Legislative Matter. — Whether there ought to be a statute of limitations applicable to suits by the State is a matter for the legislature, not the courts. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

When Statute Runs against State. — Notwithstanding the inclusive provisions of this section, it has been uniformly held that no statute of limitations runs against the State, unless it is expressly provided therein. *City of Raleigh v. Mechanics & Farmers Bank*,

223 N.C. 286, 26 S.E.2d 573 (1943); *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

Limitations Statute Held Inapplicable. — Three-year statute of limitations pleaded by the defendant was not applicable in an action by the State to recover certain documents, namely indictments issued in 1967 and 1968, since nothing in the record indicated when the documents were taken from the possession of the State and hence when the cause of action arose, and since the statute pleaded was not made expressly applicable to the State. *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977).

Three-year statute of limitations did not apply to an action by a municipality to enforce assessment liens for public improvements, since such statute did not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E.2d 97 (1942).

Where act authorizing collection of tax arrearages did not prescribe any limitation, the 10-year statute of limitations did not apply, and the unpaid taxes for any year could be recovered. *City of Wilmington v. Cronly*, 122 N.C. 388, 30 S.E. 9 (1898).

Cited in *City of Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967).

OPINIONS OF ATTORNEY GENERAL

Statutes of Limitations Are Not Applicable against the State in Escheats. — See opinion of Attorney

General to Mr. Edwin Gill, State Treasurer, 42 N.C.A.G. 49 (1972).

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

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (C.C.P., s. 39; Code, s. 160; Rev., s. 376; C.S., s. 421; 1951, c. 837, s. 1.)

Cross References. — As to book accounts as evidence of last settlement

between parties in actions for less than \$60.00, see § 8-42.

CASE NOTES

"Mutual Account" Defined. — An account may be "mutual" if there are reciprocal dealings so that each party extends credit to the other and the account is allowed to run with a view to an ultimate adjustment of the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

"Open Account" Defined. — An ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

"Current Account" Defined. — An account is "running" or "current" where it continues with no time limitations fixed by express or implied agreement. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

What Accounts Contemplated by Section. — The mere existence of disconnected and opposing demands between two parties will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. *Green v. Caldcleugh*, 18 N.C. 320 (1835).

In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings kept by one party with the knowledge and concurrence of the other. *Hussey v. Burgwyn*, 51 N.C. 385 (1859).

Extension of Credit Must Be Reciprocal. — A mutual account must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of case law nor the statute applicable. *Hollingsworth v. Allen*, 176 N.C. 629, 97 S.E. 625 (1918).

Mutuality of accounts may be the result of direct agreement or may be inferred from the dealings of the parties; if established, it renders unavailable the defense of the statute of limitations to both parties. *Stancell v. Burgwyn*, 124 N.C. 69, 32 S.E. 378 (1899).

When Mutuality May Be Inferred. — A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. *Green v. Caldcleugh*, 18 N.C. 320 (1835); *Hussey v. Burgwyn*, 51 N.C. 385 (1859); *Robertson v. Pickerell*,

77 N.C. 302 (1877); *E. Mauney & Son v. Coit*, 86 N.C. 464 (1882); *Stokes v. Taylor*, 104 N.C. 394, 10 S.E. 566 (1889).

Section Inapplicable to Credit Account. — The purchase of merchandise on credit, where the purchaser pays a certain sum in cash on the account each fall and the balance is carried forward into the next year and the next year's purchases are added thereto, is not a mutual, open and current account within the purview of this section, but is an account current. *Richlands Supply Co. v. Banks*, 205 N.C. 343, 171 S.E. 358 (1933).

This section does not apply to an ordinary store account, though open and continued, where the credit is all on one side and the only items of discharge consist in payments on account. *Brock v. Franck*, 194 N.C. 346, 139 S.E. 696 (1927).

An ordinary store account or any other account (though open and continued) where the credit is all on one side and the payments on account are on the other is not a "mutual, open and current account" under this section. *Whitley's Elec. Serv., Inc. v. Sherrod*, 32 N.C. App. 338, 232 S.E.2d 223, rev'd on other grounds, 293 N.C. 498, 238 S.E.2d 607 (1977).

An indefinite promise to pay intermittently from time to time for services rendered by one party to another is not a mutual, open and current account with reciprocal demands between the parties within the purview of this section. *Phillips v. Penland*, 196 N.C. 425, 147 S.E. 731 (1929).

Draft Not Referring to Account. — The bar of the statute of limitations was not repealed by the transmission of a draft by the debtor and its receipt by the creditor within the three years, where the former made no allusion to or recognition of the account or any debt whatever. *Hussey v. Burgwyn*, 51 N.C. 385 (1859).

When Statute Runs on Mutual Accounts. — Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date, but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. *Robertson v. Pickerell*, 77 N.C. 302 (1877).

Action for Services Rendered to Decedent. — Where plaintiff instituted action against administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for

such services and that he entered thereon from time to time credits for rent for decedent's land, the facts were insufficient to establish mutual, open and current accounts, and the statute of limitations began to run against plaintiff's claims for the date of each item. *Tew v. Hinson*, 215 N.C. 456, 2 S.E.2d 376 (1939).

In an action against decedent's administrator to recover for services rendered to decedent under an agreement that he would pay for services to be irregularly rendered from time to time as needed, without a definite time fixed for payment but under a general promise to pay for them, a payment made by decedent in 1925, intended by him to be made upon the debt, would have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. *Phillips v. Penland*, 196 N.C. 425, 147 S.E. 731 (1929).

Conflicting Evidence for Jury. — Conflicting evidence as to whether last item entered was proper in mutual, open and current account was for the jury. *Hammond v. Williams*, 215 N.C. 657, 3 S.E.2d 437 (1939).

Directed Verdict Held Error. — Where there was conflicting evidence as to whether item sued on was to be related to other items upon which defendant relied, it was reversible error for the judge to direct a verdict thereon if the jury believed the evidence. *McKinnie Bros. Co. v. Wester*, 188 N.C. 514, 125 S.E. 1 (1924).

Effect of Part Payment. — While there is language in some of the decisions suggesting that a part payment on a current account revives only those items that accrued within three years preceding the payment, the Supreme Court has not so held in any case where (1) a current account was established, (2) the debtor made a partial payment, and (3) there were circumstances showing that in making the payment the debtor intended to acknowledge the entire account and thereby impliedly promised to pay the balance due. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his

willingness, or at least his obligation, to pay the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely as to those items which accrued within three years of the payment. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293

N.C. 498, 238 S.E.2d 607 (1977).

Acknowledgment of Obligation. — Where suit is brought more than three years after claim arises on an account or other contractual debt, the bar of the statute of limitations may be avoided if the debtor has acknowledged his obligation within three years prior to the date the action is filed. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

§ 1-32. Not applicable to bank bills.

The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this State. (C.C.P., s. 53; 1874-5, c. 170; Code, s. 174; Rev., s. 377; C.S., s. 422.)

§ 1-33. Actions against bank directors or stockholders.

The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this State, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (C.C.P., s. 54; Code, s. 175; Rev., s. 378; C.S., s. 423.)

CASE NOTES

Cited in *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898).

§ 1-34. Aliens in time of war.

When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (C.C.P., s. 44; Code, s. 165; Rev., s. 379; C.S., s. 424.)

CASE NOTES

As to the right of alien enemy to sue in the courts of this State, see *Krachanake v. Acme Mfg. Co.*, 175 N.C. 435, 95 S.E. 851 (1918).

ARTICLE 4.

*Limitations, Real Property.***§ 1-35. Title against State.**

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same—

- (1) When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.
- (2) When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries. (R.C., c. 65, s. 2; C.C.P., s. 18; Code, s. 139; Rev., s. 380; C.S., s. 425.)

Cross References. — As to validity of possession described in this section against claimants under the State, see § 1-37.

Legal Periodicals. — For article discussing the "doctrine of color of title in North Carolina," see 13 N.C. Cent. L.J. 123 (1982).

CASE NOTES

History. — Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this State had adopted the arbitrary rule that from the adverse possession of land for 30 years a grant from the State should be presumed, a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, *id certum est quod certum reddi potest*. *FitzRandolph v. Norman*, 4 N.C. 564 (1817); *Candler v. Lunsford*, 20 N.C. 542 (1839); *Price v. Jackson*, 91 N.C. 11 (1884).

As to the nature of the presumption of a grant from adverse possession under former law, see *Melvin v. Waddell*, 75 N.C. 361 (1876).

Effect of Section on Prior Law. — But the law is now changed, and the 30 years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the State. *Price v. Jackson*, 91 N.C. 11 (1884).

As to the nonretroactive effect of this section, see *Johnson v. Parker*, 79 N.C. 475 (1878).

Section Applies Only to Adverse Possession. — This section is confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of 30 years or 21 years on personal actions after the State has parted with the title to the lands, for those periods relate only to the adverse possession,

without or with color, which will be sufficient to bar the title. This section does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be 30 or 21 years. *Tillery v. Whiteville Lumber Co.*, 172 N.C. 296, 90 S.E. 196 (1916).

The State is deemed to have surrendered its right where it permits adverse occupation of land under colorable title without interruption for 21 years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. *Walker v. Moses*, 113 N.C. 527, 18 S.E. 339 (1893).

As to the elements of adverse possession, see *Hedrick v. Gobble*, 61 N.C. 348 (1867); *Mallory v. Bruden*, 86 N.C. 251 (1882); *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969).

Showing of Privity Required. — In case of a reliance upon 30 years' adverse possession, the plaintiff must show a privity between himself and those who preceded him in the possession, and must also show that the possession was held up to known and visible boundaries. *Price v. Jackson*, 91 N.C. 11 (1884).

As to necessity of continuity and privity under former law, see *FitzRandolph v. Norman*, 4 N.C. 564 (1817); *Chandler v. Lunsford*, 20 N.C. 542 (1839); *Reed v. Earnhart*, 32 N.C. 516 (1849); *Melvin v. Waddell*, 75 N.C. 361 (1876); *Davis v. McArthur*, 78 N.C. 357 (1878); *Cowles v. Hall*, 90 N.C. 330 (1884); *Mallett v. Simpson*, 94 N.C. 37 (1886); *Bryan v. Spivey*, 109 N.C. 57, 13 S.E. 766 (1891); *Hamilton v. Icard*, 114 N.C. 532, 19 S.E. 607 (1894); *Walden v. Ray*, 121 N.C. 237, 28 S.E. 293 (1897); *May v. Manufacturing & Trading Co.*, 164 N.C. 262, 80 S.E. 380 (1913).

Connection of Occupation with Boundaries. — Where there is a physical occupation with the claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed, or some exclusive control or dominion over the unoccupied portions of the land. *May v. Manufacturing & Trading Co.*, 164 N.C. 262, 80 S.E. 380 (1913).

As to adverse possession against municipality, see *Crump v. Mims*, 64 N.C. 767 (1870); *State v. Long*, 94 N.C.

896 (1886); *Moore v. Meroney*, 154 N.C. 158, 69 S.E. 838 (1910); *Threadgill v. Town of Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916). See also, § 1-45.

As to controversies between titles of different dates which lap, see *Hedrick v. Gobble*, 61 N.C. 348 (1867).

Effect on Running of Statute where Overlapping Grant Is Made. — Where an occupant is seated on the interference when overlapping grant is issued, and is claiming colorable title adversely to the State under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. If, on the contrary, the occupant of the lappage wishes to use his adversary's grant to show that the title is out of the State in order to establish it in himself, by virtue of § 1-38, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. *Hamilton v. Icard*, 114 N.C. 532, 19 S.E. 607 (1894).

The constructive possession of one claiming under color of title for 21 years, the period necessary to give title against the State, is not interrupted by the mere issuance to another of a patent including part of the land claimed by him, where his actual possession is within the lappage. *Hamilton v. Icard*, 114 N.C. 532, 19 S.E. 607 (1894).

The party asserting title by adverse possession must carry the burden of proof on that issue. *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969).

Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for 21 years under subdivision (2) of this section. *Hamilton v. Icard*, 114 N.C. 532, 19 S.E. 607 (1894).

Questions for jury. — Where the evidence established 30 years' possession, questions as to whether such possession was adverse and as to whether such possession was held up to known and visible lines and boundaries, as required by this section, were still left for the jury's determination. *McKay v. Bullard*, 207 N.C. 628, 178 S.E. 95 (1935).

Application of § 1-38 after Running of Statute against State. — When a

title was shown out of the State by adverse possession, § 1-38 applied where one thereafter acquired title under a sheriff's deed and held possession thereunder for seven years. *Walker v. Moses*, 113 N.C. 527, 18 S.E. 339 (1893).

Evidence of Possession Held Insufficient. — Possession is insufficient to constitute the basis of adverse possession against the State or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and that plaintiff's father cultivated an acre or two of the land one year. *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800 (1903).

The evidence was sufficient to support a directed verdict for the holder of a paper title on the theory that defendants did not establish title by adverse possession as contemplated by this section and § 1-42. *Peterson v. Sucro*, 101 F.2d

282 (4th Cir. 1939).

Evidence of Possession Held Sufficient. — The evidence was held sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 187 S.E. 804 (1936).

Applied in *State v. West*, 31 N.C. App. 431, 229 S.E.2d 826 (1976).

Cited in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889); *Ware v. Knight*, 199 N.C. 251, 154 S.E. 35 (1930); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939); *United States v. Burnette*, 103 F. Supp. 645 (W.D.N.C. 1952); *State v. Taylor*, — N.C. App. —, 300 S.E.2d 42 (1983).

§ 1-36. Title presumed out of State.

In all actions involving the title to real property title is conclusively deemed to be out of the State unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C.S., s. 426.)

CASE NOTES

Purpose of Section. — The legislature enacted this section to remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State. The section provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627 (1920); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E.2d 703 (1952); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953).

Power of Legislature to Enact Section. — This section affects the remedy, the mode of procedure, and is within the power of the General Assembly to pass. *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

Section Not Retroactive. — This sec-

tion, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. *Riddle v. Riddle*, 176 N.C. 485, 97 S.E. 382 (1918); *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

Under this section neither party is required to show title out of the State though either may do so. *Pennell v. Brookshire*, 193 N.C. 73, 136 S.E. 257 (1927); *Dill-Cramer-Truitt Corp. v. Downs*, 195 N.C. 189, 141 S.E. 570 (1928). See also, *Ward v. Smith*, 223 N.C. 141, 25 S.E.2d 463 (1943).

Under this section, it is not necessary to prove that the sovereign has parted with its title when it is not a party to the action. *Cothran v. Akers Motor Lines*, 257 N.C. 782, 127 S.E.2d 578 (1962); *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

Plaintiff Must Rely upon Strength of Own Title. — In actions involving title to real property, where the State is

not a party, title is conclusively presumed out of the State, without a presumption in favor of either party, and plaintiff must rely upon the strength of his own title. *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451 (1946).

Sources of Title Available. — Where plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. *Stewart v. Stephenson*, 172 N.C. 81, 89 S.E. 1060 (1916).

No Presumption in Favor of One Party or the Other. — Under this section, in all actions involving title to real property title is conclusively presumed to be out of the State unless it is a party to the action, but there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627 (1920); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673 (1951); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E.2d 703 (1952); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593 (1955); *Scott v. Lewis*, 246 N.C. 298, 98 S.E.2d 294 (1957); *Tripp v. Keais*, 255 N.C. 404, 121 S.E.2d 596 (1961); *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied,

279 N.C. 726, 184 S.E.2d 883 (1971).

In an action to recover lands by 20 years' adverse possession under § 1-40, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

Title out of State Presumed. — In a condemnation proceeding, where the question of ownership was essentially an action between individual litigants, and the State, although a party for purposes of condemnation, claimed title only by virtue of the condemnation and not otherwise, the presumption was that title was out of the State. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

Applied in *Berry v. Coppersmith*, 212 N.C. 50, 193 S.E. 3 (1937); *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953).

Quoted in *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 187 S.E. 804 (1936).

Stated in *Ramsey v. Ramsey*, 224 N.C. 110, 29 S.E.2d 340 (1944).

Cited in *Ware v. Knight*, 199 N.C. 251, 154 S.E. 35 (1930); *Vance v. Guy*, 224 N.C. 607, 31 S.E.2d 766 (1944); *Shingleton v. North Carolina Wildlife Resources Comm'n*, 248 N.C. 89, 102 S.E.2d 402 (1958); *Lachmann v. Baumann*, 22 N.C. App. 160, 205 S.E.2d 805 (1974).

§ 1-37. Such possession valid against claimants under State.

All such possession as is described in G.S. 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be good and legal bar against the entry or suit of any person, under the right or claim of the State. (C.C.P., s. 19; Code, s. 140; Rev., s. 381; C.S., s. 427.)

CASE NOTES

This section does not apply where proof of possession is insufficient under § 1-35. *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800 (1903).

For application of this section and § 1-30 against municipality under

law prior to enactment of § 1-45, see *Threadgill v. Town of Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916).

Cited in *United States v. Burnette*, 103 F. Supp. 645 (W.D.N.C. 1952).

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

(a) When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title.

(b) If

(1) The marking of boundaries on the property by distinctive markings on trees or by the implacement of visible metal or concrete boundary markers in the boundary lines surrounding the property, such markings to be visible to a height of 18 inches above the ground, and

(2) The recording of a map prepared from an actual survey by a surveyor registered under the laws of North Carolina, in the book of maps in the office of the register of deeds in the county where the real property is located, with a certificate attached to said map by which the surveyor certifies that the boundaries as shown by the map are those described in the deed or other title instrument or proceeding from which the survey was made, the surveyor's certificate reciting the book and page or file number of the deed, other title instrument or proceeding from which the survey was made,

then the listing and paying of taxes on the real property marked and for which a survey and map have been certified and recorded as provided in subdivisions (1) and (2) above shall constitute prima facie evidence of possession of real property under known and visible lines and boundaries. Maps recorded prior to October 1, 1973 may be qualified under this statute by the recording of certificates prepared in accordance with subdivision (b)(2) above. Such certificates must contain the book and page number where the map is filed, in addition to the information required by subdivision (b)(2) above, and shall be recorded and indexed in the deed books. When a certificate is filed to qualify such a recorded map, the register of deeds shall make a marginal notation on the map in the following form: "Certificate filed pursuant to G.S. 1-38(b), book (enter book where filed), page"

(c) Maps recorded prior to October 1, 1973 shall qualify as if they had been certified as herein provided if said maps can be proven to conform to the boundary lines on the ground and to conform to instruments of record conveying the land which is the subject matter of the map, to the person whose name is indicated on said recorded map as the owner thereof. Maps recorded after October 1, 1973 shall comply with the provisions for a certificate as hereinbefore set forth. (C.C.P., s. 20; Code, s. 141; Rev., s. 382; C.S., s. 428; 1963, c. 1132; 1973, c. 250; 1975, c. 207.)

Cross References. — As to title against the State, see § 1-35. As to title being presumed out of State, see § 1-36. As to adverse possession of 20 years, see § 1-40.

Legal Periodicals. — For article, "Adverse Possession — Color of Title," see 16 N.C.L. Rev. 149.

For note on tacking successive adverse possessions of a strip of land not included in a deed, see 31 N.C.L. Rev. 478 (1953).

For note on intent as a requisite in mistaken boundary cases, see 33 N.C.L. Rev. 632.

For note on tax foreclosure deed to property held by tenants in common as

color of title, see 36 N.C.L. Rev. 526 (1958).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article discussing the "doctrine of color of title in North Carolina," see 13 N.C. Cent. L.J. 123 (1982).

CASE NOTES

- I. In General.
- II. Possession, Generally.
- III. Hostile or Adverse Nature of Possession.
- IV. Continuity of Possession.
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- VI. Color of Title.
 - A. In General.
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I. IN GENERAL.

Editor's Note. — Many of the cases cited below may also have application to the 20 year statute, § 1-40.

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. *Lofton v. Barber*, 226 N.C. 481, 39 S.E.2d 263 (1946).

Section Applies to State and Its Agencies. — The General Assembly intended that this section and § 1-40 should apply to any legal entity, including the State and its agencies, capable of adversely possessing land and of acquiring title thereto. *Williams v. North Carolina State Bd. of Educ.*, 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Adverse possession and prescription may be had against a trustee, even if the cestui que trust is under a disability and out of the State. *Blake v. Allman*, 58 N.C. 407 (1860).

And where title is lost by the trustee, the cestui que trust is also concluded. *King v. Rhew*, 108 N.C. 696, 13 S.E. 174 (1891); *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906).

Joint tenants and tenants in common may lose property by adverse possession, and what is sufficient against one is sufficient against all. *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728 (1906).

As to effect of disability on adverse possession, see *Clayton v. Rose*, 87 N.C. 106 (1882); *Stone v. Conder*, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Compulsory Reference. — An action in ejectment in which defendants pleaded the twenty and the seven-year statutes of limitation was not subject to compulsory reference pursuant to former § 1-189. *Williams v. Robertson*, 233 N.C. 309, 63 S.E.2d 632 (1951).

Effect on Lien of Judgment Creditor. — Adverse possession against a judgment debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. *Moses v. Major*, 201 N.C. 613, 160 S.E. 890 (1931).

Landowner with Good Title Cannot Ignore Duly Recorded Easement. — When it is shown that landowner has a good title based on a connected chain of title to a common source, such landowner will not be permitted to ignore a duly recorded easement granted by his predecessors in title by the fiction of treating his valid deed merely as color of title and thereby defeat an outstanding valid easement by adverse possession for a period of seven years. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973).

Section 1-56 Inapplicable to Recovery of Realty. — This section and § 1-40 apply to actions for the recovery of real estate, to the exclusion of § 1-56. *Williams v. Scott*, 122 N.C. 545, 29 S.E. 877 (1898).

Applied in *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914); *Nichols v. York*, 219 N.C. 262, 13 S.E.2d 565 (1941); *Layden v. Layden*, 228 N.C. 5, 44 S.E.2d 340 (1947); *Hughes v. Oliver*, 228 N.C. 680, 47 S.E.2d 6 (1948); *Grady v. Parker*, 230 N.C. 166, 52 S.E.2d 273 (1949); *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953); *Newkirk v. Porter*, 240 N.C. 296, 82 S.E.2d 74 (1954); *Lachmann v. Baumann*, 22 N.C. App. 160, 205 S.E.2d 805 (1974); *Kennedy v. Whaley*, 55 N.C. App. 321, 285 S.E.2d 621 (1982).

Cited in *Atwell v. Shook*, 133 N.C. 387, 45 S.E. 777 (1903); *Clendenin v. Clendenin*, 181 N.C. 465, 107 S.E. 458 (1921); *Virginia-Carolina Power Co. v. Taylor*, 191 N.C. 329, 131 S.E. 646 (1926); *Dill-Cramer-Truitt Corp. v. Downs*, 195 N.C. 189, 141 S.E. 570 (1928); *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 187 S.E. 804 (1936); *McKay v. Bullard*, 219 N.C. 589, 14 S.E.2d 657 (1941); *Parham v. Henley*, 224 N.C. 405, 30 S.E.2d 372 (1944); *Perry v. Alford*, 225 N.C. 146, 33 S.E.2d 665 (1945); *Ramsey v. Nebel*, 226 N.C. 590, 39 S.E.2d 616 (1946); *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451 (1946); *Venus Lodge No. 62, F. & A.M. v. Acme Benevolent Ass'n*, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950); *United States v. Burnette*, 103 F. Supp. 645 (W.D.N.C. 1952); *Wilson v. Chandler*, 235 N.C. 373, 70 S.E.2d 179 (1952); *Chambers v. Chambers*, 235 N.C. 749, 71 S.E.2d 57 (1952); *Waddell v. Carson*, 245 N.C. 669, 97 S.E.2d 222 (1957); *Morehead v. Harris*, 255 N.C. 130, 120 S.E.2d 425 (1961); *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961); *Mallet v. Huske*, 262 N.C. 177, 136 S.E.2d 553 (1964); *Patterson v. Buchanan*, 265 N.C. 214, 143 S.E.2d 76 (1965); *Scott Poultry Co. v. Graves*, 272 N.C. 22, 157 S.E.2d 608 (1967); *McRorie v. Shinn*, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

II. POSSESSION, GENERALLY.

Mere possession does not necessarily amount to adverse possession in law. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. *Carswell v. Creswell*, 217 N.C. 40, 7 S.E.2d 58 (1940).

Elements of Adverse Possession, Generally. — Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to the right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that one is exercising the dominion of owner. *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912); *Mallet v. Huske*, 262 N.C. 177, 136 S.E.2d 553 (1964); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970); *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

Possession of real property, to be adverse, must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. *Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943).

Such adverse possession as will ripen into title must be for the prescribed period of time and must be clear, definite, positive and notorious. It must be continuous, adverse, hostile and exclusive during the whole statutory period, and under a claim of title to the land occupied. *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

Under either § 1-38 or § 1-40, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous and hostile to the true owner's title and to all persons for the full statutory period. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953); *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

The adverse possession for seven years under color which bars the entry of the true owner, must be open, continuous, uninterrupted and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title to show such actual adverse possession. *Monk v. Wilmington*, 137 N.C. 322, 49 S.E. 345 (1904); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907); *Stewart v. McCormick*, 161 N.C. 625, 77 S.E. 761 (1913).

Acts of Possession Must Give Owner Cause of Action. — The claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. *Snowden v. Bill*, 159 N.C. 497, 75 S.E. 721 (1912).

And Make Claimant Liable to Action of Ejectment. — In order to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953).

To convert the shadow of color of title into perfect title, possession must be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass *quare clausum fregit*. *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E.2d 6 (1962).

Owner's Knowledge of Possession Not Required. — Although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of its adverse character to the ordinary person if he should make the observation that the ordinary owner would

make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. *Kennedy v. Maness*, 138 N.C. 35, 50 S.E. 450 (1905).

The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession — that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should. *Green v. Harman*, 15 N.C. 158 (1833); *Blue Ridge Land Co. v. Floyd*, 171 N.C. 543, 88 S.E. 862 (1916).

But Possession Must Be So Notorious as to Put True Owner on Notice of Adverse Claim. — The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. *Cothran v. Akers Motor Lines*, 257 N.C. 782, 127 S.E.2d 578 (1962).

The possession of one under color is sufficient notice of his claim of title to the lands. *Butler v. Bell*, 181 N.C. 85, 106 S.E. 217 (1921).

Test for Determining Sufficiency of Acts of Possession. — A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass *quare clausum fregit* for damages. *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895); *Mallet v. Huske*, 262 N.C. 177, 136 S.E.2d 553 (1964).

Paying taxes is not enough to constitute adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient, because it is not an actual, open, visible occupation begun and continued under a claim of right. *Malloy v. Bruden*, 86 N.C. 251 (1882); decided prior to enactment of subsections (b) and (c) of this section.

Listing and payment of taxes would not suffice to support an action in ejectment or trespass, which is the test of possession referred to in this section and § 1-40. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E.2d 726 (1961), decided prior to subsections (b) and (c) of this section.

However, payment of taxes constitutes a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. *Austin v. King*, 97 N.C. 339, 2 S.E. 678 (1887); *Christman v. Hillard*, 167 N.C. 4, 82 S.E. 949 (1914), decided prior to enactment of subsections (b) and (c) of this section.

The fact that defendants listed and paid taxes was evidence of the character of their claim, but it was no evidence of actual possession. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E.2d 726 (1961), decided prior to enactment of subsections (b) and (c) of this section.

Giving permission to hunt, like the payment of taxes, is evidence of an adverse claim, but is not possession. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Cutting Timber or Pulpwood. — When cutting timber or pulpwood is relied upon to show adverse possession it must be kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Use of Way over Another's Land. — In North Carolina there is a presumption that the use of a way over another's land is permissive unless evidence appears to the contrary. *Potts v. Burnette*, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Acts of Possession Held Sufficient. — Continuously cutting timber and making shingles in a swamp which was unfit for cultivation, for seven years, was a good possession. *Tredwell v. Reddick*, 23 N.C. 56 (1840), cited in *Loftin v. Cobb*, 46 N.C. 406 (1854).

Maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a nonnavigable stream. *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912).

For additional cases in which acts of possession were found sufficient, see *Andrews v. Mulford*, 2 N.C. 311 (1796);

Burton v. Carruth, 18 N.C. 2 (1834); *Wallace v. Maxwell*, 32 N.C. 110 (1849); *Smith v. Bryan*, 44 N.C. 180 (1852); *Moore v. Thompson*, 69 N.C. 120 (1873); *Gudger v. Kensley*, 82 N.C. 482 (1880); *Staton v. Mullis*, 92 N.C. 624 (1885); *Wall v. Wall*, 142 N.C. 387, 55 S.E. 283 (1906); *LaRoque v. Kennedy*, 156 N.C. 360, 72 S.E. 454 (1911).

Acts of Possession Held Insufficient. — Cutting trees and feeding hogs upon land susceptible of other uses is insufficient. *Loftin v. Cobb*, 46 N.C. 406 (1854).

Payment of taxes and the employment of agents in respect to land were insufficient acts to constitute possession. *Ruffin v. Overly*, 88 N.C. 369 (1883), decided prior to enactment of subsections (b) and (c) of this section.

Possession by a tenant of defendant's ancestor for one year, under his deed, and occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, was insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Blue Ridge Land Co. v. Floyd*, 167 N.C. 686, 83 S.E. 687 (1914).

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. *Berry v. Richmond Cedar Works*, 184 N.C. 187, 113 S.E. 772 (1922).

For additional cases in which acts of possession were held insufficient, see *Ward v. Herrin*, 49 N.C. 23 (1856); *Barlett v. Simmons*, 49 N.C. 295 (1857); *Hamilton v. Icard*, 114 N.C. 532, 19 S.E. 607 (1894); *State v. Suttle*, 115 N.C. 784, 20 S.E. 725 (1894); *Shaffer v. Gaynor*, 117 N.C. 15, 23 S.E. 154 (1895); *Hamilton v. Icard*, 117 N.C. 476, 23 S.E. 354 (1895); *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800 (1903); *Campbell v. Miller*, 165 N.C. 51, 80 S.E. 974 (1914); *Blue Ridge Land Co. v. Floyd*, 167 N.C. 686, 83 S.E. 687 (1914).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

As to requirement that possession be hostile to the true owner, see *Gwyn v. Stokes*, 9 N.C. 235 (1822); *Rogers v. Mabe*, 15 N.C. 180 (1833); *Foscue v. Foscue*, 37 N.C. 321 (1842); *Johnson v. Farlow*, 35 N.C. 84 (1851); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

In order to establish that a use is hostile, it is not necessary to show a

heated controversy, but it is necessary to show that the use was of a nature that would give the owner of the land notice that the use was being made under a claim of right. *Potts v. Burnette*, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Title Must Be Claimed against All the World. — Possession must be adverse; that is, title must be claimed against all the world. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part on other grounds, 323 F.2d 95 (4th Cir. 1963).

Hostile Act Does Not Start Running of Statute against Owner in Possession. — In determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim. Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the running of the statute of limitations against an owner in possession and occupancy. The foregoing rule applies to an equitable owner in possession of land; so long as he retains possession, nothing else appearing, the statute of limitations does not run against him. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

Possession of one tenant in common is presumed to be the possession of all tenants. *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Until Actual Ouster or a Sole Adverse Possession. — The possession of one tenant in common is in law the possession of all his cotenants, unless and until there is an actual ouster or a sole adverse possession for 20 years. *Winstead v. Woolard*, 223 N.C. 814, 28 S.E.2d 507 (1944).

Ouster and Possession by Tenant in Common against Cotenants. — There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906). See

also, *Tharpe v. Holcomb*, 126 N.C. 365, 35 S.E. 608 (1900).

Where a mortgage is made to one tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years' color or under 20 years otherwise. Hence, where plaintiffs sought to be let into possession of lands as tenants in common, and it appeared without conflicting evidence that defendants had been in peaceful possession under a mortgage from ancestor for more than 30 years after ouster, no issue of fact was raised for the determination of the jury, the title being complete in the adverse possessors. *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

When Statute Runs against Remaindermen. — Title by adverse possession cannot be had against remaindermen before life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. *Brown v. Brown*, 168 N.C. 4, 84 S.E. 25 (1915).

The statutes cannot begin to run against remaindermen until expiration of the particular estate. *Honeycutt v. Brooks*, 116 N.C. 788, 21 S.E. 558 (1895); *Roe v. Journigan*, 181 N.C. 180, 106 S.E. 680 (1921).

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. *Roe v. Journigan*, 181 N.C. 180, 106 S.E. 680 (1921).

Possession of real property cannot be adverse to remaindermen until the death of the life tenant, even though during the lifetime of the life tenant he gave a deed purporting to convey a fee. *Stone v. Conder*, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Possession by the grantee of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant. The seven-year statute of limitation prescribed by this section does not begin to run against the remaindermen until the life tenant dies. *Sprinkle v. City of Reidsville*, 235 N.C. 140, 69 S.E.2d 179 (1952).

Grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor. *Lovett v. Stone*, 239 N.C. 206, 79 S.E.2d 479 (1954).

Possession by Parent against Child or Vice Versa. — In order that a possession by a parent against a child, or vice versa, may become adverse, the owner must have had some clear, definite and unequivocal notice of the adverse claimant's intention to assert an exclusive ownership in himself. *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Claim under Void Devise Is Not Adverse. — Where one enters into possession of lands claiming as a devisee under a will, and the devise is void, he does not claim adversely, but rather permissively or mistakenly. *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Possession Held to Be Adverse to Owner. — After abandonment, wife's possession as purchaser at execution sale of a judgment obtained against her husband was adverse to the husband, and her possession for the period required by this section would bar him. *Campbell v. Campbell*, 221 N.C. 257, 20 S.E.2d 53 (1942).

Possession Held Not to Be Adverse. — Where plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant, in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law, while commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant; hence, plaintiffs were entitled to possession during the continuance of the life estate, but their possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Persons in possession pursuant to foreclosure of tax sale certificate conveying only title of life tenant could not maintain that their possession was adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under former § 105-410 was not automatic but had to be judicially determined in an appropriate proceeding. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Where two persons owned adjoining lands, and one ran a fence so near the line as to induce the jury to believe that

any slight encroachments were inadvertently made and that it was the design to run on the line, the possession constituted by the enclosure would be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession would have had that effect, because there was no intention to go beyond the deed, but an intention to keep within it. *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581 (1908); *Blue Ridge Land Co. v. Floyd*, 171 N.C. 543, 88 S.E. 862 (1916).

IV. CONTINUITY OF POSSESSION.

Occasional acts of ownership, no matter how adverse, do not constitute a possession that will mature title. *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953).

Continuous and Uninterrupted Possession Is Required. — Continuity of possession being one of the essential elements of adverse possession, in order that title may be ripened thereby, such possession must be shown to have been continuous and uninterrupted for the full statutory period. This is because if the possession of the adverse claimant is broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953).

While the possession need not be unceasing, the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected the disputed land to the only use of which it was susceptible. *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912); *Cross v. Seaboard Air Line Ry.*, 172 N.C. 119, 90 S.E. 14 (1916).

And Must Be Proved. — In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by necessary implication. *Ruffin v. Overby*, 105 N.C. 78, 11 S.E. 251 (1890).

The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is

deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. *Malloy v. Bruden*, 86 N.C. 251 (1882).

Occasional Entries Are Not Sufficient. — To claim adverse possession, there must be a continuous possession of public notoriety. Occasional entries upon the land will not serve, for they may not be observed, or if observed, they may not be considered as the assertion of rights. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Adverse possession is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. *Alexander v. Richmond Cedar Works*, 177 N.C. 137, 98 S.E. 312, petition for new trial dismissed, 177 N.C. 536, 98 S.E. 780 (1919).

It is not to be understood that possession is interfered with sufficiently to defeat title by the causal entry of a trespasser. *Hayes v. Williamson-Brown Lumber Co.*, 180 N.C. 252, 104 S.E. 527 (1920).

But Occupation and Use Need Not Be Unceasing. — Whereas the occupation and use by the adverse claimant must be continuous, it need not be unceasing. *Helton v. Cook*, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

Time Gaps Held to Destroy Continuity. — A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. *Malloy v. Bruden*, 85 N.C. 251 (1881).

An intervening period of five months was a sufficient interval to defeat adverse possession. *Holdfast v. Shephard*, 28 N.C. 361 (1846).

An intervening period of one year was sufficient to defeat title by adverse possession. *Ward v. Herrin*, 49 N.C. 23 (1856); *Malloy v. Bruden*, 86 N.C. 251 (1882).

Continuity May Be Shown by Tacking Where Privity Exists. — In order to fulfill requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953).

It is not necessary that the adverse claimant hold possession for the statutory period, provided he can establish a privity in claim, possession, etc., with the prior possessors which, when taken together, will constitute the period of time necessary to give title. *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905).

And several successive possessions may be tacked to show continuous adverse possession where there is privity of estate or connection of title between several successive occupants. *Scott v. Lewis*, 246 N.C. 298, 98 S.E.2d 294 (1957).

Privity means privity of possession and not privity in blood. *Trustees of Univ. v. Blount*, 4 N.C. 455 (1816); *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748 (1896); *Barrett v. Brewer*, 153 N.C. 547, 69 S.E. 614 (1910).

Reason for Privity Requirement. — Privity is necessary where the claimant has not had possession for the statutory period, for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. *Johnston v. Case*, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44 S.E. 617 (1903).

Rule of privity applies alike to adverse possession against State and private individuals, whether with or without color of title. *Johnston v. Case*, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44

S.E. 617 (1903); *May v. Manufacturing & Trading Co.*, 164 N.C. 262, 80 S.E. 380 (1913).

Possession of Grantor or Ancestor May Be Tacked. — A grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title may tack his grantor's possession of such land to his own for the purpose of establishing adverse possession for the requisite statutory period. Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953).

But a deed does not of itself create privity between grantor and grantee as to land not described in the deed but occupied by the grantor in connection therewith, even though grantee enters into possession of the land not described and uses it in connection with that conveyed. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953).

Where claimant is holding possession under color of title, he cannot tack his possession of land not covered by his color to the possession of his grantor. *Blackstock v. Cole*, 51 N.C. 560 (1859); *Jennings v. White*, 139 N.C. 23, 51 S.E. 799 (1905).

Possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years' possession under color of title as required by this section. *Morrison v. Craven*, 120 N.C. 327, 26 S.E. 940 (1897).

A widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead or dower. *Atwell v. Shook*, 133 N.C. 387, 45 S.E. 777 (1903); *Jacobs v. Williams*, 173 N.C. 276, 91 S.E. 951 (1917).

Possession by the legal representative is a continuation of deceased's possession. *Trustees of Univ. v. Blount*, 4 N.C. 455 (1816).

Possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748 (1896).

Tacking Not Permitted. — Where heir went into adverse possession of a tract of land, but ancestor died before such possession had been held for 20 years, such possession prior to the

ancestor's death could not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than 20 years subsequent to the ancestor's death did not ripen title in him. *Wilson v. Wilson*, 237 N.C. 266, 74 S.E.2d 704 (1953).

Where parties brought action for the recovery of land as heirs at law of their ancestor, and judgment was rendered adverse to them, such judgment adjudicated want of title in their ancestor and was binding upon them, and they could not in a subsequent action in which they asserted title by adverse possession tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under known and definite boundaries. *Scott v. Lewis*, 246 N.C. 298, 98 S.E.2d 294 (1957).

Where the purchase was of part of a tract of land, the vendee's possession would not inure to the benefit of the vendor as to the remainder of the tract for the purpose of showing possession of the tract by the vendor. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Adverse Possession Not Interrupted by Occasional Entries. — The occasional going onto the property by one of the plaintiffs, claiming title to the property under a will, to cut a Christmas tree or to rake pinestraw for a dog house, did not interrupt continued adverse possession by defendants and their predecessors in title. *Stone v. Conder*, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

V. BOUNDARIES OF LAND POSSESSED.

Possession Must Be Actual. — There can be no adverse possession without an actual possession of the locus in quo. *Cutler v. Blockman*, 4 N.C. 368 (1816).

No constructive possession will ripen into good title. *Williams v. Wallace*, 78 N.C. 354 (1878).

Possession Must Be Under Known and Visible Boundaries. — A party claiming under adverse possession must show possession under known and visible boundaries. *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. *Berry v. Coppersmith*, 212 N.C. 50, 193 S.E. 3 (1937).

So as to Show Extent of Possession Claimed. — There must be known and visible boundaries such as may apprise the true owner and the world of the extent of the possession claimed. *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677 (1913); *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965).

Possession Extended to Outer Bounds of Deed where Land is Held under Colorable Title. — Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. *Vance v. Guy*, 223 N.C. 409, 27 S.E.2d 117 (1943); *Wachovia Bank & Trust Co. v. Miller*, 243 N.C. 1, 89 S.E.2d 765 (1955).

Provided that No Part of Premises Is Held Adversely by Another. — When one enters upon a tract of land and asserts his ownership of the whole under an instrument which constitutes color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed, provided that no part of the premises is held adversely by another. His exclusive possession, if continued uninterruptedly for seven years, will ripen title to all the land embraced within the deed. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Willis v. Johns*, 55 N.C. App. 621, 286 S.E.2d 646 (1982).

Possession Not Extended to Other Tracts Conveyed by Separate Descriptions. — When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. But where two or more adjoining tracts of land are conveyed in one deed, or in separate deeds, by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964).

Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance.

Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Nor to Additional Land in Subsequent Deeds in Chain of Title. — Where description in a deed from a common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. *Bumgarner v. Corpening*, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where the title deeds of two rival claimants lap upon each other, and neither claimant is in actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one is seated on the lappage and the other is not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *Vance v. Guy*, 224 N.C. 607, 31 S.E.2d 766 (1944); *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969). See also, *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E.2d 101 (1950).

When a portion of a boundary of a junior grant laps on a superior title, to mature a title under the junior grant there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years' adverse possession under color to show that the boundaries of the lappage were visible on the ground, although the claimant must establish the required adverse possession within those lines. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Allen v. Morgan*, 48 N.C. App. 706, 269 S.E.2d 753 (1980).

VI. COLOR OF TITLE.

A. In General.

Adverse possession, to ripen into

title after seven years, must be under color of title; otherwise a period of 20 years is required under § 1-40. *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953); *Williams v. Weyerhaeuser Co.*, 378 F.2d 7 (4th Cir. 1967).

The possession has to be under color of title. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), *aff'd* in part and *rev'd* in part on other grounds, 323 F.2d 95 (4th Cir. 1963).

When Title Is out of State. — When title to land is out of the State, seven years' adverse possession under color of title is sufficient to ripen title in ordinary cases. *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939).

Title is deemed to be out of the State where the State is not a party to the action. *Duke Power Co. v. Toms*, 118 F.2d 443 (4th Cir. 1941).

Plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. *Blair v. Miller*, 13 N.C. 407 (1830); *Isler v. Dewey*, 84 N.C. 345 (1881); *Christenbury v. King*, 85 N.C. 229 (1881); *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

Color of Title Defined. — Color of title is a paper writing which purports to convey land but fails to do so. *First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E.2d 841 (1952); *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60 (1958).

Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973); *Adams v. Severt*, 40 N.C. App. 247, 252 S.E.2d 276 (1979); *General Greene Inv. Co. v. Greene*, 48 N.C. App. 29, 268 S.E.2d 810, *cert. denied*, 301 N.C. 235, 283 S.E.2d 132 (1980).

An instrument is nonetheless color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and to supply a defense where none existed without its

aid. *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941).

If an instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance may be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. *First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E.2d 841 (1952); *Johnson v. McLamb*, 247 N.C. 534, 101 S.E.2d 311 (1958).

If an instrument actually passes the title, it is not color of title. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973).

A deed is color of title. *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

But Good Faith Required. — In order for a deed to constitute color of title, the grantee must enter the land under the deed in good faith. *State v. Taylor*, — N.C. App. —, 300 S.E.2d 42 (1983).

Exchange of deeds cannot constitute color of title. *State v. Taylor*, — N.C. App. —, 300 S.E.2d 42 (1983).

Color of title is not sufficient to make a prima facie case of title. *Cothran v. Akers Motor Lines*, 257 N.C. 782, 127 S.E.2d 578 (1962); *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

The color of title must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. *Cothran v. Akers Motor Lines*, 257 N.C. 782, 127 S.E.2d 578 (1962); *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

Color of Title Affords No Protection where Requisites of Adverse Possession Are Not Present. — A deed which is color of title does not draw to the grantee-occupant of the land described therein the protection of the statute of

limitations where the requisites of adverse possession are not present. *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964).

To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965).

A deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge*, 88 N.C. 326 (1883); *Smith v. Fite*, 92 N.C. 319 (1885); *Barker v. Southern Ry.*, 125 N.C. 596, 34 S.E. 701 (1899); *Johnston v. Case*, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44 S.E. 617 (1903); *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451 (1946); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673 (1951); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593 (1955); *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

And the description in the deed must by proof be made to fit the land it covers. *Smith v. Fite*, 92 N.C. 319 (1885); *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451 (1946); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673 (1951); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965).

Deed which Fails to Identify Land Conveyed Cannot Be Color of Title.

— A deed which is inoperative because the land intended to be conveyed thereby is incapable of identification from the description therein is inoperative as color of title. *Dickens v. Barnes*, 79 N.C. 490 (1878); *Barker v. Southern Ry.*, 125 N.C. 596, 34 S.E. 701 (1899); *Fincannon v. Sudderth*, 144 N.C. 587, 57 S.E. 337 (1907); *Katz v. Daughtrey*, 198 N.C. 393, 151 S.E. 879 (1930); *Thomas v. Hipp*, 223 N.C. 515, 27 S.E.2d 528 (1943); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60 (1958).

Deed Must Be Shown to Cover Land in Dispute. — Where a party introduces into evidence a deed which he intends to use as color of title, he must

prove that its boundaries cover the land in dispute. It is error to allow a jury, on no evidence, to locate the land described in a deed. *Stuart v. Bryant*, 40 N.C. App. 206, 252 S.E.2d 286 (1979).

Proof Required Where Commissioner's Deed Used as Color. — While a commissioner's deed in a judicial sale constitutes color of title, a party who uses a deed to establish color of title must prove that the boundaries in the deed cover the land in dispute. *Willis v. Johns*, 55 N.C. App. 621, 286 S.E.2d 646 (1982).

Where jury determined that defendants' deed did not embrace disputed area, defendants could not contend that they obtained title to the disputed area by adverse possession for seven years under color of title under this section. *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

Color of Title Does Not Relate Back to Time of Entry. — Though a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry. *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953).

As to color of title generally, see also *Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428 (1895); *Smith v. Proctor*, 139 N.C. 314, 51 S.E. 889 (1905); *Norwood v. Totten*, 166 N.C. 648, 82 S.E. 951 (1914); *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925); *Barbee v. Bumpass*, 191 N.C. 521, 132 S.E. 275 (1926); *Garner v. Horner*, 191 N.C. 539, 132 S.E. 290 (1926); *Booth v. Hariston*, 193 N.C. 278, 136 S.E. 879 (1927), petition for rehearing dismissed, 195 N.C. 8, 141 S.E. 480 (1928); *Ennis v. Ennis*, 195 N.C. 320, 142 S.E. 8 (1928); *Stuart v. Bryant*, 40 N.C. App. 206, 252 S.E.2d 286 (1979).

B. Documents Held to Be Color of Title.

Deed Regular Upon its Face. — Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey, so that grantee and those claiming under her, who immediately went into possession and remained in exclusive possession thereof for 12 or 15 years, acquired title by their adverse possession under color, if not by their deed.

Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Fraudulent Deed. — A fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner. *First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E.2d 841 (1952); *Johnson v. McLamb*, 247 N.C. 534, 101 S.E.2d 311 (1958).

Void Deed. — A void deed constitutes color of title. *Bond v. Beverly*, 152 N.C. 56, 67 S.E. 55 (1910). See also, *Potts v. Payne*, 200 N.C. 246, 156 S.E. 499 (1931).

Voidable Deed. — A voidable deed is sufficient color, although it is a distinct and separate source of title from the one under which entry was first made. *Butler v. Bell*, 181 N.C. 85, 106 S.E. 217 (1921).

Valid Deed. — A valid deed — a muniment of title — may also serve as color of title. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973).

Deed Describing Contiguous Land Not Owned by Vendor. — When the description in a deed embraces not only land owned by the grantor, but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Champertous Deed. — Regardless of whether a deed which conveyed to grantor's son certain described lands, reserving to grantor and his wife a life estate, given in consideration of grantee's successfully maintaining a suit to clear title to the lands conveyed, was champertous, it was sufficient color of title after registration and after the falling in of the reserved life estate to ripen the title in grantee under this section. *Ennis v. Ennis*, 195 N.C. 320, 142 S.E. 8 (1928).

Registered Deed where Grantor therein Held under Unregistered Deed. — While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, where the grantee in the unregistered deed conveyed by registered deed, and mesne conveyances from him were duly registered, such registered deeds were color of title under this section, and where the land was held by actual possession successively by the grantees in such chain of

title continuously for over seven years prior to the filing of a judgment against the grantor in the unrestricted deed, the grantor in the unregistered deed was divested of title by adverse possession prior to the filing of the judgment, and the judgment did not constitute a lien against the land. *Glass v. Lynchburg Shoe Co.*, 212 N.C. 70, 192 S.E. 899 (1937).

Deed from Purchase of Land at Mortgage Foreclosure Sale. — A deed obtained from the purchase of land at a mortgage foreclosure sale constitutes color of title, even though the foreclosure sale is defective or void. *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 157 S.E.2d 693 (1967).

Deed of Person Non Compos. — The deed of a person non compos is color of title, and possession under it for seven years ripens into title against those not under disability. *Ellington v. Ellington*, 103 N.C. 54, 9 S.E. 208 (1889).

Commissioner's Deed. — Where land devised to testator's children with remainder to testator's grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the deed executed by the commissioner, being similar to a deed from a stranger, constituted color of title. *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941).

Commissioner's deed in tax foreclosure proceedings instituted against one tenant in common was color of title as against the cotenants who were not parties to the foreclosure. *Johnson v. McLamb*, 247 N.C. 534, 101 S.E.2d 311 (1958).

Sheriff's Deed after Judgment against Nonresident. — A sheriff's deed at an execution sale under a judgment obtained against nonresident owner by his wife to recover for maintenance and necessities furnished by her to their minor children, in which action attachment was levied on the land, was at least color of title under this section, the judgment not being void. *Campbell v. Campbell*, 221 N.C. 257, 20 S.E.2d 53 (1942).

Deed Made in Defective Partition Proceedings. — Where, in a partition proceeding to sell land, less than the whole number of tenants in common were made parties, a deed made pursuant to an order of court to the purchaser was color of title and seven years

adverse possession thereunder would bar those tenants in common who were not made parties. *First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E.2d 841 (1952); *Johnson v. McLamb*, 247 N.C. 534, 101 S.E.2d 311 (1958).

Where a sale was made pursuant to court order in a partition proceeding, and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. *Yow v. Armstrong*, 260 N.C. 287, 132 S.E.2d 620 (1963).

Deed by grantee in deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition was color of title within this section where the third person had no interest in the land outside of the deed. *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914).

Bond for Title. — After payment of the purchase money, a bond for title is color of title to support adverse possession even against the vendor. *Avent v. Arrington*, 105 N.C. 377, 10 S.E. 991 (1890); *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914).

Where a bond for title was unconditional and called for no future payment, the presumption, in the absence of any evidence to the contrary, was that the price was paid before or at the time of the signing, so that it was color of title to support adverse possession within this section. *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914).

Defectively Probated Will. — Where a will was defectively probated, but the defect in the probate was not so obvious that it might mislead a man of ordinary capacity, it was color of title for the land disposed of therein. *Watson v. Chilton*, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

C. Documents Held Not Color of Title.

Deed by Mortgagor in Possession. — A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. *Parker v. Banks*, 79 N.C. 480 (1878).

Valid Deed. — A valid deed is not color of title. When one gives a deed for lands for a valuable consideration, and

the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title. *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953). But see, *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E.2d 1 (1973), cited above.

Unregistered Deed. — An unregistered deed ordinarily is not color of title, except as between the original parties. *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

An unregistered deed is not color of title as against judgment creditors of the grantor. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Where the probate of a deed to lands was fatally defective, it was not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee. *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929).

Deed for Partition. — A deed by the heirs of a deceased owner of land for partition thereof was not color of title within this section. *Betts v. Gahagan*, 212 F. 120 (4th Cir. 1914).

VII. PROCEDURE AND PROOF.

As to this section being a proper plea in bar to action in ejectment under former practice, see *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 157 S.E.2d 693 (1967).

Generally speaking, a claim of title by adverse possession must be pleaded under North Carolina law. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), rev'd on other grounds, 323 F.2d 95 (4th Cir. 1963).

But This Applies Only when Adverse Possession Is Used as Defense. — The requirement that a claim of title by adverse possession must be pleaded applies only when adverse possession is set up as a defense to an action. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), rev'd on other grounds, 323 F.2d 95 (4th Cir. 1963).

And Not where Claim Is Based on Adverse Possession under Color of Title. — The requirement that a claim of adverse possession must be pleaded does not apply when a claim of title is based upon adverse possession under color of title. *United States v. Chatham*, 208 F. Supp. 220 (W.D.N.C. 1962), rev'd on other grounds, 323 F.2d 95 (4th Cir. 1963).

Methods of Proving Title. — Plaintiffs, in order to recover, had the burden of proving their title to the disputed area by any one of the various methods set out in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys and filed notes. A map made by a surveyor of the premises sued for and of other tracts, adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Nothing Must Be Left to Conjecture. — In proving title by continuous, open and adverse possession of land under color of title for seven years, nothing must be left to conjecture. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

Burden of Proof when Adverse Possession Is Claimed. — When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. *Monk v. Wilmington*, 137 N.C. 322, 49 S.E. 345 (1904); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

Adverse Possession Is a Jury Question. — Conflicting evidence as to the character or extent of the possession under color of title by adverse possession

raises the issue for the determination of the jury. *Bumgarner v. Corpening*, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where plaintiff in an action to quiet title established a prima facie case, defendant's plea of title by adverse possession under color for seven years did not justify nonsuit of plaintiff's cause, since the plea of adverse possession raised an issue of fact for the jury upon which defendant had the burden of proof. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

Mere Admission of Possession Does Not Amount to Admission of Adverse Possession. — Plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action did not justify nonsuit of plaintiff's cause of action to quiet title, since mere admission of possession, without evidence in respect to the nature or character of such possession, does not amount to an admission of adverse possession in law, even if defendant is given the benefit of presumptions arising from mesne conveyances from such person. *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953).

Testimony Held Competent. — In an action to quiet title, fact that as a result of the impounding of water some of the boundaries were submerged and could not be located did not destroy value of testimony as to their location at the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and the acts of possession occurring on that land. *Duke Power Co. v. Toms*, 118 F.2d 443 (4th Cir. 1941).

§ 1-39. Seizin within twenty years necessary.

No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within 20 years before the commencement of the action, unless he was under the disabilities prescribed by law. (C.C.P., s. 22; Code, s. 143; Rev., s. 383; C.S., s. 429.)

CASE NOTES

Section Not Retroactive. — This salutary provision did not extend to actions already commenced or rights of action already accrued at the ratification

of the Code. *Covington v. Stewart*, 77 N.C. 148 (1877).

This section and § 1-42 are to be construed together. *Barbee v.*

Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Presumption of Possession from Legal Title under § 1-42. — This section and § 1-42 are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within 20 years before action brought, for if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980). See also, Johnston v. Pate, 83 N.C. 110 (1880); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

In cases where there is no tenancy in common this section must be construed with § 1-42, for this section is explained in § 1-42 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

How Presumption of Possession Rebutted. — The pleading by a defendant of this section does not shift upon plaintiff the burden of showing that he has been in the possession 20 years before the commencement of the action; rather, the presumption created by § 1-42 can only be rebutted by proof on the part of defendant that defendant had been in adverse possession of the premises for 20 years. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Deed as Evidence of Possession. — The offer of a deed dated 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for recovery

or possession of real property. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, § 1-38. Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

Where plaintiffs acquired title by adverse possession under color for more than 30 years, they had at least constructive seizin or possession within 20 years before suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession, and it was not incumbent on them to show an actual seizin or possession of the premises in question for 20 years before the commencement of the action. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Stewart v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913).

Notwithstanding the fact that a judgment was rendered against a party in an action to recover lands, if he subsequently entered, enclosed and used the lands for the statutory period he would acquire a new estate by disseizin and acquiescence and would be presumed to have been in possession within the past 20 years. Moore v. Curtis, 169 N.C. 74, 85 S.E. 132 (1915).

This section does not apply when plaintiffs have shown legal title and defendants' possession has not been for 20 continuous years. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Stipulation that Plaintiff Possessed Premises Does Not Concede that Plaintiff Has Good Title. — A defendant may stipulate that a plaintiff is entitled to prosecute his action to recover realty because he has been possessed of the premises in question within 20 years before the commencement of the action without conceding that the plaintiff has good title to the property or is presently entitled to possession. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

Failure to Allege Seizin Not Ground for Demurrer. — In an action for possession of land, failure to affirmatively allege that plaintiff had been seized or possessed of the premises within 20 years prior to the institution of

the action was not ground for demurrer. *Elliott v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959).

State statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards. *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938).

Applied in *Tripp v. Keais*, 255 N.C. 404, 121 S.E.2d 596 (1961); *Kennedy v. Whaley*, 55 N.C. App. 321, 285 S.E.2d 621 (1982).

Cited in *Dean v. Gupton*, 136 N.C.

141, 48 S.E. 576 (1904); *Clendenin v. Clendenin*, 181 N.C. 465, 107 S.E. 458 (1921); *Rutledge v. A.T. Griffin Mfg. Co.*, 183 N.C. 430, 111 S.E. 774 (1922); *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928); *Reid v. Reid*, 206 N.C. 1, 173 S.E. 10 (1934); *Williams v. Robertson*, 233 N.C. 309, 63 S.E.2d 632 (1951); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953); *McRorie v. Shinn*, 11 N.C. App. 475, 181 S.E.2d 773 (1971); *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

§ 1-40. Twenty years adverse possession.

No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (C.C.P., s. 23; Code, s. 144; Rev., s. 384; C.S., s. 430.)

Cross References. — As to adverse possession for seven years under color of title, see § 1-38.

Legal Periodicals. — For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

CASE NOTES

- I. In General.
- II. Possession, Generally.
- III. Hostile or Adverse Nature of Possession.

I. IN GENERAL.

Editor's Note. — Many of the cases cited in the case notes to § 1-38 may also have application to this section.

Actual Title in Fee Now Given under this Section. — The possession for 20 years which under prior law raised a presumption of title now has the force and effect of giving an actual title in fee by the provisions of this section. *Covington v. Stewart*, 77 N.C. 148 (1877).

Section Prescribes Maximum Time Required. — It is error to charge that the adverse claimant must maintain open and continuous possession without a break for 30 years before the bringing of his action, as only 20 years' adverse

possession is required to give a title in fee to the possessor, as against all persons not under disability, except the State. *Walden v. Ray*, 121 N.C. 237, 28 S.E. 293 (1897).

Section 1-56 Inapplicable to Recovery of Realty. — This section and § 1-38 apply to actions for the recovery of real estate, to the exclusion of § 1-56. *Williams v. Scott*, 122 N.C. 545, 29 S.E. 877 (1898).

Color of Title under § 1-38 Immaterial when this Section Applies. — Where title by adverse possession can be established under this section, the question of whether color of title is sufficient under § 1-38 is immaterial. *Atwell v. Shook*, 133 N.C. 387, 45 S.E. 777 (1903).

See also, *May v. Atlantic Coast Line R.R.*, 151 N.C. 388, 66 S.E. 310 (1909).

Plaintiffs' unregistered deed did not prevent their setting up adverse possession for 20 years. *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953).

Application of Section to State and its Agencies. — The General Assembly intended that this section and § 1-38 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. *Williams v. North Carolina State Bd. of Educ.*, 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Assertion of Claim Where United States Is Nominal Party. — The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, however gross, did not apply where the United States is a mere nominal party, so as to preclude an adverse possessor from asserting an adverse claim against Indians, who were the real parties in interest. *United States v. Rose*, 20 F. Supp. 350 (W.D.N.C. 1937).

Effect of Appointment of Receiver. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, his appointment will not suspend the running of limitations under this section. *Nicholas v. Salisbury Hdwe. & Furn. Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958).

Where judgment debtor had lost title by adverse possession prior to acquisition and registration of judgment, the judgment creditor under § 1-234 was not entitled to execution on the locus in quo, as the judgment debtor had no title at the time of the judgment; this result was not affected by the giving of a deed by the debtor to the claimant which was not registered until after the judgment. *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

Presumption of Deed to Possessor. — There was no error in a charge that where title was out of the State and the evidence showed possession for 20 years the jury might presume a deed to the possessor from any person having title. This

is settled law. *Melvin v. Waddell*, 75 N.C. 361 (1876).

Deed Held Inoperative to Fix "Known and Visible Lines and Boundaries". — Where the deed relied on by plaintiffs was inoperative as color of title, the description therein was equally inoperative to fix "known and visible lines and boundaries" as the basis for a claim of adverse possession for 20 years. *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953).

Recovery of Right-of-Way Not Used for Railroad Purposes. — The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover for that part of right-of-way no longer used for railroad purposes until the expiration of 20 years. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 700 (1950).

For case holding that court erred in determining that defendants established adverse possession under color where disputed area was a lappage, see *Allen v. Morgan*, 48 N.C. App. 706, 269 S.E.2d 753 (1980).

Adverse Possession as Question for Jury. — Where there is evidence that title has been acquired under 20 years' adverse possession, this question should be submitted to the jury. *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929).

Effect of Purchase of Adverse Claim. — A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. The acts and declarations of the possessor may be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

As to absence due to imprisonment, see *Helton v. Cook*, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

Applied in *Reid v. Reid*, 206 N.C. 1, 173 S.E. 10 (1934); *Caskey v. West*, 210 N.C. 240, 186 S.E. 324 (1936); *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 187 S.E. 804 (1936); *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953);

Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961); Kennedy v. Whaley, 55 N.C. App. 321, 285 S.E.2d 621 (1982).

Stated in Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Cited in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1789); Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904); Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916); Rutledge v. A.T. Griffin Mfg. Co., 183 N.C. 430, 111 S.E. 774 (1922); Dill-Cramer Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928); Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57, rehearing denied, 236 N.C. 766, 72 S.E.2d 8 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Everett v. Sanderson, 238 N.C. 564, 78 S.E.2d 408 (1953); Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

II. POSSESSION, GENERALLY.

Requisites of Adverse Possession.

— In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

There must be an actual possession of the real property claimed; the possession must be hostile to the true owner; the claimant's possession must be exclusive; the possession must be open and notorious; the possession must be continuous and uninterrupted for the statutory period; and the possession must be with an intent to claim title to the land occupied. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980).

Adverse possession sufficient to ripen title is the exclusive use of the claimant for 20 years, continuously taxing such exclusive benefits as the land is capable of yielding, under known and visible metes and bounds. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Actual Possession and Intent Required. — In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

The claimant must exercise acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible, with such acts being so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

So as to Subject Himself to Action in Ejectment. — A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible. The test involved is whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass *quare clausam fregit* for damages. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

No Constructive Possession Absent Color of Title. — There can be no constructive possession by one holding land adversely unless he holds under color of title. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

And Adverse Possessor without Color Cannot Enlarge Rights beyond Limits of Actual Possession. — An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Where plaintiffs rely upon adverse possession alone, without color of title,

title acquired under such circumstances is confined to the lands actually occupied. An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953).

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several occupants. *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952).

But a grantee cannot tack adverse possession of predecessor as to land not embraced in his deed; therefore, where he has been in possession for less than 20 years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. *Ramsey v. Ramsey*, 229 N.C. 270, 49 S.E.2d 476 (1948); *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

And a Deed Does Not Create Privity as to Land Not Described Therein But Occupied in Connection Therewith. — Although a grantee claiming land within the boundaries called for in a deed or other instrument constituting color of title may tack his grantor's possession of such land to that of his own for the purpose of establishing adverse possession for the requisite period, the rule is that a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

The adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession, where there was no hiatus or interruption in the possession. *International Paper Co. v. Jacobs*, 258 N.C. 439, 128 S.E.2d 818 (1963).

One may assert title to land embraced within another's deed by showing adverse possession of the portion claimed for 20 years under known and visible lines and boundaries, but his claim is limited to the area actually possessed, and the burden is

upon the claimant to establish his title to the land in that manner. *Wallin v. Rice*, 232 N.C. 371, 61 S.E.2d 82 (1950); *Scott v. Lewis*, 246 N.C. 298, 98 S.E.2d 294 (1957).

Where the owner of a lot encroaches upon an adjacent lot and builds structures partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and he does not lose his title thereto until the adverse user has continued for the 20 years necessary to ripen title by adverse possession under this section, the user not being under color of title. *Ramsey v. Nebel*, 226 N.C. 590, 39 S.E.2d 616 (1946).

Effect of Exclusive Dominion after Dedication to Public. — Where landowner platted and sold the land by deeds referring to streets, parks, etc., according to a registered map, so that the grantees had an easement therein, but later fenced off a part of the land so offered for dedication to the public and under known metes and bounds exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations would begin to run against the easements of the grantees thus acquired, which would ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of this section by 20 years' adverse possession. *Gault v. Town of Lake Waccamaw*, 200 N.C. 593, 158 S.E. 104 (1931).

Mines and Mineral Rights. — Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for 20 years. Mere prospecting does not constitute possession of such rights. *Davis v. Federal Land Bank*, 219 N.C. 248, 13 S.E.2d 417 (1941).

For case holding sheriff's deed to grantor of plaintiff in ejectment not to be evidence of possession, see *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800 (1903).

Evidence Held Insufficient. — Where plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least 20 years without color of title, but his evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, and he had no evidence tending to describe, identify or locate the

particular land actually occupied, nonsuit was properly entered. *Carswell v. Town of Morganton*, 236 N.C. 375, 72 S.E.2d 748 (1952).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

In order to establish that a use is hostile, it is not necessary to show a heated controversy, but it is necessary to show that the use was of a nature that would give the owner of the land notice that the use was being made under a claim of right. *Potts v. Burnette*, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Entry into Possession with Permission of Owner. — If a person enters into possession of a piece of land with the permission of the owner, such possession would not be adverse unless and until he disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that he was no longer using the land by permission but was claiming it as absolute owner. *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

Presumption of Permissive Use of Way Over Another's Land. — In North Carolina, unlike the majority of other jurisdictions, there is a presumption that the use of a way over another's land is permissive, unless evidence appears to the contrary. *Potts v. Burnette*, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Use of a way over another's land is presumed permissive or with the owner's consent unless the contrary is shown by competent evidence. *Clifton v. Fesperman*, 50 N.C. App. 178, 272 S.E.2d 624 (1980).

Occupation of Land Mistakenly Believed to Be Described in Deed Is Not Adverse. — A grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it was covered by the description in his deed will not be considered adverse. Thus, where a grantee goes into possession of a tract of land conveyed and also takes possession of a contiguous tract under the mistaken belief that the contiguous tract is also included within the description of his deed, no act on his part, however exclusive, open and notorious, will constitute adverse pos-

session of the contiguous tract prior to the time he discovers that the disputed area was not covered by the description in his deed. *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

Possession of one tenant in common is presumed to be possession of all. *Tharpe v. Holcomb*, 126 N.C. 365, 35 S.E. 608 (1900); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952).

Absent Actual Ouster or Sole Adverse Possession. — Possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for 20 years. *Parham v. Henley*, 224 N.C. 405, 30 S.E.2d 372 (1944); *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964).

Where plaintiff and defendants were tenants in common, possession of defendants, not having been adverse for 20 years, was the possession of plaintiff. *Conkey v. John L. Roper Lumber Co.*, 126 N.C. 499, 36 S.E. 42 (1900).

Possession Pursuant to Agreement between Cotenants Insufficient. — Where the possession of one cotenant is pursuant to an agreement of all cotenants, his possession for more than 20 years is insufficient to bar his cotenants or their privies. *Stallings v. Keeter*, 211 N.C. 298, 190 S.E. 473 (1937).

Adverse possession will not ripen title as against a tenant in common short of 20 years, even under color of title. *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952).

And to ripen title under a deed from a tenant in common 20 years' adverse possession is necessary, and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. *Bradford v. Bank of Warsaw*, 182 N.C. 225, 108 S.E. 750 (1921).

In the absence of an actual ouster, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than 20 years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964).

Parol Partition among Cotenants.

— Allegations that defendant's predecessor in title went into possession of the locus in quo pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than 20 years, were sufficient to raise the issue of title by adverse possession in the tenant in common, and it was error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. *Martin v. Bundy*, 212 N.C. 437, 193 S.E. 831 (1937).

In an action to establish a resulting

trust instituted shortly after guardian's death, upon evidence that lands were conveyed to the guardian personally but were paid for with guardianship funds, it was error to enter nonsuit upon the plea of laches and the statutes of limitation upon evidence that the guardian remained in possession for over 40 years and devised same to plaintiffs by will when defendants offered evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there was no evidence of disavowal of the trust or adversary holding during the life of the guardian. *Cassada v. Cassada*, 230 N.C. 507, 55 S.E.2d 77 (1949).

§ 1-41. Action after entry.

No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this Chapter. (C.C.P., s. 24; Code, s. 145; Rev., s. 385; C.S., s. 431.)

History. — At common law any person who had a right of possession could assert it by a peaceful entry, without the formality of legal action, and being so in possession, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry of the wrongdoer was unlawful. See 1 Bouv. Law Dict., title "Entry." This section seems to be a limitation upon the rule in that while an entry may be made, it must be followed by a suit within one year and within the period of limitation (either 20, 7, 30 or 21 years after the stat-

ute began running, as this case might be) prescribed by the various sections of the chapter. The effect seems to be that the common-law entry without maintaining a suit within one year thereof is insufficient, so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section, "and within the time prescribed in this chapter," is but a recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title.

CASE NOTES

Cited in *Clayton v. Cagle*, 97 N.C. 300, 1 S.E. 523 (1887).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.

In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years

next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (i) the date of beginning or recommencing of the operation or use, (ii) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (iii) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (iv) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C.C.P., s. 25; Code, s. 146; Rev., s. 386; C.S., s. 432; 1945, c. 869; 1959, c. 469; 1965, c. 1094.)

Cross References. — As to title against the State, see § 1-35. As to adverse possession of seven years under color of title, see § 1-38. As to adverse possession of 20 years, see § 1-40.

Legal Periodicals. — For note on the relationship of this section to the acquisition of easements by prescription, see 32 N.C.L. Rev. 483 (1954).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article discussing the "doctrine of color of title in North Carolina," see 13 N.C. Cent. L.J. 123 (1982).

CASE NOTES

This section and § 1-39 are to be construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980).

Effect of Construing this Section and § 1-39 Together on Burden of

Proof. — This section, when construed with § 1-39, simply means that proof of a connected chain of title to real estate for a period of 30 years by a party seeking possession thereof is prima facie evidence that such party has been in possession of the real estate within 20 years next preceding the institution of the action, as required by § 1-39, and thus has standing to maintain his action. It does not mean that a party may meet the burden of proving title simply by basing

his claim on an instrument recorded at least 30 years before the institution of his action. That burden must still be met. *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

Section 1-39 and this section are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within 20 years before the action was brought, for if he establishes at trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. *Williams v. North Carolina State Bd. of Educ.*, 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Where plaintiff, by proving legal title, has raised the presumption under this section that he has been in possession within 20 years, such presumption operates to satisfy the requirements of § 1-39, so that plaintiff does not have to prove such possession. Then defendant must show that he himself has been in possession adversely for 20 years. *Johnston v. Pate*, 83 N.C. 110 (1880); *Conkey v. John L. Roper Lumber Co.*, 126 N.C. 499, 36 S.E. 42 (1900).

Statutory Presumption Dependent on Showing of Legal Title. — Statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title"; until this is made to appear, the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627 (1920).

Presumption Inapplicable where Rebutted by Admission. — It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by admission in the case. *Kirkman v. Holland*, 139 N.C. 185, 51 S.E. 856 (1905).

Presumption Not Rebutted. — The presumption that one who proves legal title in himself has been in possession within 20 years was not rebutted by proof that an adverse claimant had been in

possession where the claimant held under a deed from a tenant in common with the deviser of the holder of the legal title. *Roscoe v. John L. Roper Lumber Co.*, 124 N.C. 42, 32 S.E. 389 (1899).

Occupancy in Subordination to Title Acquired by Adverse Possession. — Title acquired by adverse possession is legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. *Purcell v. Williams*, 220 N.C. 522, 17 S.E.2d 652 (1941).

There is no presumption that possession in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

Showing Required to Avoid Presumption of Subordination. — When defendant relied on a deed made to his ancestor as color of title, and on the adverse possession of others thereunder to ripen his title, it was necessary to show that their occupancy was under or connected with the deed under which he claimed, or the presumption would obtain that they were under the true title shown by plaintiff. *Blue Ridge Land Co. v. Floyd*, 167 N.C. 686, 83 S.E. 687 (1914).

When plaintiff in ejectment shows title to the locus in quo, and defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, defendants' occupation will be deemed to be under and in subordination to the legal title. *Hayes v. Cotton*, 201 N.C. 369, 160 S.E. 453 (1931).

Operation of Section where Neither Party in Possession. — Where neither party is in possession, and defendants have not shown 20 years' possession, while the plaintiffs have shown the legal title, the law carries the seizin to the party having the legal title. *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

Burden of Establishing Title. — When both parties claim title to land, and each seeks an adjudication that he is the owner and is entitled to possession of the disputed property, each has the burden of establishing his title. *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

For additional cases as to burden and sufficiency of proof under this section, see *Ruffin v. Overby*, 105 N.C. 78, 11 S.E. 251 (1890); *Bryan v. Spivey*, 109 N.C. 57, 13 S.E. 766 (1891); *Monk v. Wilmington*, 137 N.C. 322, 49 S.E. 345 (1904); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907); *Fraley v. Fraley*, 150 N.C. 501, 64 S.E. 381 (1909); *State v. McDonald*, 152 N.C. 802, 67 S.E. 762 (1910); *Steward v. McCormick*, 161 N.C. 625, 77 S.E. 761 (1913); *Blue Ridge Land Co. v. Floyd*, 171 N.C. 543, 88 S.E. 862 (1916); *Virginia-Carolina Power Co. v. Taylor*, 194 N.C. 231, 139 S.E. 381 (1927).

Where the parties claimed title from a common source, plaintiff's deed being the older but defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having had possession, this section did not apply. *Mintz v. Russ*, 161 N.C. 538, 77 S.E. 851 (1913).

Claim of Title under Paper Writing more than 30 Years Old. — This section does not declare that one who claims title relying merely on a paper writing more than 30 years old thereby acquires title to the land described in the instrument, nor does it establish title prima facie. *Bowers v. Mitchell*, 258 N.C.

80, 128 S.E.2d 6 (1962).

Deed as Evidence of Possession. — The offer of a deed dated 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for the recovery or possession of real property. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Disability Exception Limited to Persons Having Right of Entry or Action. — Adverse possession relates only to the true title; hence, the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. *Berry v. Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906).

Applied in *Johnston v. Pate*, 83 N.C. 110 (1880).

Quoted in *DeBruhl v. L. Harvey & Son Co.*, 250 N.C. 161, 108 S.E.2d 469 (1959).

Cited in *Monk v. Wilmington*, 137 N.C. 322, 49 S.E. 345 (1904); *Peterson v. Sucro*, 101 F.2d 282 (4th Cir. 1939); *Ownbey v. Parkway Properties, Inc.*, 222 N.C. 54, 21 S.E.2d 900 (1942); *Walker v. Story*, 253 N.C. 59, 116 S.E.2d 147 (1960).

§ 1-42.1. Certain ancient mineral claims extinguished.

(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, or that the record title holder 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 ten (10) years prior to January 1, 1965, any person, having the legal capacity to own land in this State, who has on September 1, 1965 an unbroken chain of title of record to such surface estate of such area of land for fifty (50) years or more, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was

executed or recorded fifty (50) years or more prior to September 1, 1965, 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 such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two (2) years after September 1, 1965, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such 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 said 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. Such 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.

(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 releases.

(d) All oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.1(b) and recorded in the local registry in the book provided by G.S. 1-42 within two years from September 1, 1967, 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. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1967.

The provisions of this subsection shall apply to the following counties: Anson, Buncombe, Durham, Franklin, Guilford, Hoke, Jackson, Montgomery, Person, Richmond, Swain, Transylvania, Union, Wake and Warren. (1965, c. 1072, s. 1; 1967, c. 905.)

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 1-42.2. Certain additional 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, or 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 10 years prior to January 1, 1971, any person, having the legal capacity to own land in this State, who has on September 1, 1971, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 but not more than 56 years prior to September 1, 1971, 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 such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1971, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such 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 said 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. Such 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.

(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 releases.

(d) Within two years from November 1, 1971, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.2(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. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1971.

The provisions of this subsection shall apply to the following counties: Rowan, Anson, Buncombe, Catawba, Davidson, Durham, Franklin, Guilford, Haywood, Hoke, Iredell, Jackson, Madison, Montgomery, Moore, Person, Richmond, Robeson, Scotland, Swain, Transylvania, Union, Wake, Warren and Yancey. (1971, c. 235, s. 1; c. 855.)

§ 1-42.3. Additional ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation in such counties.

(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, or 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 10 years prior to January 1, 1974, any person having the legal capacity to own land in this State, who has on September 1, 1974, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interest in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1974, 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 such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1974, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such 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 said 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. Such 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.

(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 releases.

(d) Within two years from November 1, 1974, all oil, gas or mineral interest in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.3(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. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1974.

The provisions of this subsection shall apply to the following counties: Alleghany, Burke, Caldwell, Cherokee, Clay, Cleveland, Gaston, Gates, Graham, Halifax, Henderson, Macon, McDowell, Mitchell, Polk, Randolph, Stanly, Surry, Watauga, and Wilkes. (1973, c. 1435; 1981, c. 329, s. 2.)

Cross References. — For the section applicable to Avery County, see § 1-42.5.

Effect of Amendments. — The 1981

amendment, effective June 30, 1982, deleted Avery from the list of counties in the second paragraph of subsection (d).

§ 1-42.4. Additional 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 interest 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, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1977, any person having the legal capacity to own land in this State, who has on September 1, 1977, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1977, 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 such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1977, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such 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 said 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. Such 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.

(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 releases.

(d) Within two years from November 1, 1977, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.4(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. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1977. The provisions of this subsection shall apply to the following county: Ashe. (1977, c. 751.)

Local Modification. — The title of restricted its application to Ashe County. the act which added this section

§ 1-42.5. Additional ancient mineral claims extinguished in Avery County; oil, gas and mineral interests to be recorded in such county.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest 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, any person having legal capacity to own land in this State, who has an unbroken chain of title of record to such surface estate of such area of land for at least 30 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interest in such area of land, the existence of which depends upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was recorded prior to such 30-year period, and such oil, gas or mineral interests are hereby declared null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within such 30-year period, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such area of land, or any part thereof lies, and in the book thereof 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 the name of the surface owner and also contain either such a description of the area of land involved as to make said 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. Such 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.

(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 releases.

(d) The board of county commissioners shall publish a notice of this section within 90 days after the ratification date, and within 90 days prior to June 30, 1982. Such notice shall be published once per week for four consecutive weeks in a newspaper published in the counties of Avery, Burke, Mitchell and Watauga, or a newspaper having general circulation in those counties.

The provisions of this section shall apply to the following county: Avery. (1981, c. 329, s. 1.)

Editor's note. — Session Laws 1981, c. 329, s. 3, makes this section effective June 30, 1982.

§ 1-42.6. Additional ancient oil, gas or mineral interests extinguished in Alleghany County; recording interests; listing interests 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 this interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which it is located for a period of 10 years prior to February 1, 1981, any person having the legal capacity to own land in this State who has on July 1, 1981, an unbroken chain of title of record to the surface estate of the area of land for at least 50 years, and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the surface estate as provided in the succeeding subsections of this section, subject to any interests

and defects as are inherent in the provisions and limitations contained in the muniments that form the chain of record title.

(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 50 years or more prior to July 1, 1981, 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 July 1, 1981, 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 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.

(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 releases.

(d) Within two years from July 1, 1981, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.3(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. The board of county commissioners shall publish a notice of this section within 180 days after May 6, 1981. Such notice shall be published once per week for four consecutive weeks in a newspaper published in the county, or a newspaper of general circulation in the county.

This section applies only to Alleghany County. (1981, c. 333, ss. 1, 2.)

§ 1-42.7. Additional amount mineral claims extinguished in Chatham County; 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 interest 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, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1979, any person having the legal capacity to own land in this State, who has on September 1, 1979, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1979, 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 such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1979, 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 such oil, gas or mineral interest and gives the book and page where recorded. Such 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 such 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 said 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. Such 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.

(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 releases.

(d) Within two years from November 1, 1979, all oil, gas or mineral interests in land severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.5(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. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1979.

This section shall apply to Chatham County only. (1979, c. 343, ss. 1, 2.)

Editor's Note. — This section was 1979, c. 343, and was not previously enacted as § 1-42.5 by Session Laws codified.

§ 1-42.8. Ancient mineral claims extinguished in Rutherford County; 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 this interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another; or that the record titleholder of any oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which it is located for a period of 10 years prior to February 1, 1982, any person having the legal capacity to own land in this State who has on September 1, 1982, an unbroken chain of title of record to the surface estate of the area of land for at least 50 years, and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the surface estate as provided in the succeeding subsections of this section, subject to any interests and defects as are inherent in the provisions and limitations contained in the muniments that form the chain of record title.

(b) This marketable title shall be held by such persons 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 50 years or more prior to September 1, 1982, 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 not already extinguished by existing laws may be preserved and kept effective by recording within two years after September 1, 1982, 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 shall also contain either a sufficient description of the area of land involved as to make the property readily located or due incorporation by reference of the recorded instrument containing the reservation or exception of the oil, gas or mineral interest. The notice may be made and recorded by the claimant or by any other 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 but whose identity cannot be established or is uncertain at the time of filing the 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 include those of persons whether within or without the State, and whether natural or corporate, but do not include governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from September 1, 1982, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.3(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 September 1, 1982.

(f) This act applies only to Rutherford County. (1981 (Reg. Sess., 1982), c. 1391, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1391, s. 2, provides: "This act does not revive any oil, gas or

mineral interests that have been extinguished under the provisions of any prior law."

§ 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, 1983, any person, having the legal capacity to own land in this State, who has on September 1, 1983, 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 title 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 September 1, 1983, 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 September 1, 1983, 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 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.

(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 releases.

(d) Within two years from September 1, 1983, 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 September 1, 1983. (1983, c. 502.)

Editor's Note. — Session Laws 1983, c. 502, s. 2, makes this section effective July 1, 1983.

Section 2 further provides: "This act does not revive any interest rendered ineffective under the provisions of G.S. 1-42.1 through G.S. 1-42.8."

The period following "clear" in the first sentence of subsection (b) was placed in brackets by the editor as it appears to have been inserted by mistake.

§ 1-43. Tenant's possession is landlord's.

When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (C.C.P., s. 26; Code, s. 147; Rev., s. 387; C.S., s. 433.)

Cross References. — As to provisions concerning landlords and tenants generally, see § 42-1 et seq.

CASE NOTES

Presumption Limited to Statutory Period. — The presumption which attaches to the possession of a tenant following the termination of tenancy is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. *Melvin v. Waddell*, 75 N.C. 361 (1876); *Virginia-Carolina Power Co. v. Taylor*, 191 N.C. 329, 131 S.E. 646 (1926).

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title. — The rule that the pos-

session of the tenant is possession of the landlord, precluding adverse possession by the tenant without first surrendering the possession he has under the lease, obtains only when the tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title. Such rule does not obtain where the tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting and relying upon that title, as acquired by them in due course. The strength of the landlord's

title is the foundation of their claim. *Lofton v. Barber*, 226 N.C. 481, 39 S.E.2d 263 (1946).

Loyalty Is to Title and Not to Landlord. — The rule that a tenant's possession is the possession of the landlord and that a tenant under a lease may not maintain an action against his landlord involving title during the period of the lease without first surrendering the possession he has under the lease does not apply where, after the renting, the title of the landlord has terminated or has been transferred either to a third person or to the tenant himself, for under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. *Lofton v. Barber*, 226 N.C. 481, 39 S.E.2d 263 (1946).

Where tenant acquired the title of his landlord, the tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting the title thus acquired. *Lofton v. Barber*, 226 N.C. 481, 39 S.E.2d 263 (1946).

Parol Gift as Rebuttal of Tenancy. — A parol gift of land will not convey title, but it will rebut the idea of tenancy, so that possession under it will ripen into title if continued for 20 years. *Wilson v. Wilson*, 125 N.C. 525, 34 S.E. 685 (1897); *Dean v. Gupton*, 136 N.C. 141, 48 S.E. 576 (1904).

As to effect of eviction under legal process and reentry, see *Pate v. Turner*, 94 N.C. 47 (1886).

Surrender of Possession by Tenant prior to Maintaining Action Involving Title. — A tenant under a lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. *Abbott v. Cromartie*, 72 N.C. 292 (1875); *Lawrence v. Eller*, 169

N.C. 211, 85 S.E. 291 (1915).

Judgment where Landlord Fails to Prove Title. — Where plaintiff landlord fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. *Benton v. Benton*, 95 N.C. 559 (1886).

Competency of Evidence respecting Tenancy. — Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as a tenant is competent. *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748 (1896); *Shannon v. Lamb*, 126 N.C. 38, 35 S.E. 232 (1900); *Hatcher v. Hatcher*, 127 N.C. 200, 37 S.E. 207 (1900); *Bullock v. Bullock*, 131 N.C. 29, 42 S.E. 458 (1902).

Evidence Held Insufficient to Show Entry under Title of Another. — Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession paid rent to another, prior to the existence of the cotenancy, was not evidence that defendant entered into possession under the title of such other person. *Virginia-Carolina Power Co. v. Taylor*, 191 N.C. 329, 131 S.E. 646 (1926).

Quoted in *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952).

Cited in *Day v. Howard*, 73 N.C. 1 (1875); *Melvin v. Waddell*, 75 N.C. 361 (1876); *Conwell v. Mann*, 100 N.C. 234, 6 S.E. 782 (1888); *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889); *McNeill v. Fuller*, 121 N.C. 209, 28 S.E. 299 (1897); *Roscoe v. John L. Roper Lumber Co.*, 124 N.C. 42, 32 S.E. 389 (1899); *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800 (1903); *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627 (1920); *Pitman v. Hunt*, 197 N.C. 574, 150 S.E. 13 (1929); *Nichols v. York*, 219 N.C. 262, 13 S.E.2d 565 (1941).

§ 1-44. No title by possession of right-of-way.

No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (R.C., c. 65, s. 23; C.C.P., s. 29; Code, s. 150; Rev., s. 388; C.S., s. 434.)

CASE NOTES

Purpose of Section. — The provisions of this section are justified upon the ground that the right-of-way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right-of-way is at most a permissive licensee. *Carolina Cent. R.R. v. McCaskill*, 94 N.C. 746 (1886); *Railroad v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906); *Muse v. Seaboard Air Line Ry.*, 149 N.C. 443, 63 S.E. 102 (1908).

Loss of Railroad Right-of-Way by Occupation Precluded. — When a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right-of-way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person. *Keziah v. Seaboard Air Line R.R.*, 272 N.C. 299, 158 S.E.2d 539 (1968).

Once title of railroad to a right-of-way is acquired, it cannot be lost by occupancy as to any part of it by the lapse of time. *Carolina Cent. R.R. v. McCaskill*, 94 N.C. 746 (1886); *Purifoy v. Richmond & D.R.R.*, 108 N.C. 100, 12 S.E. 741 (1891).

Under this section, possession by defendants of land covered by right-of-way could not operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right-of-way. *Railroad v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906).

Section Inapplicable until Right-of-Way Is Acquired. — Before this section can apply, the company must have secured or acquired the right-of-way either by condemnation or otherwise, and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance, it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. *Beattie v. Carolina Cent. R.R.*, 108 N.C. 425, 12 S.E. 913 (1891). See also, *May v. Atlantic Coast Line R.R.*, 151 N.C. 388, 66 S.E. 310 (1909).

Loss of Executory Grant of Right-of-Way. — The grant to a railroad company of an undefined or "floating" right-of-way is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of 10 years upon failure of

entry and of location by the company. *Wiley v. Norfolk S.R.R.*, 96 N.C. 408, 1 S.E. 446 (1887); *Hemphill v. Annis*, 119 N.C. 514, 26 S.E. 152 (1896); *May v. Atlantic Coast Line R.R.*, 151 N.C. 388, 66 S.E. 310 (1909).

Application of Section where Grant Presumed by Charter. — Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies, so that although a part of its right-of-way might be used by the owner it has a right of entry whenever it needs the property for its use. *Carolina Cent. R.R. v. McCaskill*, 94 N.C. 746 (1886); *Raleigh & A. Air Line R.R. v. Sturgeon*, 120 N.C. 225, 26 S.E. 779 (1897); *Railroad v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906); *Earnhardt v. Southern Ry.*, 157 N.C. 358, 72 S.E. 1062 (1911).

No Effect on Power of State or Municipality to Require Grade Change. — This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. *Atlantic Coast Line R.R. v. City of Goldsboro*, 155 N.C. 356, 71 S.E. 514 (1911), *aff'd*, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

Section Not Applicable to Condemnation by Municipalities. — An incorporated city or town may obtain title to streets located upon the right-of-way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. *In re Assessment against Property of S. Ry.*, 196 N.C. 756, 147 S.E. 301 (1929).

Fact that others own the fee in the right-of-way and that such ownership is indicated by deed or map appearing in the public registry presents no evidence of probative force that the right-of-way does not belong to the railroad, since it only has an easement which it may exercise to the full extent when in its judgment the necessities of its business so require. *Keziah v. Seaboard Air Line R.R.*, 272 N.C. 299, 158 S.E.2d 539 (1968).

As to effect of permitting improvements, see *Carolina Cent. R.R. v. McCaskill*, 94 N.C. 746 (1886).

Applied in *Withers v. Long Mfg. Co.*, 259 N.C. 139, 129 S.E.2d 886 (1963).

Cited in *Town of Durham v. Richmond*

& *D.R.R.*, 104 N.C. 261, 10 S.E. 208 (1889); *Purify v. Richmond & D.R.R.*, 108 N.C. 100, 12 S.E. 741 (1891); *Bass v. Roanoke Nav. & Waterpower Co.*, 111 N.C. 439, 16 S.E. 402 (1892); *Loven v. Parson*, 127 N.C. 301, 37 S.E. 271 (1900).

§ 1-44.1. Presumption of abandonment of railroad right-of-way.

Any railroad which has removed its tracks from a right-of-way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right-of-way after such removal of tracks for a period of seven (7) years after such removal, shall be presumed to have abandoned the railroad right-of-way. (1955, c. 657.)

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

No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (1891, c. 224; Rev., s. 389; C.S., s. 435.)

CASE NOTES

Adverse Possession Ineffective against Public Way, Square or Common. — Where there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction, the statute of limitations does not now run against the municipality or governing body. *Steadman v. Pinetops*, 251 N.C. 509, 112 S.E.2d 102 (1960).

Possession of a street by one claiming it adversely cannot divest or destroy the right of the public therein. *State v. Godwin*, 145 N.C. 461, 59 S.E. 132 (1907).

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. *City of Salisbury v. Barnhardt*, 249 N.C. 549, 107 S.E.2d 297 (1959).

But Municipality Must Have Title or Rights Therein. — The rule that individuals may not acquire title to any part of a municipal street by encroaching

upon or obstructing the same in any way does not apply when the evidence fails to show that the municipality had any title or rights therein. *Hall v. City of Fayetteville*, 248 N.C. 474, 103 S.E.2d 815 (1958).

Section Inapplicable where Dedication Not Accepted. — The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. *Gault v. Town of Lake Waccamaw*, 200 N.C. 593, 158 S.E. 104 (1931).

Or where Streets, etc., Are Abandoned. — This section does not apply to streets, alleys and parks that have been offered for dedication if the offer has not been accepted, or if the offer has been accepted but the streets, alleys or parks have been abandoned. *Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1952); *City of Salisbury v. Barnhardt*, 249 N.C. 549, 107 S.E.2d 297 (1959).

Section Not Applicable to Property Conveyed to Trustees for Municipal Purposes. — Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section did not apply. *Carswell v. Carswell*, 217 N.C. 40, 7 S.E.2d 58 (1940).

Effect of Adverse Possession prior to Enactment of Section. — When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them had been shown for 35 years prior to the enactment of this section, the right of the town to the use of the street was barred by the statute of limitations. *Tadlock v. Mizell*, 195 N.C. 473, 142 S.E. 713 (1928).

Right to maintain a building on a navigable stream which obstructed operation of a county bridge could not be acquired by adverse user by virtue of this section. *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912).

Where county entered into possession of a square for the public use before enactment of this section, this section would not permit plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. *Gates County v. Hill*, 158 N.C. 584, 73 S.E. 804 (1912).

Acquisition of Right Superior to All

except State Not Prevented. — While this section prevents a person from acquiring an exclusive right to land, it does not prevent a person from acquiring a right superior to that of all other persons save the State. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

Stipulation that certain land was within a right-of-way of the Highway Department indicated only that the State had a superior right, if it chose to exercise it, to the land. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

Rights of the State do not preclude a person from acquiring actual, lawful possession, if the evidence is sufficient to support a finding of fact to that effect. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

For cases decided under prior law, see *Crump v. Mims*, 64 N.C. 767 (1870); *State v. Long*, 94 N.C. 896 (1886); *Moose v. Carson*, 104 N.C. 431, 10 S.E. 689 (1889); *Turner v. Commonwealth*, 127 N.C. 153, 37 S.E. 191 (1900); *Threadgill v. Town of Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916).

Cited in *Atlantic Coast Line R.R. v. Town of Dunn*, 183 N.C. 427, 111 S.E. 724 (1922); *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E.2d 606 (1945).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article. (C.C.P., s. 30; Code, s. 151; Rev., s. 390; C.S., s. 436.)

CASE NOTES

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated

within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The court has no discretion when considering whether a claim is barred by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Right of Defendant to Rely on Stat-

ute as a Defense. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The statute of limitations relates only to the remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy. *Berry v. Corpening*, 90 N.C. 395 (1884).

Statute of limitations does not run when there is no one in esse capable of suing. *Grant v. Hughes*, 94 N.C. 231 (1886).

As to the time for commencing an action when the period of limitation is changed by amendment, see *Culbreth v. Downing*, 121 N.C. 205, 28 S.E. 294 (1897). See also, *Nichols v. Norfolk & C.R.R.*, 120 N.C. 495, 26 S.E. 643 (1897).

Actions to which No Statutes of Limitations Apply. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

There is no statute applicable to the probate of wills. *In re Will of Dupree*, 163 N.C. 256, 79 S.E. 611 (1913).

Where a partner received firm money in winding up affairs of the partnership in pursuance of an agreement that he receive such funds, he

held them in trust for the other partners and the statutes did not run. *McNair v. Ragland*, 7 N.C. 139 (1819).

Burden of Proof. — Where defendant sufficiently pleads the statute of limitations, the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute. *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E.2d 610 (1946).

Pleading of Statute Held Sufficient. — Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than 10 years prior to institution of the action and was barred under this section was a sufficient pleading of statute of limitations, even though no specific reference was made to the particular sections of the statute applicable. *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E.2d 610 (1946).

Applied in *Rafferty v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

Quoted in *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E.2d 606 (1945).

Cited in *Campbell v. Brown*, 86 N.C. 376 (1882); *Copley v. Scarlett*, 214 N.C. 31, 197 S.E. 623 (1938); *Henderson v. Henderson*, 232 N.C. 1, 59 S.E.2d 227 (1950); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Thurston Motor Lines, Inc. v. GMC*, 258 N.C. 323, 128 S.E.2d 413 (1962); *Clardy v. Duke Univ.*, 299 F.2d 368 (4th Cir. 1962); *Hager v. Brewer Equip. Co.*, 17 N.C. App. 489, 195 S.E.2d 54 (1973); *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E.2d 559 (1981); *Wells v. Barefoot*, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

§ 1-47. Ten years.

Within ten years an action —

- (1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.
- (1.1) Upon a judgment rendered by a justice of the peace, from its date.
- (2) Upon a sealed instrument against the principal thereto. Provided, however, that if action on a sealed instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

- (3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.
- (4) For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.
- (5) Repealed by Session Laws 1959, c. 879, s. 2. (C.C.P., ss. 14, 31; Code, s. 152; Rev., s. 391; C.S., s. 437; 1937, c. 368; 1959, c. 879, s. 2; 1961, c. 115, s. 2; 1969, c. 810, s. 1.)

Cross References. — As to counterclaims and cross-claims, see Rule 13, Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

For comment on this section, see 11 N.C.L. Rev. 220 and 22 N.C.L. Rev. 146.

For article "Recognition of Foreign

Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 1914 (1977).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

- I. In General.
- II. Judgments and Decrees.
- III. Judgments Rendered by Justices.
- IV. Sealed Instruments.
 - A. In General.
 - B. Counterclaims.
- V. Mortgage Foreclosure.
- VI. Redemption of Mortgages.

I. IN GENERAL.

Statute of limitation may be characterized as a right not to be sued beyond the time limited. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. *Brown v. Harding*, 171 N.C. 686, 89 S.E. 222 (1916).

This section has taken the place of the former statute of presumptions, Revised Code, c. 65, § 18, in respect to judgments. *Brown v. Harding*, 171 N.C. 686, 89 S.E. 222 (1916).

Section Not Retroactive. — This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. *Gaither v. Sain*, 91 N.C. 304 (1884).

Applicability of Section to Actions.

— The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. *Berry v. Corpening*, 90 N.C. 395 (1884).

Proceeding for leave to issue execution on judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. *Ex parte Smith*, 134 N.C. 495, 47 S.E. 16 (1904).

Plea of Statute Held Sufficient. — An answer alleging that the plaintiff had not brought his action within the time prescribed by law, and that the same was barred by the statute of limitations, was a sufficient plea of the statute of limi-

tations. *Pemberton v. Simmons*, 100 N.C. 316, 6 S.E. 122 (1888).

Duty to Consider Unsatisfactory Plea. — Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was error. *Proctor v. Proctor*, 105 N.C. 222, 10 S.E. 1036 (1890).

Burden of Proof. — Upon defendant's plea of the statute of limitations, the burden devolved upon plaintiffs to show that their action was not barred, but was instituted within the time permitted by statute. *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

Effect of Voluntary Partial Payment. — A partial payment voluntarily made does not remove the statutory bar. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Plea of Statute Held Available to Distributee. — In an action by plaintiff to recover his distributive share of an estate, where defendant administrator set up and pleaded debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff had no application and the plea of the statute of limitations was available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. First-Citizens Bank & Trust Co.*, 223 N.C. 642, 27 S.E.2d 636 (1943).

As to law prior to enactment of this section, see *Hamlin v. Mebane*, 54 N.C. 18 (1853); *Hodges v. Council*, 86 N.C. 181 (1882); *Headen v. Womack*, 88 N.C. 468 (1883); *Rogers v. Clements*, 98 N.C. 180, 3 S.E. 512 (1887); *Ex parte Walker*, 107 N.C. 340, 12 S.E. 136 (1890).

Applied in *Woody v. Jones*, 113 N.C. 253, 18 S.E. 205 (1893); *Geitner v. Jones*, 176 N.C. 542, 97 S.E. 494 (1918); *Serls v. Gibbs*, 205 N.C. 246, 171 S.E. 56 (1933); *Town of Farmville v. Paylor*, 208 N.C. 106, 179 S.E. 459 (1935); *Davis v. Cockman*, 211 N.C. 630, 191 S.E. 322 (1937); *Allsbrook v. Walston*, 212 N.C. 225, 193 S.E. 151 (1937); *Bell v. Chadwick*, 226 N.C. 598, 39 S.E.2d 743 (1946); *Layden v. Layden*, 228 N.C. 5, 44 S.E.2d 340 (1947); *Hughes v. Oliver*, 228 N.C. 680, 47 S.E.2d 6 (1948); *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949); *McCollum v. Smith*, 233 N.C. 10, 62 S.E.2d 483 (1950); *Hanson v. Yandle*, 253 N.C. 532, 70 S.E.2d 565 (1952); *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646

(1953); *Jordan v. Chappel*, 246 N.C. 620, 99 S.E.2d 778 (1957); *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981).

Quoted in *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184 (4th Cir. 1977).

Cited in *Broyles v. Young*, 81 N.C. 315 (1879); *Hall v. Gibbs*, 87 N.C. 4 (1882); *Usry v. Suit*, 91 N.C. 406 (1884); *Wilcoxon v. Logan*, 91 N.C. 449 (1884); *Sikes v. Parker*, 95 N.C. 232 (1886); *Rogers v. Clements*, 98 N.C. 180, 3 S.E. 512 (1887); *Williams v. McNair*, 98 N.C. 332, 4 S.E. 131 (1887); *Houck v. Adams*, 98 N.C. 519, 4 S.E. 502 (1887); *Frederick v. Williams*, 103 N.C. 189, 9 S.E. 298 (1889); *Brittain v. Dickson*, 104 N.C. 547, 10 S.E. 701 (1889); *Owen v. Paxton*, 122 N.C. 770, 30 S.E. 343 (1898); *Ferrell v. Hinton*, 161 N.C. 348, 77 S.E. 224 (1913); *Hyman v. Jones*, 205 N.C. 266, 171 S.E. 103 (1933); *In re Gibbs*, 205 N.C. 312, 171 S.E. 55 (1933); *Furr v. Trull*, 205 N.C. 417, 171 S.E. 641 (1933); *Merrimon v. Postal Telegraph-Cable Co.*, 207 N.C. 101, 176 S.E. 246 (1934); *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934); *Ritter v. Chandler*, 214 N.C. 703, 200 S.E. 398 (1939); *Ownbey v. Parkway Properties, Inc.*, 221 N.C. 27, 18 S.E.2d 710 (1942); *City of Raleigh v. Mechanics & Farmers Bank*, 223 N.C. 286, 26 S.E.2d 573 (1943); *Lee v. Rhodes*, 231 N.C. 602, 58 S.E.2d 363 (1950); *First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 69 S.E.2d 841 (1952); *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417 (1955); *State v. Bryant*, 251 N.C. 423, 111 S.E.2d 591 (1959); *Scott Poultry Co. v. Graves*, 272 N.C. 22, 157 S.E.2d 608 (1967); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978); *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Bank of N.C. v. Cranfill*, 297 N.C. 43, 253 S.E.2d 1 (1979); *Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 1980); *Blue Cross & Blue Shield v. Odell Assocs.*, — N.C. App. —, 301 S.E.2d 459 (1983).

II. JUDGMENTS AND DECREES.

Statute to Be Strictly Construed. — A statute so entirely in derogation of common right as is the statute of limitations should be strictly construed, and under it a judgment should not be treated as a contract. *McDonald v. Dickson*, 87 N.C. 404 (1882).

There is no analogy which makes decisions under former precedents applicable to present law in effect since the Code of Civil Procedure in 1868, inasmuch as such decisions relate entirely to rules of evidence, and not to the removal of a statutory bar where the action is upon a bond or judgment. *McDonald v. Dickson*, 87 N.C. 404 (1882).

As to prior law, see *Ex parte Walker*, 107 N.C. 340, 12 S.E. 136 (1890).

Section Not Retroactive. — A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, because this section is not retroactive. *Herman v. Watts*, 107 N.C. 646, 12 S.E. 437 (1890).

A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure was subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. *Johnston v. Jones*, 87 N.C. 393 (1882).

The words "any state" must be taken to mean the judgment of a court of any state, including North Carolina. But even if they are not construed to include this State, it would make no material difference, since under § 1-56 every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. *McDonald v. Dickson*, 85 N.C. 248 (1881), *aff'd* on rehearing, 87 N.C. 404 (1882).

It makes no difference whether subdivision (1) of this section or § 1-56 applies. The result will be the same in either case. *Ex parte Smith*, 134 N.C. 495, 47 S.E. 16 (1904). See also, *McDonald v. Dickson*, 85 N.C. 248 (1881).

This section applies to foreign judgments. *Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212 (1900).

Section Not Applicable to Award by Industrial Commission. — Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, such award is not a judgment of a court within the meaning of subdivision (1) of this section. *Bryant v. Poole*, 261 N.C. 553, 135 S.E.2d 629 (1964).

United States Not Barred from Enforcing Judgment on Unpaid Criminal Fine. — No limitation period, state or federal, bars the United States

from enforcing a judgment on an unpaid criminal fine. *United States v. Welborn*, 495 F. Supp. 833 (M.D.N.C. 1980).

Effect of Section on Judgments. — This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. *McDonald v. Dickson*, 85 N.C. 248 (1881), *aff'd* on rehearing, 87 N.C. 404 (1882).

Statute of limitations is a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. *McDonald v. Dickson*, 85 N.C. 248 (1881), *aff'd* on rehearing, 87 N.C. 404 (1882).

The issuing of an execution on a decree charging owelty in partition is barred within 10 years. *Ex parte Smith*, 134 N.C. 495, 47 S.E. 16 (1904).

Effect of Judgment upon Cause of Action on Contract or Tort. — A cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N.C. 404 (1882).

Specialties, when reduced to judgments, are merged, and the statute barring judgments will then apply. *Brittain v. Dickson*, 104 N.C. 547, 10 S.E. 701 (1889).

A cause of action on a judgment accrues from the date of its rendition. *Rodman v. Stillman*, 220 N.C. 361, 17 S.E.2d 336 (1941).

Partial payment on a judgment does not arrest the running of the statute of limitations. *Hughes v. Boone*, 114 N.C. 54, 19 S.E. 63 (1894); *McCaskill v. McKinnon*, 121 N.C. 192, 28 S.E. 265 (1897).

Running of Statute — On Judgment for Devastavit against Executor. — When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when an action is brought after the death of the executor, the cause of action accrues as against his real and personal representative when such representative qualifies and gives notice to creditors. *Syme v. Badger*, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Same — On Judgment in favor of Infant. — The statute limiting the time

to bring an action on a judgment to 10 years from the date of its rendition does not begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose. Section 1-17 permits the bringing of an action on such judgment within the time limited by subdivision (1) of this section, i.e., 10 years, after he became 21 (now 18) years old. *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964).

Same — On Alimony and Child Support Payable Periodically. —

Periodic sums of alimony and child support which became due more than 10 years before the institution of a motion in a cause for a judicial determination of the amount due are barred by the 10-year limitation of this section. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

In an action on a judgment for alimony, payable annually, the annual sums are barred within 10 years from the time they become due, under this section. *Arrington v. Arrington*, 127 N.C. 190, 37 S.E. 212 (1900).

Where an action was instituted to recover amount due on a note and foreclose mortgage securing the same, and judgment was rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. *McCaskill v. McKinnon*, 121 N.C. 192, 28 S.E. 265 (1897).

Action to enforce judgment lien by condemning land of the judgment debtor to be sold was not an action upon a judgment within the purview of subdivision (1) of this section, but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the 10-year period prescribed by § 1-234. *Lupton v. Edmundson*, 220 N.C. 188, 16 S.E.2d 840 (1941).

Judgment Held Barred. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, which motion was denied, upon which appeal was taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect

of stopping the statute, and the judgment was barred in 1939 by the 10-year statute of limitations. *Exum v. Carolina R.R.*, 222 N.C. 222, 22 S.E.2d 424 (1942).

The statute of limitations may be set up as a defense by an administrator to a motion for leave to issue execution after 10 years from the date of docketing a judgment against his intestate, even though executions have regularly been issued within each successive period of three years after the judgment was docketed. *Berry v. Corpening*, 90 N.C. 395 (1884).

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. *Osborne v. Board of Educ.*, 207 N.C. 503, 177 S.E. 642 (1935).

III. JUDGMENTS RENDERED BY JUSTICES.

Limitation Is now 10 Years. — The period not prescribed for the commencement of an action on a judgment rendered in a justice's court is 10 years from its date. *Bryant v. Poole*, 261 N.C. 553, 135 S.E.2d 629 (1964).

IV. SEALED INSTRUMENTS.

A. In General.

Subdivision (2) Applies Only to Principals. — By its express terms, subdivision (2) of this section is applicable only to principals. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960).

Notwithstanding Seal. — Affixing a seal to an instrument does not make this section applicable. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960).

And Does Not Apply to Sureties. — Subdivision (2) of this section is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Subdivision (1) of § 1-52 is applicable to sureties, and action against them is limited to three years. *Welfare v. Thompson*, 83 N.C. 279 (1880); *Redmond v. Pippen*, 113 N.C. 90, 18 S.E. 50 (1893); *Barnes v. Crawford*, 201 N.C. 434, 160 S.E. 464 (1931); *North Carolina Bank & Trust Co. v. Williams*, 208 N.C. 243, 180 S.E. 81 (1935); *North Carolina Bank & Trust Co. v. Williams*, 209 N.C. 806, 185 S.E. 18 (1936).

Action against endorser on a note under seal is ordinarily barred after three years from maturity of the note, by subdivision (1) of § 1-52, even though the endorsement is itself also under seal,

an endorser not being a principal to the note so as to come within the provisions of this section. *Howard v. White*, 215 N.C. 130, 1 S.E.2d 356 (1939).

Purchase Money Security Agreements under Seal Governed by Subdivision (2). — The 10-year limitation of subdivision (2) of this section, and not the four-year limitation of § 25-2-725, is applicable to purchase money security agreements executed under seal. *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

In an action to recover a deficiency remaining after repossession and sale of collateral security, where defendant has purchased a motor vehicle on credit, executing a purchase money security agreement giving the seller a purchase money security interest in the vehicle and retaining title in the seller or its assignees until the purchase price was fully paid, and immediately thereafter defaulted, the 10-year limitation of subdivision (2) of this section was applicable, rather than the four-year limitation of § 24-2-725. *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Effect of Assignment of Sealed Contract. — Where assignor had a right not to be sued after 10 years from the accrual of a cause of action under sealed contract, by assigning this contract, assignor could not confer upon defendant assignee a greater immunity to suit than assignor itself possessed. Hence, when defendant assignee impliedly assumed its assignor's contractual obligations under the general assignment of a contract under seal, it exposed itself for 10 years to suit on the sealed contract. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Section Operates upon Remedy. — This section limits the time within which actions may be brought, and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. *Demai v. Tart*, 221 N.C. 106, 19 S.E.2d 130 (1942).

What Plaintiff Must Show. — The burden is upon plaintiff to prove that the action accrued within the time limited by this section, by showing that the corporate defendant adopted the seal appearing on the contract for the special occasion or for all similar occasions, or

that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there were facts and circumstances which excluded the operation of the three-year statute, § 1-52, other than the matter of a seal. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

When Statute Begins to Run — Breach of Warranty. — In an action for breach of a covenant of warranty, the statute of limitation begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Breach of Covenant of Seizin. — In an action for damages for breach of covenant of seizin, the statute of limitations begins to run upon delivery of the deed. *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Coupons of Bonds. — The statute of limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. *Threadgill v. Commissioners of Anson County*, 116 N.C. 616, 21 S.E. 425 (1895).

Where bond coupons, negotiable in form and payable to the bearer, had been detached from the bonds and the bonds had been sold, the statute of limitations began to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond was untenable. *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E.2d 610 (1946), distinguishing *Knight v. Braswell*, 70 N.C. 709 (1874).

Same — Guaranty under Seal. — An action upon a guaranty under seal is not barred until 10 years after the cause of action accrues. *Coleman v. Fuller*, 105 N.C. 328, 11 S.E. 175 (1980).

Effect of Partial Payment on Running of Statute. — The limitations period on an action on a promissory note will begin anew when a partial payment, nothing else appearing, is made by the debtor before the limitations period has expired. *Wells v. Barefoot*, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Where action was instituted on note under seal on 10 February, 1943, and the last payment had been made upon the note on 1 October, 1933, the action was not barred by this section, as the statute

commenced again to run from the day when the last payment was made. *Sayer v. Henderson*, 225 N.C. 642, 35 S.E.2d 875 (1945), citing *Green v. Greensboro Female College*, 83 N.C. 449, 35 Am. St. R. 579 (1880).

Setoff Does Not Repel Statute. — A setoff in favor of the obligor is not a part payment as to an endorser and does not repel the statute. *Woodhouse v. Simmons*, 73 N.C. 30 (1875).

When Contract under Seal as a Matter of Law. — If it appears without ambiguity, on the face of the contract, that a party signed under seal, it is held as a matter of law that the contract is under seal. *Central Systems v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

When Question of Seal Is for the Jury. — If a contract is ambiguous as to whether a party adopted a seal, it is a jury question as to whether the party signed under seal. *Central Systems v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 882, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

Instrument Held under Seal as Matter of Law. — Defendant executed a contract under seal as a matter of law, and the 10-year statute of limitations applied to an action on the contract, where the contract stated that the parties "have executed this agreement under seal," and the word "seal" appeared under the names of the attesting witnesses who were not parties to the contract and close to the place where defendant executed the contract. *Central Systems v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute was based upon defendant's contention that the note was not under seal, but defendant offered no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his name as maker, the question of the statute became a matter of law, and the court properly refused to submit an issue as to whether the action was barred. *Curran v. Curran*, 219 N.C. 815, 15 S.E.2d 279 (1941).

Intent of Parties as to Seal Held Question of Fact. — In an action to

recover the balance due on a promissory note, where a corporate seal appeared but there was no seal after defendants' names, a material issue of fact was raised as to the intent of the parties to enter into a sealed instrument, and the statute of limitations of subdivision (2) of this section would not necessarily be applicable. *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

Section Held Controlling. — Where note contained the word "seal" opposite the signature it was conclusive as to the nature of the instrument, and this section controlled as to the time within which an action might be brought. *Federal Reserve Bank v. Kalin*, 81 F.2d 1003 (4th Cir. 1936).

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of 10 years. *Lee v. Chamblee*, 223 N.C. 146, 25 S.E.2d 433 (1943).

Where the contract sued upon was an original agreement executed on an independent consideration and the defendant promisor was a principal, the 10-year statute of limitations was controlling. *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 64 S.E.2d 826 (1951).

Where contract for the management and division of profits of a business was held to be an instrument as that term is used in subdivision (2) of this section, and there was no ambiguity in the wording of the contract as to the intent of the parties that it be under their respective seals, plaintiff's right to bring his action was governed by the provisions of this section, not § 1-52. *Hutchinson v. Hutchinson*, 49 N.C. App. 687, 272 S.E.2d 146 (1980).

A bond for the payment of money executed prior to this section by the principal and his sureties was exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N.C. 709 (1874).

A corporation may adopt a seal different from its corporate seal for a special occasion. *Central Systems v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

B. Counterclaims.**Purpose of 1969 Amendment.** —

The 1969 amendment, allowing persons sued under sealed instruments to assert any claims or defenses they might have by joinder of third parties as allowable under the Rules of Civil Procedure (§ 1A-1), even though those claims might otherwise be barred by other limiting statutes, ameliorated the potential for harsh results in the situation where a financial institution could wait to sue for deficiency after repossession and sale of collateral security until after the buyer's rights of action against sellers for any breach of warranty were barred. The potential for abuse of the 10-year limitation was apparent in the situation where sellers and lenders were closely or inseparably related; the legislature chose to remedy this problem, not by reducing the length of time in which a lender or his assignee could sue on a sealed purchase money security agreement, but by increasing the period of time in which a buyer so sued could assert claims against his seller for breach, so that the time available to parties for either type of action is equal and concurrent when the holder of security interest sues first. *North Carolina Nat'l Bank v. Holshouser*, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Counterclaim under Truth-in-Lending Act. — In an action to recover under an installment sales contract, subdivision (2) of this section cannot be utilized to allow a counterclaim under the Federal Truth-in-Lending Act, 15 U.S.C. 1601, after the one-year limitation on actions under 15 U.S.C. 1640(e) has expired, since it is inconsistent with the new amendment to the federal act, 15 U.S.C. 1681. *Ken-Lu Enterprises, Inc. v. Neal*, 29 N.C. App. 78, 223 S.E.2d 831, cert. denied, 290 N.C. 308, 225 S.E.2d 829, cert. denied, 429 U.S. 1002, 97 S. Ct. 533, 50 L. Ed. 2d 614 (1976).

V. MORTGAGE FORECLOSURE.

This section is the only limitation upon mortgagee's right of action for foreclosure or sale. *Parker v. Banks*, 79 N.C. 480 (1878).

Prerequisites to Bar. — In order to bar an action for relief under this section, two things must occur, namely, the lapse of 10 years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that

period. *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904); *Ownbey v. Parkway Properties, Inc.*, 222 N.C. 54, 21 S.E.2d 900 (1942).

Constructive Possession Not Intended. — It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right of possession by construction of law, as he has the legal title, and if a constructive possession was intended, there was no use in requiring possession at all, as if neither party was in actual possession, the constructive possession would always be in the mortgagee. *Dobbs v. Gullidge*, 20 N.C. 197 (1838); *Williams v. Wallace*, 78 N.C. 354 (1878); *London v. Bear*, 84 N.C. 266 (1881); *Deming v. Gainey*, 95 N.C. 528 (1886); *Simmons v. Ballard*, 102 N.C. 105, 9 S.E. 495 (1889); *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904); *Ownbey v. Parkway Properties, Inc.*, 222 N.C. 54, 21 S.E.2d 900 (1942).

Where there is no possession by either party, there can be no running of the statute, and § 1-56 would not apply in such a case. *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904).

Actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the remainderman cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. *Malloy v. Bruden*, 86 N.C. 251 (1882); *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904).

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after 10 years from the forfeiture thereof or from the last payment, such action being brought within 10 years from the time of the acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904).

When Holding of Mortgagor Becomes Adverse. — When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until the condition is broken. *Woody v. Jones*, 113 N.C. 253, 18 S.E. 205 (1893).

For cases decided under § 1-56, holding that a party who remains in possession is not barred of any equity by lapse of time, and that the

statute runs only where the other party has had possession, see *Smith v. McKee*, 87 N.C. 389 (1882); *Mask v. Tiller*, 89 N.C. 423 (1883); *Thornburg v. Mastin*, 93 N.C. 258 (1885); *Norton v. McDevit*, 122 N.C. 755, 756, 30 S.E. 24 (1898). See also, *Menzel v. Hinton*, 132 N.C. 660, 44 S.E. 385, 95 Am. St. R. 647 (1903), explained in *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904).

Subdivision (3) Inapplicable to Executory Contracts. — While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, subdivision (3) of this section does not embrace actions arising out of executory contracts for sales of land. *Overman v. Jackson*, 104 N.C. 4, 10 S.E. 87 (1889).

Institution of suit to foreclose by mortgagee in possession tolls operation of this section, and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. *Anderson v. Moore*, 233 N.C. 299, 63 S.E.2d 641 (1951).

Absence from State as Suspending Section. — An action to foreclose a mortgage comes within the purview of § 1-21, and absence of the mortgagor from the State suspends the running of the statute. *Love v. West*, 169 N.C. 13, 84 S.E. 1048 (1915).

Effect of Bar of Debt upon Foreclosure. — The fact that a note is barred by the three-year statute does not prevent the mortgagee from foreclosing his mortgage securing it, this section being applicable. *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918). See also, *Capehart v. Dettrick*, 91 N.C. 344 (1884).

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. *Overman v. Jackson*, 104 N.C. 4, 10 S.E. 87 (1889).

Where a note has not been barred, foreclosure of a deed in trust securing it may be ordered. *Geitner v. Jones*, 176 N.C. 542, 97 S.E. 494 (1918).

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. *Humphrey v. Stephens*, 191 N.C. 101, 131 S.E. 383 (1926).

Action to Recover Debt Not Barred by Subdivision (3). — Subdivision (3) of this section only bars an action to foreclose the mortgage, and does not bar

an action to recover the debt secured by the mortgage. *Fraser v. Bean*, 96 N.C. 327, 2 S.E. 159 (1887).

For cases holding that subdivision (3) is not applicable to powers of sale, see *Menzel v. Hinton*, 132 N.C. 660, 44 S.E. 385, 95 Am. St. R. 647 (1903); *Cone v. Hyatt*, 132 N.C. 810, 44 S.E. 678 (1903); *Miller v. Coxe*, 133 N.C. 578, 45 S.E. 940 (1903); *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904); *Spain v. Hiens*, 214 N.C. 432, 200 S.E. 25 (1938). But see § 45-21.12.

As to the bar now obtaining against exercise of a power of sale when foreclosure is barred, pursuant to § 45-21.12 (formerly § 45-26), see *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918); *Humphrey v. Stephens*, 191 N.C. 101, 131 S.E. 383 (1926).

Effect of Payment of Interest. — This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. *Dixie Grocery Co. v. Hoyle*, 204 N.C. 109, 167 S.E. 469 (1933).

Effect of Partial Payment. — Payment on a bond secured by a mortgage before it goes out of date and within 10 years before suit is brought will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. *Williams v. Kerr*, 113 N.C. 306, 18 S.E. 501 (1893).

Where partial payment is made on a note secured by a deed of trust, action to foreclose the instrument is not barred until 10 years from date of such payment. *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

Part payment operating to start the running of the statute of limitations anew against the right of action to foreclose a mortgage or deed of trust is any payment on the debt secured by the instrument, and the action to foreclose is not barred within 10 years from such payment, notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. *Demai v. Tart*, 221 N.C. 106, 19 S.E.2d 130 (1942).

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of 10 years. *Miller v. Coxe*, 133 N.C. 578, 45 S.E. 940 (1903).

Foreclosure Held Only Remedy in Absence of Signed Note. — Where

plaintiff did not sign note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, in the event of default in payment foreclosure of the deed of trust was the only action maintainable against her. This section, therefore, prescribed the time within which an action might be brought. *Carter v. Bost*, 209 N.C. 830, 184 S.E. 817 (1936).

Sale while Foreclosure Suit Was Pending. — Where a suit to foreclose a duly registered deed of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis, and while the suit was pending but after expiration of the 10-year period prescribed by statute, the assigns of the cestuis sold the property, and upon discovering the transfer plaintiff had the purchasers made parties, the purchasers were chargeable with notice of the suit and acquired only that interest which their grantors then had, and they could not assert the bar of the statute. *Massachusetts Bonding & Ins. Co. v. Knox*, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Relationship of Mortgagor and Mortgagee Established by Consent Judgment. — A consent judgment providing that defendant had an equity to redeem the land upon payment of a certain sum on or before a certain day, and that if this payment was timely made plaintiff would convey said land to defendant, but that in case of failure to pay within the time limited, defendant would stand absolutely debarred and foreclosed of and from any and all equity or other estate, established relationship of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relationship continued to exist after the day of forfeiture, so that under subdivision (3) of this section 10 years' possession by defendant, after default, barred plaintiff. *Bunn v. Braswell*, 139 N.C. 135, 51 S.E. 927 (1905).

Remedy of Mortgagor for Sale under Barred Mortgage. — A sale under a mortgage barred by the statute would carry no title to the purchaser. The mortgagor, being in possession, would have a full defense to an action for ejectment when brought by the purchaser. *Capehart v. Biggs & Co.*, 77 N.C. 261 (1877); *Fox v. Kline*, 85 N.C. 173 (1881); *Hutaff v. Adrian*, 112 N.C. 259, 17 S.E. 78 (1893).

Where a mortgagor in possession had a full defense to an action for ejectment brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court would not interfere by injunction to prevent a sale threatened by the mortgagee; however, it would be otherwise if there were a contest as to the amount due under the mortgage. *Hutaff v. Adrian*, 112 N.C. 259, 17 S.E. 78 (1893).

Section Must Be Specifically Pleaded. — In an action to foreclose a mortgage, the 10-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 133 N.C. 76, 45 S.E. 466 (1903).

Power of Grantees to Plead. — In a foreclosure action, the grantees of a mortgagor are entitled to plead the statute of limitations. *Stancill v. Spain*, 133 N.C. 76, 45 S.E. 466 (1903).

As to prior law, see *Pemberton v. Simmons*, 100 N.C. 316, 6 S.E. 122 (1888).

VI. REDEMPTION OF MORTGAGES.

When Redemption Barred. — Where mortgagee has actual possession, either when the cause of action for redemption accrues or when he thereafter goes into and remains continuously in such possession for more than 10 years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. *Bernhardt v. Hagamon*, 144 N.C. 526, 57 S.E. 222 (1907); *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

Bar of Right to Redeem Bars Right to Accounting. — When the right to redeem is barred by this section, the right to enforce an accounting is likewise barred. *Anderson v. Moore*, 233 N.C. 299, 63 S.E.2d 641 (1951).

As to necessity that possession be in the mortgagee, see *Simmons v. Ballard*, 102 N.C. 105, 9 S.E. 495 (1889); *Cauley v. Sutton*, 150 N.C. 327, 64 S.E. 3 (1909).

It is not required that mortgagee's possession be adverse in order to bar mortgagor's action in 10 years under this section. *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

But the possession required by this statute must be actual and not merely constructive. *Weathersbee v. Goodwin*, 175 N.C. 234, 95 S.E. 491 (1918); *Stevens v. Turlington*, 186 N.C. 191, 119 S.E. 210

(1923); *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

Possession presumed by virtue of § 1-42 is not sufficient to meet the requirements of subdivision (4) of this section, for even if more than 10 years have passed since the cause of action accrued, an action for redemption under subdivision (4) is not barred unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. *Simmons v. Ballard*, 102 N.C. 105, 9 S.E. 495 (1889); *Cauley v. Sutton*, 150 N.C. 327, 64 S.E. 3 (1909); *McNair v. Boyd*, 163 N.C. 478, 79 S.E. 966 (1913); *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

Redemption of Mortgage Held Barred. — Where mortgagee had been in possession more than 30 years since execution of the mortgage, the right of redemption was barred. *Gray v. Williams*, 130 N.C. 53, 40 S.E. 843 (1902).

Where, in accordance with agreement

expressed in instrument, mortgagee entered at once into possession of lands, mortgagor's right for an accounting arose when the bond which the instrument secured had matured and remained unpaid; and his right of action and that of those claiming under him accrued then, and the mortgagor's right of action was barred by a continued peaceful possession by the mortgagee for 10 years therefrom. Section 1-42 did not apply. *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784 (1926).

Where mortgagee was permitted to remain in actual possession of mortgaged land, as mortgagee, for a period of 10 years, and in the meantime the mortgage debt was not paid and no action to foreclose or redeem was instituted, title to the premises would be deemed to be in him, and the 10-year statute of limitations, if properly pleaded and relied upon, would be a complete defense to an action to redeem. *Anderson v. Moore*, 233 N.C. 299, 63 S.E.2d 641 (1951).

§ 1-48: Transferred to § 1-54, subdivision (6), by Session Laws 1951, c. 837, s. 2.

§ 1-49. Seven years.

Within seven years an action —

- (1) Repealed by Session Laws 1961, c. 115, s. 1.
- (2) By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (C.C.P., s. 32; Code, s. 153; Rev., s. 392; C.S., s. 438; 1961, c. 115, s. 1.)

Cross References. — As to notice to creditors of decedent, see § 28A-14-1 et

seq. As to claims against estate, see § 28A-19-1 et seq.

CASE NOTES

Purpose of Section. — The present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. *Lawrence v. Norfleet*, 90 N.C. 533 (1884).

This section must be construed with § 1-52. *Joyner v. Massey*, 97 N.C. 148, 1 S.E. 702 (1887).

And with § 1-22. *Redmond v. Pippen*, 113 N.C. 90, 18 S.E. 50 (1893).

Statute as Absolute Bar. — After the time prescribed in this section, the statute is an absolute bar to creditors. *Lawrence v. Norfleet*, 90 N.C. 533 (1884); *Worthy v. McIntosh*, 90 N.C. 536 (1884).

Regardless of Whether There Are Assets in Hands of Representatives. — This statute is an absolute bar unless

suit is brought within the time specified, whether or not there be assets in the hands of the representative. *Lawrence v. Norfleet*, 90 N.C. 533 (1884).

This section contemplates claims upon which right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. *Miller v. Shoaf*, 110 N.C. 319, 14 S.E. 800 (1892).

The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in 10 years under § 1-56. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Section Applies to Actions against Representatives. — This section applies to an action against a personal, and where necessary, the real representatives, to compel the performance of some right of which the debt itself is the foundation. *Lister v. Lister*, 222 N.C. 555, 24 S.E.2d 342 (1943).

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e.g., the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. *Smith v. Brown*, 101 N.C. 347, 7 S.E. 890 (1888).

Application of Section to Suit between Administrators. — Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. *Lawrence v. Norfleet*, 90 N.C. 533 (1884).

Prerequisites to Running of Statute. — The mere lapse of seven years does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. *Love v. Ingram*, 104 N.C. 600, 10 S.E. 77 (1889).

The executor or administrator must show that seven years have transpired after his qualification before commencement of the action, and that he has advertised as required by law. Without proof of the advertisement, the plea of

the statute of limitations cannot avail him. *Cox v. Cox*, 84 N.C. 138 (1881).

Time to Be Computed from Qualification of Representative. — While the advertisement is an indispensable prerequisite to the operation of the statute, it is incidental, and the time must be computed from qualification of the representative. *Cox v. Cox*, 84 N.C. 138 (1881); *Lawrence v. Norfleet*, 90 N.C. 533 (1884).

Conditions Preventing Running of the Statute. — Nothing will defeat the operation of the statute except the disabilities mentioned in the Code or such fraud or other matter of equitable nature as would make it against conscience to rely on the statute. *Syme v. Badger*, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Pendency of Suit as Suspension of Statute. — If an action is brought by a creditor against the personal representative of deceased debtor within seven years, etc., but by reason of delays the court's judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896), overruling *Syme v. Badger*, 96 N.C. 197, 2 S.E. 61 (1887) insofar as it holds to the contrary. See also, *Smith v. Brown*, 101 N.C. 347, 7 S.E. 890 (1888); *Woodlief v. Bragg*, 108 N.C. 571, 13 S.E. 211 (1891).

Creditor Who Is Not Barred against Representative Not Barred against Land. — When creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not that of the heir as such. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Proceedings which Were Not Barred against Representative Not Barred against Heirs. — Where proceedings against administratrix were instituted within the seven years after her qualification and making advertisement, though the heirs at law were not made parties to the proceedings until after the lapse of seven years, the proceedings, not being barred as to the personal representative, could not be barred as to the heirs at law by this section. *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Necessity for Full Administration. — Creditors of a deceased person whose claims were due at the death of the debtor are barred after seven years next after letters are granted, provided the estate has been fully administered. *Morris v. Syme*, 88 N.C. 453 (1883).

As to what must be pleaded and proved by the administrator, see *Little v. Duncan*, 89 N.C. 416 (1883).

Heirs as Parties. — In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. *Lilly v. Wooley*, 94 N.C. 412 (1886); *Syme v. Badger*, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds in *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896); *Brittain v. Dickson*, 104 N.C. 547, 10 S.E. 701 (1889); *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Death of surety and lapse of time longer than that prescribed before qualification of personal representative did not suspend the operation of the statute, if during that time the wards could have proceeded against the guardian. *Williams v. McNair*, 98 N.C. 332, 4 S.E. 131 (1887).

Section Held Inapplicable. — This

section did not apply to an action brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death. *Norton v. McDevit*, 122 N.C. 755, 30 S.E. 24 (1898).

Action Barred by Laches. — Where, in an action instituted 14 years after testator's death, plaintiff claimed the proceeds of an insurance policy payable to testator's estate, and contended that the policy was taken out by him to secure him for funds advanced to the testator, it was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches. *Strayhorn v. Aycock*, 215 N.C. 43, 200 S.E. 912 (1939).

As to prior law, see *Godley v. Taylor*, 14 N.C. 178 (1831); *Cooper v. Cherry*, 53 N.C. 323 (1861); *McKeithan v. McGill*, 83 N.C. 517 (1880); *Morris v. Syme*, 88 N.C. 453 (1883); *Syme v. Badger*, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, *Lee v. McKoy*, 118 N.C. 518, 24 S.E. 210 (1896).

Cited in *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417 (1955).

§ 1-50. Six years.

Within six years an action —

- (1) Upon the official bond of a public officer.
- (2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.
- (3) For injury to any incorporeal hereditament.
- (4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation.
- (5) a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years 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.
- b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
 1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
 2. Actions to recover damages for the negligent construction or repair of an improvement to real property;

3. Actions to recover damages for personal injury, death or damage to property;
 4. Actions to recover damages for economic or monetary loss;
 5. Actions in contract or in tort or otherwise;
 6. Actions for contribution or indemnification for damages sustained on account of an action described in this subdivision;
 7. Actions against a surety or guarantor of a defendant described in this subdivision;
 8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
 9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.
- c. For purposes of this subdivision, "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.
- d. The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.
- e. The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.
- f. This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the

defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

- (6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption. (C.C.P., s. 33; Code, s. 154; Rev., s. 393; C.S., s. 439; 1931, c. 169; 1963, c. 1030; 1979, c. 654, s. 2; 1981, c. 644, s. 1.)

Cross References. — For three-year limitation applicable to actions against sureties of executors, etc., on their principal's official bond, see § 1-52(6). As to bond of personal representative, see § 28A-8-1 et seq. As to action on bond of guardian, see § 33-14. As to product liability actions, see § 99B-1 et seq.

Editor's Note. — Session Laws 1979, c. 654, which added subdivision (6), provides in s. 6: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."

Session Laws 1979, c. 654, s. 7, provides: "This act shall not affect pending litigation."

Session Laws 1981, c. 644, which

rewrote subdivision (5), provides in s. 2 that the act shall not affect pending litigation.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article discussing product liability as affected by statutes of repose, see 61 N.C.L. Rev. 33 (1982).

For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For article discussing product liability as affected by statutes of repose, see 61 N.C.L. Rev. 33 (1982).

CASE NOTES

- I. In General.
- II. Bonds of Public Officers.
- III. Bonds of Executors, Administrators, Collectors or Guardians.
- IV. Incorporeal Hereditaments.
- V. Defective Condition of Improvements to Real Property.
- VI. Defective Products.

I. IN GENERAL.

This section must be affirmatively pleaded. *Humble v. Mebane*, 89 N.C. 410 (1883).

Burden on Plaintiff when Statute Is Pleaded. — Upon defendant's plea of the statute of limitations, the burden devolved upon plaintiffs to show that their action was not barred, but was instituted within the time permitted by statute. *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

As to the time for bringing actions

on bonds under prior law, see *Humble v. Mebane*, 89 N.C. 410 (1883).

Applied in *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980); *Martin v. Smith*, 534 F. Supp. 804 (W.D.N.C. 1982).

Quoted in *Shuler v. Gaston County Dyeing Mach. Co.*, 30 N.C. App. 577, 227 S.E.2d 634 (1976); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E.2d 846 (1977).

Stated in *State ex rel. Williams v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975).

Cited in *Commissioners of Moore County v. MacRae*, 89 N.C. 95 (1883); *J.G. Dudley Co. v. Commissioner*, 298 F.2d 750 (4th Cir. 1962); *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965); *Earls v. Link, Inc.*, 38 N.C. App. 204, 247 S.E.2d 617 (1978); *Feibus & Co. v. Godley Constr. Co.*, 44 N.C. App. 133, 260 S.E.2d 665 (1979); *Town of Scotland Neck v. Western Sur. Co.*, 46 N.C. App. 124, 264 S.E.2d 917 (1980); *Moore v. Moody*, 304 N.C. 719, 285 S.E.2d 811 (1982); *Tyson v. North Carolina Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982).

II. BONDS OF PUBLIC OFFICERS.

This statute protects both principal and surety upon the bond. *Vaughan v. Hines*, 87 N.C. 445 (1882).

Section Applicable to Bond of Defaulted Court Clerk. — This section is applicable to an action against the surety on the bond of a defaulted clerk of the superior court. *State ex rel. Lee v. Martin*, 186 N.C. 127, 118 S.E. 914 (1923), modified on other grounds on rehearing, 188 N.C. 119, 123 S.E. 631 (1924).

But Not to Action for Tort against Clerk. — In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required, this section does not apply. *Shackelford v. Staton*, 117 N.C. 73, 23 S.E. 101 (1895).

Application to Register of Deeds. — The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years, under this section. The statute commences to run from the time of the failure to register. *State ex rel. Daniel v. Grizzard*, 117 N.C. 105, 23 S.E. 93 (1895). See also, *State ex rel. Bank of Spruce Pine v. McKinney*, 209 N.C. 668, 184 S.E. 506 (1936).

When Statute Begins to Run — In General. — An action upon an official bond may be brought within six years after a breach thereof; the statute begins to run only from the breach of the bond. *Commissioners of Moore County v. MacRae*, 89 N.C. 95 (1883).

Same — Failure of Sinking Fund Commissioner to Account for Funds. — Ordinarily the statute begins to run from the time of the breach of the bond. Where, upon termination of a sinking fund commissioner's term, the law required him to account for funds in his hands, his failure to do so constituted a breach of his official bond, giving rise to

a cause of action thereon immediately. *City of Washington v. Bonner*, 203 N.C. 250, 165 S.E. 683 (1932).

Same — Losses Sustained through Clerk's Investment. — Ordinarily, the statute of limitations on the bond of a clerk of the superior court begins to run upon default and not upon discovery, and when funds are paid into the clerk's office to the use of a person who is sui juris and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of § 1-52(9) have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. *State ex rel. Thacker v. Fidelity & Deposit Co.*, 216 N.C. 135, 4 S.E.2d 324 (1939).

Where official bond of a public officer by valid contractual limitation covered only the first year of the official's six-year term of office, the statute of limitations began to run in favor of the surety on the bond from the expiration of the first year of the official's term of office, and not from the expiration of the official's statutory six-year term of office. *City of Washington v. Trust Co.*, 205 N.C. 382, 171 S.E. 438 (1933).

III. BONDS OF EXECUTORS, ADMINISTRATORS, COLLECTORS OR GUARDIANS.

Purpose of Section. — This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887).

This Section and §§ 1-52(6) and 1-56 Distinguished. — Subdivision (2) of this section expressly applies to actions on the "official bond," while § 1-52(6) applies to sureties only, and § 1-56, insofar as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Persons against Whom Section Is Absolute Bar. — An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent within six years after the filing of the final account, or it will be barred by the statute. *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887). See also,

Spruill v. Sanderson, 79 N.C. 466 (1878); *Vaughan v. Hines*, 87 N.C. 445 (1882); *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

This statute protects the surety as well as the principal. *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887); *Kennedy v. Cromwell*, 108 N.C. 1, 13 S.E. 135 (1891).

Additional Protection of Sureties under § 1-52(6). — In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under subdivision (6) of § 1-52. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of under subdivision (6) of § 1-52. *Kennedy v. Cromwell*, 108 N.C. 1, 13 S.E. 135 (1891).

When Applicable to Action for Distributive Shares. — The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares, unless the action is on the bond to recover the amount of such share. *Vaughan v. Hines*, 87 N.C. 445 (1882). See also, *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

When Applicable to Action for Balance Due. — No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

The final account is the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in § 1-49. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887).

And until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

The bar is unavailable under this section unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond in favor of the surety. *Humble v. Mebane*, 89 N.C. 410 (1883).

Action must be brought within six years after auditing and filing of the account. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

As to effect of failure to make final settlement, see *Self v. Shugart*, 135 N.C. 185, 47 S.E. 484 (1904).

Significance of Demand Irrespective of Final Account. — Whether or not final account is filed, if there is a demand and refusal the action is barred as to both the principal and sureties on the bond in three years under subdivision (6) of § 1-52. *Kennedy v. Cromwell*, 108 N.C. 1, 13 S.E. 135 (1891).

Action by ward against sureties on guardian's bond is barred after three years from the time the ward becomes of age if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. *Self v. Shugart*, 135 N.C. 185, 47 S.E. 484 (1904).

Where there was no one in esse who could sue upon the bond from the death of the first administrator until the qualification of the administrator *de bonis non*, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N.C. 524, 14 S.E. 73 (1891).

Action Not Barred. — An action against a guardian for failure to pay ward the balance of the estate due him after the ward attained his majority was not barred by the six-year statute of limitations where the guardian had not filed a final account as required under this section, the statute not applying to such action. *State ex rel. Finn v. Fountain*, 205 N.C. 217, 171 S.E. 85 (1933).

Action Held Barred. — Where guardian qualified in July, 1872, his

ward came of age the following September, and the guardian died without having settled his trust or making any of the returns required, when in 1887 the ward made a demand upon and brought suit against the sureties on the bond, it was held that his action was barred. *Norman v. Walker*, 101 N.C. 24, 7 S.E. 468 (1888).

Where distributees, who until they became of age had a guardian, did not bring suit for an alleged balance due under testator's will for 15 years after the executor filed his final account, the action was barred by either this section or § 1-56. *Culp v. Lee*, 109 N.C. 675, 14 S.E. 74 (1891).

Section Held Inapplicable. — Where an action was not brought upon official bond as administrator of the testator of the defendant, but it was brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, defendant was a trustee of an express trust, and the statute of limitations did not apply. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

IV. INCORPOREAL HEREDITAMENTS.

Restrictive Covenant Governed by Subdivision (3). — An action to enforce a restrictive covenant is governed by subdivision (3) of this section. A restrictive covenant is a servitude, commonly referred to as a negative easement, and an easement is an incorporeal hereditament. This section requires that an action for injury to any incorporeal hereditament be brought within six years. *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 259 S.E.2d 591 (1979), *aff'd*, 300 N.C. 660, 268 S.E.2d 494, rehearing denied, 301 N.C. 107, 273 S.E.2d 442 (1980).

V. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Editor's Note. — The cases cited below were decided under subdivision (5) of this section as it read prior to the 1981 amendment.

Constitutionality of Subdivision (5). — The class created by subdivision (5) of this section as it stood prior to the 1981 amendment had a rational basis, and such subdivision did not violate the Fourteenth Amendment of the U.S. Constitution or the law of the land clause of N.C. Const., Art. I, § 19. *Lamb v.*

Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), modified and *aff'd*, — N.C. —, 302 S.E.2d 868 (1983).

Subdivision (5) of this section as it read prior to the 1981 amendment did not impermissibly distinguish between architects, engineers, and contractors, who are protected from liability beyond the six-year period, and materialmen, suppliers, manufacturers and persons in actual possession and control of the property, who are not. Therefore, it did not violate the equal protection provisions of either the federal or State Constitutions. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

The legislature has not, in subdivision (5) of this section, absolutely abolished all claims against builders and designers arising out of improvements they built or designed. Rather, it has established a time period beyond which such claims may not be brought even if the injury giving rise to the claim does not occur until the time period has elapsed. This condition to the legal cognizability of a claim does not violate the constitutional guarantee under N.C. Const., Art. I, § 18, that for every "injury done" there shall be a "remedy." *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

The classification under subdivision (5) of this section, as it read prior to the 1981 amendment, did not create a special emolument or privilege within the meaning of N.C. Const., Art. I, § 32. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

Subdivision (5) is Substantive. — Subdivision (5) of this section, like many others enacted throughout the nation, is a statute of repose, which constitutes a substantive definition of, rather than a procedural limitation on, rights. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

Purpose of Subdivision. — Subdivision (5) of this section is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

Subdivision (5) of this section is to be interpreted in conjunction with § 1-52(5) so that both statutes may be given effect. *Smith v. American Radiator & Std. San. Corp.*, 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on

other grounds in *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1981).

Subdivision (5) of this section provides an outside limit of six years from the bringing of an action coming within the terms thereof. Within that outside limit, § 1-52(5) continues to operate, and subdivision (5) of this section does not serve to extend the time for bringing an action otherwise barred by the three-year statute. *Smith v. American Radiator & Std. San. Corp.*, 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on other grounds in *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

Elements Required for Applicability of Subdivision (5) prior to 1981 Amendment. — In order for subdivision (5) of this section, as it existed prior to the 1981 amendment, to apply, three circumstances had to exist: (1) The action had to be for recovery of damages to real or personal property; (2) The damages had to arise out of the defective and unsafe condition of an improvement to real property; and (3) The party sued must have been involved in the designing, planning or construction of the defective or unsafe improvement. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

The injury contemplated by subdivision (5) of this section is obviously not the defective and unsafe condition itself; the statutory language indicates that the injury is something subsequent to and caused by the defective condition and must mean the temporal damage caused by the condition. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (5) Not Applicable to Property Severed from Realty. — In an action by an insurer for damages for defendant's alleged breach of warranty and negligent failure to properly repair a furnace transformer, where the transformer was not part of the realty at any time defendant was repairing it, but had been severed and removed from its plant by the insured and sent to defendant's plant by railroad flatcar for repair, subdivision (5) of this section clearly was not applicable. *Employers Com. Union Co. of Am. v. Westinghouse Elec. Corp.*, 15 N.C. App. 406, 190 S.E.2d 364 (1972).

As to nonapplicability of subdivision (5) to a simple breach of contract by defective performance, prior to the 1981 amendment, see *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978).

Legislature intended, in subdivision (5), to benefit only those persons who were not in possession and control of the real property at the time the defective or unsafe condition of such improvement constituted the proximate cause of the injury or damage for which the action was brought. Hence, an action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property is governed by § 1-52(5), the three-year statute of limitations, rather than by subdivision (5) of this section. *Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 194 S.E.2d 817 (1973), decided prior to 1981 amendment.

The legislature intended in subdivision (5) of this section to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought against persons in possession and control of an improvement to real property who might also have designed or built the improvement. If, of course, persons in possession and control neither designed nor built the improvement, then the first sentence would by its own terms have no application. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

The purpose of the second sentence of subdivision (5) of this section is to preserve these kinds of claims by exempting them from the limiting period, since if those in possession and control also happen to have designed or built the improvement, a not uncommon occurrence, then claims against them brought beyond the limiting period would be barred were it not for the exclusionary sentence. *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302 S.E.2d 868 (1983).

Section Held Inapplicable to Tenant's Corporate Successor. — The six-year statute of limitations of this section did not apply to an action for fraud arising out of the collapse of the floor of a building, where the corporate tenant of the building merged into the successor

corporate plaintiff after the building collapsed, since the plaintiff succeeded to the rights of the corporate tenant and thus was in actual possession and control of the building as tenant at the time of the injury. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981), decided prior to 1981 amendment.

Action against Architect for Negligence Arising out of Construction Project. — The effect of § 1-52(5) and former § 1-15(b) was that the date of the accrual of a cause of action against an architect for negligence arising out of a construction project was deemed to be the date of discovery of the defective or unsafe condition of a structure, and that the action had to be brought within three years thereafter, and subdivision (5) of this section set an outside limit on the right to sue, requiring that the action be brought within six years after construction was completed, except that it was not applicable "to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980), decided prior to 1981 amendment.

VI. DEFECTIVE PRODUCTS.

Power of Legislature. — That the legislature has the authority to establish a condition precedent to what was originally a common-law cause of action is beyond question. The legislature created just such a condition precedent in subdivision (6) of this section. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Purpose of Subdivision (6). — Subdivision (6) of this section was enacted with Chapter 99B to provide a period of limitations for actions to which that Chapter applies. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Subdivision (6) of this section is intended to be a substantive definition of rights, as distinguished from a procedural limitation on the remedy used to enforce rights. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Statutes such as subdivision (6) of this section, running from a time other than accrual of an action, are substantive rather than procedural limitations. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Which Establishes an Outside Time Limit for Bringing Suit. — Subdivision (6) of this section does not extend the negligence statute of limitations from three to six years, but instead establishes an outside time limit for bringing a personal injury claim based upon a defective product. *Bobbit v. Tannewitz*, 538 F. Supp. 654 (M.D.N.C. 1982).

Subdivision (6) as Statute of Repose. — Although labeled a statute of limitations, subdivision (6) of this section is more properly referred to as a statute of repose, in that it places a cap or outer limit on the time period within which a products liability action may be brought, irrespective of when the claim accrues. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Statutes such as subdivision (6) of this section have been denominated "statutes of repose" by commentators and practitioners because they set a fixed limit after the time of the product's manufacture, sale or delivery beyond which the seller will not be held liable. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Subdivision (6) Not Applicable to Claims Accruing before October 1, 1979. — Since subdivision (6) of this section makes substantive changes in the law of products liability, it does not apply to claims arising before October 1, 1979. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Because subdivision (6) of this section is a substantive change in the conditions precedent to a cause of action, the legislature did not intend that subdivision (6) be retrospectively applied to causes of action that had accrued before its effective date of October 1, 1979. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Dismissal on Ground of Former § 1-15(b) Held Error. — In an action for tort and breach of warranties, trial court erred in dismissing plaintiffs' claims of negligence and strict liability instituted in 1979, for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer, on the ground that the claims were barred by the three-year limitation of former § 1-15(b), where plaintiffs

alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and

whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. *Gillespie v. American Motors Corp.*, 51 N.C. App. 535, 277 S.E.2d 100 (1981).

§ 1-51. Five years.

Within five years —

- (1) No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right-of-way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.
- (2) No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (1893, c. 152; 1895, c. 224; 1897, c. 339; Rev., s. 394; C.S., s. 440.)

Local Modification. — Burke: Pub. Loc., 1925, c. 535; Caldwell: Pub. Loc., 1927, c. 119; Haywood: Pub. Loc., 1923, c.

433; McDowell: Pub. Loc., 1925, c. 535; Mitchell, Yancey: Pub. Loc., 1923, c. 433.

CASE NOTES

Constitutionality. — This section is not violative of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. *Narron v. Wilmington & W.R.R.*, 122 N.C. 856, 29 S.E. 356 (1898).

Power of Legislature. — The legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. *Nichols v. Norfolk & C.R.R.*, 120 N.C. 495, 26 S.E. 643 (1897).

Actions under this Section and § 1-52 Distinguished. — In actions for damages against a railroad company arising from alleged negligence with respect to its roadbed, this section applies as to injuries arising from the original and permanent construction of the road, properly maintained; but as to injuries arising from the negligent

failure of defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding institution of the action, as in ordinary cases of recurrent injury. *Perry v. Norfolk S.R.R.*, 171 N.C. 38, 87 S.E. 948 (1916).

This section does not apply to a suit begun before its passage. *Nichols v. Norfolk & C.R.R.*, 120 N.C. 495, 26 S.E. 643 (1897); *Harrell v. Norfolk & C.R.R.*, 122 N.C. 822, 29 S.E. 56 (1898).

This section has no application to an action in ejectment by the owner of the fee to recover that part of the right-of-way no longer used by the railroad company or its lessee for railroad purposes. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 700 (1950).

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights-of-way or

use and occupancy. *Carolina & Northwestern Ry. v. Piedmont Wagon & Mfg. Co.*, 229 N.C. 695, 51 S.E.2d 301 (1949), discussed in 27 N.C.L. Rev. 579.

Section Applies Only to Railroads.

— This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. *Cherry v. Canal Co.*, 140 N.C. 422, 53 S.E. 138 (1906).

And Is Inapplicable to Telegraph Companies. — The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. *Teeter v. Postal Telegraph-Cable Co.*, 172 N.C. 783, 90 S.E. 941 (1916).

In case of railroads, the period within which actions for continuing trespasses may be brought has been reduced to five years, but there being no such statute in respect of telegraph companies, the common-law period of 20 years is required. *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942). See also, *Geer v. Durham Water Co.*, 127 N.C. 349, 37 S.E. 474 (1900).

When Statute Begins to Run — Generally. — The statute begins to run from the date of the first substantial injury. *Ridley v. Seaboard & R.R.R.*, 118 N.C. 996, 24 S.E. 730 (1896); *Beach v. Wilmington & W.R.R.*, 120 N.C. 498, 26 S.E. 703 (1897); *Stack v. Railroad*, 139 N.C. 366, 51 S.E. 1024 (1905); *Staton v. Atlantic Coast Line R.R.*, 147 N.C. 428, 61 S.E. 455 (1908); *Pickett v. Atlantic Coast Line R.R.*, 153 N.C. 148, 69 S.E. 8 (1910).

The statute of limitations begins to run, in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal but yet would be a bar to any future action. *Beach v. Wilmington & W.R.R.*, 120 N.C. 498, 26 S.E. 703 (1897).

Under this section, actions for damages occasioned by the construction of railroads are to be commenced within five years after the cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. *Lassiter v. Norfolk & C.R.R.*, 126 N.C. 509, 36 S.E. 48 (1900).

Same — Diversion of Water Caused by Insufficient Culvert. — This section did not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. *Savage v. Norfolk S.R.R.*, 168 N.C. 241, 84 S.E. 292 (1915).

Same — Damages Arising after Construction. — This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. *Barclift v. Norfolk S.R.R.*, 175 N.C. 114, 95 S.E. 39 (1918).

Same — Against Remainderman. — The right of action of a remainderman against a railroad to recover lands accrues upon the death of the life tenant. *Young v. Atlantic Coast Line R.R.*, 189 N.C. 238, 126 S.E. 600 (1925).

Permanent Damages to Be Assessed. — The evident meaning of this section is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. *Nichols v. Norfolk & C.R.R.*, 120 N.C. 495, 26 S.E. 643 (1897). See also, *Strickland v. Draughan*, 91 N.C. 103 (1884); *Beach v. Wilmington & W.R.R.*, 120 N.C. 498, 26 S.E. 703 (1897).

In actions brought for damages to crops and personal injuries, since the passage of this section, only permanent damages, i.e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. *Ridley v. Seaboard & R.R.R.*, 124 N.C. 34, 32 S.E. 325 (1899).

If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. *Lassiter v. Norfolk & C.R.R.*, 126 N.C. 509, 36 S.E. 48 (1900).

The assessment of "permanent damages" in a case against a railroad for injuries to land in the construction or repair of its roadbed is compulsory. *Beasley v. Aberdeen & R.R.R.*, 147 N.C. 362, 61 S.E. 453 (1908); *Pickett v. Atlantic Coast Line R.R.*, 153 N.C. 148, 69 S.E. 8 (1910).

What Damages Contemplated by Section. — The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the inquiry to the time of trial, which may be assessed by the jury on separate issues as to each. *Barclift v. Norfolk S.R.R.*, 175 N.C. 114, 95 S.E. 39 (1918).

Amount of Damages Recoverable. — The amount recoverable is not the estimated sum of all future damages expected to result from a continuing trespass, but rather, the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land or such use thereof as may be necessary to the easement. *Beach v. Wilmington & W.R.R.*, 120 N.C. 498, 26 S.E. 703 (1897).

This section does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. While, if entitled thereto, he must recover them in the same action, they need not necessarily be submitted in the same issue. In fact, it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong, while the other is the conveyance of a right, as the allowance of permanent damages under this section is in effect the condemnation of land to the use of a statutory easement. *Lassiter v. Norfolk & C.R.R.*, 126 N.C. 509, 36 S.E. 48 (1900).

Allowance of Interest. — It is within the power of the lower court to allow interest on the amount found, since the actual taking by the railroad company of the owner's land for its right-of-way, as a part of the damages. *Abernathy v. South & W. Ry.*, 159 N.C. 340, 74 S.E. 890 (1912).

Right of Railroad to Pay for Damages and Abate Cause of Injury. — Where railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury, without being forced to purchase the easement under this section. *Lassiter v.*

Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Damages for Permanent Ditch. — While a ditch is not necessarily a permanent structure, ditches may be made permanent, as far as plaintiff is concerned, by the refusal of defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as is clearly intended by the statute. *Lassiter v. Norfolk & C.R.R.*, 126 N.C. 509, 36 S.E. 48 (1900).

Recovery by Present Owner. — The present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted an action therefor before his sale and conveyance of the land. *Louisville & N.R.R. v. Nichols*, 187 N.C. 153, 120 S.E. 819 (1924).

Section Must Be Specially Pleaded by Railroad. — This section, with regard to bringing an action against a railroad for damages for a right-of-way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. *Abernathy v. South & W. Ry.*, 159 N.C. 340, 74 S.E. 890 (1912).

Action Held Barred. — An action against a railroad company for damages caused to plaintiff's lands by an embankment built by defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that existed since, was barred by the statute of limitations after five years. *Campbell v. Raleigh & C.R.R.*, 159 N.C. 586, 75 S.E. 1105 (1912).

Action Not Barred. — An amendment to the complaint in an action against a railroad company to recover for crop damage caused by diversion of the natural flow of water, so as to allege permanent damages to the land, did not add a new cause of action, but related only to the measure of damages arising from the injury; and this section would not bar the plaintiff by reason of the amendment alone. *Pickett v. Atlantic Coast Line R.R.*, 153 N.C. 148, 69 S.E. 8 (1910).

As to prior law, see *Ridley v. Seaboard & R.R.R.*, 118 N.C. 996, 24 S.E.

730 (1896); *Parker v. Norfolk & C.R.R.*, 119 N.C. 677, 25 S.E. 722 (1896); *Nichols v. Norfolk & C.R.R.*, 120 N.C. 495, 26 S.E. 643 (1897); *Harrell v. Norfolk & C.R.R.*, 122 N.C. 822, 29 S.E. 56 (1898); *Ridley v. Seaboard & R.R.R.*, 124 N.C. 34, 32 S.E. 325 (1899).

Applied in *Owenby v. Louisville & N.R.R.*, 165 N.C. 641, 81 S.E. 997 (1914); *Poore v. Norfolk-Southern Ry.*, 30 N.C. App. 104, 226 S.E.2d 170 (1976).

Quoted in *Blevins v. Northwest Carolina Util., Inc.*, 209 N.C. 683, 184 S.E. 517 (1936).

§ 1-52. Three years.

Within three years an action —

- (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).
- (2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.
- (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.
- (4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.
- (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
- (6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.
- (7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.
- (8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.
- (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.
- (10) Repealed by Session Laws 1977, c. 886, s. 1.
- (11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.
- (12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c).
- (13) Against a public officer, for a trespass, under color of his office.

- (14) An action under Chapter 75B of the General Statutes, the action in regard to a continuing violation accrues at the time of the latest violation.
- (15) For the recovery of taxes paid as provided in G.S. 105-267 and G.S. 105-381.
- (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.
- (17) Against a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed or by October 1, 1984, whichever is later. (C.C.P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C.S., s. 441; 1945, c. 785; 1971, c. 939, s. 1; 1975, c. 252, ss. 2, 4; 1977, c. 886, s. 1; c. 916, s. 2; c. 946, s. 4; 1979, c. 654, s. 3; 1981, c. 702; c. 777, s. 4.)

Cross References. — As to accrual of cause of action for professional malpractice, see § 1-15(c). As to actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property, see § 1-50(5).

Editor's Note. — Session Laws 1979, c. 654, which added subdivision (16), provides in s. 6: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."

Session Laws 1979, c. 654, s. 7, provides: "This act shall not affect pending litigation."

Session Laws 1981, c. 777, which added "or in G.S. 1-53(1)" at the end of subdivision (1), provides in s. 5: "This act is effective upon ratification, but shall not apply to pending claims."

Legal Periodicals. — For comment on limitations as to claims between spouses, see 44 N.C.L. Rev. 197 (1965).

For comment on running of limitations against equitable claims, see 44 N.C.L. Rev. 202 (1965).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For note on when a cause of action accrues for limitations purposes in medical malpractice — the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For article discussing product liability as affected by statutes of repose, see 61 N.C.L. Rev. 33 (1982).

CASE NOTES

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I. IN GENERAL.

Statutes of limitation may be characterized as a right not to be sued beyond the time limited. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

Statutes of limitations are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971); *Plott v. Wachovia Bank & Trust Co.*, 12 N.C. App. 694, 184 S.E.2d 384 (1971); *Blue Cross & Blue Shield v. Odell Assocs.*, — N.C. App. —, 301 S.E.2d 459 (1983).

And the court has no discretion when considering whether a claim is barred by the statute of limitations. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Right of Defendant to Rely on Statute as a Defense. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Operation of Statute Not Interrupted by Unavailability of Information. — The unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations. *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The fact that a person, in good faith, pursued another remedy, which turned out to be unavailable, does not extend the time allowed by the statute for the institution of an action. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Classification of Limitations Is Based upon Nature of Right, Rather than Remedy. — There is no suggestion of classification in the limitations statutes on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

The bar is applied under this section, not to the mode in which relief is sought, but to the relief itself. *Spruill v. Sanderson*, 79 N.C. 466 (1878).

Section Applies even though Enforcing Remedy Is Equitable Lien.

— Ten-year statute which applies when title to property is at issue does not apply where the action is merely for breach of contract, even though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is 10 years. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Equitable Estoppel Applies.

— The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations or conduct the repudiation of which would amount to a breach of good faith. *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959).

The doctrine of equitable estoppel will toll a limitation only when it is the defendant himself who has misled the plaintiff, in such a manner as to make strict application of the limitation inequitable. *Camack v. Hardee's Food Sys.*, 410 F. Supp. 469 (M.D.N.C. 1976).

When Relief Will Be Barred by Laches. — Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. *Howell v. Alexander*, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Section Not Retroactive. — A bond for the payment of money executed prior to enactment of this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N.C. 709 (1874).

The defense of the statute is not barred by the existence of a fiduciary relation between the parties. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

As to the effect of § 1A-1, Rule 41(a)(2) upon the statute of limitations where actions are twice dismissed and recommenced in accordance with that rule, see *Parrish v. Uzzell*, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

Statute Begins to Run when Plaintiff's Right to Maintain Action Accrues. — The period of the statute of limitations begins to run when plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete,

even though the injured party did not then know the wrong had been committed. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 19, 171 S.E.2d 873 (1970).

A cause of action accrues to an injured party, so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 176 S.E.2d 751 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. *Williams v. GMC*, 393 F. Supp. 387 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976).

And when Defendant Becomes Liable to Suit. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. *Lewis v. Godwin Oil Co.*, 1 N.C. App. 570, 162 S.E.2d 135 (1968).

The claim accrues at the time of invasion of the right, and nominal damages, at least, flow from such invasion. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptance of that term, at once springs into existence and the cause of action is complete. *Lewis v. Godwin Oil Co.*, 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Once the statute of limitations begins to run against an action, it continues to run. *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

And Nothing Stops It. — Once the period of limitation begins to run nothing stops it. *Davis v. E.I. DuPont DeNemours & Co.*, 400 F. Supp. 1347 (W.D.N.C. 1974).

Except Appropriate Judicial Process. — When the statute begins to run, it continues until stopped by appropriate judicial process. *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966); *Jamestown Mut. Ins. Co. v.*

Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971); *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E.2d 234, cert. granted, 295 N.C. 552, 248 S.E.2d 725 (1978).

Statute Runs between Spouses. — Statutes of limitation run as well between spouses as between strangers. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Disability. — This statute does not begin running against a person under disability, such as infancy, until the disability is removed, notwithstanding the fact that the cause may have otherwise accrued prior to that time. *Settle v. Settle*, 141 N.C. 553, 54 S.E. 445 (1906).

The statute runs against an infant as to all rights of action which the guardian might bring and which it was incumbent on him to bring, insofar as may be consistent with the limitations of his office, except in suits for realty where the legal title is in the ward. *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960).

Mere Assertion as Insufficient Plea of Statute. — The mere assertion, without any allegation of supporting facts, that plaintiff's cause of action is barred by the statute is insufficient to constitute plea in bar. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Relation Back of Amended Complaint. — Where the original pleadings clearly gave notice of the transactions, occurrences or series of transactions or occurrences to be proved pursuant to the amended pleadings, and the essential details were alleged in substantially the same fashion in both the original and the amended complaints, the original pleadings placed defendants on notice of the events involved and the amended complaint related back for purposes of the statute of limitations. *Clary v. Nivens*, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

Where an action was commenced by the issuance of summons and filing of a complaint before the running of the three-year statute of limitations, an amended complaint related back to the issuance of the summons and the filing of the original complaint where the amendment did not in any way alter the substance of the complaint. *Jones v.*

Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982).

When Judgment on Pleadings Proper. — A judgment on the pleadings based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the nonmovant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. *Land v. Neill Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E.2d 537 (1969).

Where the statute of limitations is properly pleaded and all facts are admitted or established, the question of limitations becomes a matter of law, and summary judgment is appropriate. *Blue Cross & Blue Shield v. Odell Assocs.*, — N.C. App. —, 301 S.E.2d 459 (1983).

Once the statute is pleaded, the burden is on the plaintiff to show that the action was brought within the applicable period. *Parker v. Harden*, 121 N.C. 57, 28 S.E. 20 (1897); *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 113 S.E.2d 270 (1960); *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965); *Lewis v. Godwin Oil Co.*, 1 N.C. App. 570, 162 S.E.2d 135 (1968); *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970); *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974); *Burkhimer v. Gealy*, 39 N.C. App. 450, 250 S.E.2d 678, cert. denied, 297 N.C. 298, 254 S.E.2d 918 (1979); *Silver v. North Carolina Bd. of Transp.*, 47 N.C. App. 261, 267 S.E.2d 49 (1980).

And Not on Defendant. — While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

Directed Verdict Where Plaintiff Fails to Sustain Burden. — If plaintiff fails to introduce evidence to carry the burden of proving that the action was instituted within the prescribed period,

the trial judge can allow a defense motion for a directed verdict. *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974).

Propriety of Summary Judgment when Claim Is Barred. — If the plaintiff's claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law, and summary judgment, under § 1A-1, Rule 56, is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

As to the grant of a nonsuit where party against whom statute was pleaded fails to sustain his burden, see *Solon Lodge v. Ionic Lodge*, 147 N.C. 310, 101 S.E.2d 8 (1957); *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

Ordinarily, the bar of the statute of limitations is a mixed question of law and fact. *Yancey v. Watkins*, 17 N.C. App. 515, 195 S.E.2d 89, cert. denied, 283 N.C. 394, 196 S.E.2d 277 (1973); *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974).

When Bar of Limitations Is a Matter of Law. — Where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitations becomes a matter of law. *Yancey v. Watkins*, 17 N.C. App. 515, 195 S.E.2d 89, cert. denied, 283 N.C. 394, 196 S.E.2d 277 (1973).

Where the facts are admitted or established, the trial court may sustain the plea to dismiss as a matter of law. *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974).

When the Issue Is a Jury Question. — Where the evidence is sufficient to support an inference that the cause of action is not barred, the issue is for the jury. *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974).

Where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of this section and not by § 1-56. *Reynolds v. Whitin Mach. Works*, 167 F.2d 78 (4th Cir.), cert. denied, 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948).

This section was not applicable to an action specifically brought under former § 105-414. *Miller v. McConnell*, 226 N.C. 28, 36 S.E.2d 722 (1946).

A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year statute of limitations, § 1-56, and not by this section. *Howell v. Alexander*, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Section Not Applicable to Action to Recover Share of Estate. — An action by an administrator to recover his intestate's share of an estate is governed by § 1-56, which provides that actions not otherwise provided for shall be brought within 10 years, and not this section. *Hunt v. Wheeler*, 116 N.C. 422, 21 S.E. 915 (1895).

Action Not Barred. — An action for malicious prosecution or abuse of process was not barred by this section, where the action was begun two years, 11 months and 21 days after the plaintiff was discharged from the State hospital. *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

In an action to recover damages from defendant attorneys-at-law, for failing properly to file a cause of action on behalf of the plaintiff, the claim accrued at the time of the filing of the defective summons. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971). As to actions for professional malpractice, see now § 1-15(c).

For cases as to recovery of real property sold for nonpayment of taxes under former subdivision (10) of this section, see *Lyman v. Hunter*, 123 N.C. 508, 31 S.E. 827 (1898); *Kivett v. Gardner*, 169 N.C. 78, 85 S.E. 145 (1915); *Jordan v. Simmons*, 169 N.C. 140, 85 S.E. 214 (1915); *Ruark v. Harper*, 178 N.C. 249, 100 S.E. 584 (1919); *Smith v. Allen*, 181 N.C. 56, 106 S.E. 143 (1921); *Price v. Slagle*, 189 N.C. 757, 128 S.E. 161 (1925); *Bailey v. Howell*, 209 N.C. 712, 184 S.E. 476 (1936).

Applied in *Hall v. Hood*, 208 N.C. 59, 179 S.E. 27 (1935); *Copley v. Scarlett*, 214 N.C. 31, 197 S.E. 623 (1938); *Johnson v. Pilot Life Ins. Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939); *Howard v. White*, 215 N.C. 130, 1 S.E.2d 356 (1939); *Bynum v. Life Ins. Co.*, 222 N.C. 742, 24 S.E.2d 613 (1943); *Sayer v. Henderson*, 225 N.C. 642, 35 S.E.2d 875 (1945); *Craver v. Spaugh*, 227 N.C. 129, 41 S.E.2d 82 (1947); *Henderson v. Henderson*, 232 N.C. 1, 59 S.E.2d 227 (1950); *Lewis v. Shaver*, 236 N.C. 510, 73

S.E.2d 320 (1952); *Merchants & Planters Nat'l Bank v. Appleyard*, 238 N.C. 145, 77 S.E.2d 783 (1953); *Crowell v. Eastern Air Lines*, 240 N.C. 20, 81 S.E.2d 178 (1954); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *Graham v. Taylor Biscuit Co.*, 161 F. Supp. 435 (M.D.N.C. 1957); *Nowell v. Neal*, 249 N.C. 516, 107 S.E.2d 107 (1959); *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959); *Horne v. Cloninger*, 256 N.C. 102, 123 S.E.2d 112 (1961); *Snyder v. Wylie*, 239 F. Supp. 999 (W.D.N.C. 1965); *Matthieu v. Piedmont Nat'l Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967); *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E.2d 108 (1967); *Cobb v. Clark*, 4 N.C. App. 230, 166 S.E.2d 692 (1969); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972); *Wall v. Flack*, 15 N.C. App. 747, 190 S.E.2d 671 (1972); *Ford Motor Credit Co. v. Minges*, 473 F.2d 918 (4th Cir. 1973); *Little v. Rose*, 21 N.C. App. 596, 205 S.E.2d 150 (1974); *Brantley v. Meekins*, 22 N.C. App. 683, 207 S.E.2d 377 (1974); *Luther v. Hauser*, 24 N.C. App. 71, 210 S.E.2d 218 (1974); *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975); *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702 (1975); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); *Howard v. Hamilton*, 28 N.C. App. 670, 222 S.E.2d 913 (1976); *Shuler v. Gaston County Dyeing Mach. Co.*, 30 N.C. App. 577, 227 S.E.2d 634 (1976); *Pinkston v. Baldwin*, Lima, Hamilton Co., 292 N.C. 260, 232 S.E.2d 431 (1977); *Ward v. Hotpoint Div., Gen. Elec. Co.*, 35 N.C. App. 495, 241 S.E.2d 710 (1978); *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978); *Johnson v. Ryder Truck Lines*, 575 F.2d 471 (4th Cir. 1978); *Federal Deposit Ins. Corp. v. Loft Apts., Ltd. Partnership*, 39 N.C. App. 473, 250 S.E.2d 693 (1979); *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E.2d 684 (1979); *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980); *Brickell v. Collins*, 44 N.C. App. 707, 262 S.E.2d 387 (1980); *Hill v. Pinelawn Mem. Park*, 50 N.C. App. 231, 275 S.E.2d 838 (1981); *Hill v. Lassiter*, 51 N.C. App. 34, 275 S.E.2d 237 (1981); *Chambers v. McLean Trucking Co.*, 550 F. Supp. 1335 (M.D.N.C. 1981); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Quoted in *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184 (4th Cir. 1977); *Selby v.*

Taylor, 57 N.C. App. 119, 290 S.E.2d 767 (1982).

Stated in *Life Ins. Co. v. Edgerton*, 206 N.C. 402, 174 S.E. 96 (1934); *Chas. R. Shepherd, Inc. v. Clement Bros. Co.*, 177 F. Supp. 288 (W.D.N.C. 1959); *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960); *Gelder & Assocs. v. Huggins*, 52 N.C. App. 336, 278 S.E.2d 295 (1981); *Strong v. Johnson*, 53 N.C. App. 54, 280 S.E.2d 37 (1981); *Cheshire v. Carolina Power & Light Co.*, 54 N.C. App. 467, 283 S.E.2d 810 (1981); *Poore v. Swan Quarter Farms, Inc.*, 57 N.C. App. 97, 290 S.E.2d 799 (1982); *Bobbitt v. Tannewitz*, 538 F. Supp. 654 (M.D.N.C. 1982).

Cited in *Ross v. Henderson*, 77 N.C. 170 (1877); *Mask v. Tiller*, 89 N.C. 423 (1883); *Moore v. Garner*, 101 N.C. 374, 7 S.E. 732 (1888); *Lanning v. Commissioners of Transylvania County*, 106 N.C. 505, 11 S.E. 622 (1890); *Muse v. London Assurance Corp.*, 108 N.C. 240, 13 S.E. 94 (1891); *Bray v. Creekmore*, 109 N.C. 49, 13 S.E. 723 (1891); *Stubbs v. Motz*, 113 N.C. 458, 18 S.E. 387 (1893); *Alpha Mills v. Watertown Steam Engine Co.*, 116 N.C. 797, 21 S.E. 917 (1895); *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898); *Rouss v. Ditmore*, 122 N.C. 775, 30 S.E. 335 (1898); *Harris v. Davenport*, 132 N.C. 697, 44 S.E. 406 (1903); *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578 (1903); *Sanderlin v. Cross*, 172 N.C. 234, 90 S.E. 213 (1916); *Chatham v. Mecklenburg Realty Co.*, 180 N.C. 500, 105 S.E. 329 (1920); *In re Will of Johnson*, 182 N.C. 522, 109 S.E. 373 (1921); *Latham v. Latham*, 184 N.C. 55, 113 S.E. 623 (1922); *Dayton v. City of Asheville*, 185 N.C. 12, 115 S.E. 827 (1923); *Little v. Bank of Wadesboro*, 187 N.C. 1, 121 S.E. 185 (1924); *Rhodes v. Tanner*, 197 N.C. 458, 149 S.E. 552 (1929); *Griffith Profitt Co. v. English*, 198 N.C. 66, 150 S.E. 619 (1929); *Fort Worth & D.C. Ry. v. Hegwood*, 198 N.C. 309, 151 S.E. 641 (1930); *Heath v. Moncrief Furnace Co.*, 200 N.C. 377, 156 S.E. 920 (1931); *Johnson Cotton Co. v. Alex. Sprunt & Co.*, 201 N.C. 419, 160 S.E. 457 (1931); *Van Kempen v. Latham*, 201 N.C. 505, 160 S.E. 759 (1931); *Efird v. Sikes*, 206 N.C. 560, 174 S.E. 513 (1934); *State ex rel. Hicks v. Purvis*, 208 N.C. 227, 180 S.E. 88 (1935); *McCormick v. Jackson*, 209 N.C. 359, 183 S.E. 369 (1936); *Teseneer v. Henrietta Mills Co.*, 209 N.C. 615, 184 S.E. 535 (1936); *Carter v. Bost*, 209 N.C. 830, 184 S.E. 817 (1936); *Mebane Graded School Dist. v.*

County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937); *Powell v. Malone*, 22 F. Supp. 300 (M.D.N.C. 1938); *Ritter v. Chandler*, 214 N.C. 703, 200 S.E. 398 (1939); *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939); *State ex rel. Thacker v. Fidelity & Deposit Co.*, 216 N.C. 135, 4 S.E.2d 324 (1939); *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940); *Powers v. Planters Nat'l Bank & Trust Co.*, 219 N.C. 254, 13 S.E.2d 431 (1941); *Curran v. Curran*, 219 N.C. 815, 15 S.E.2d 279 (1941); *Garrett v. Stadiem*, 220 N.C. 654, 18 S.E.2d 178 (1942); *Roberts v. Grogan*, 222 N.C. 30, 21 S.E.2d 829 (1942); *Lee v. Johnson*, 222 N.C. 161, 22 S.E.2d 230 (1942); *Lister v. Lister*, 222 N.C. 555, 24 S.E.2d 342 (1943); *Small v. Dorsett*, 223 N.C. 754, 28 S.E.2d 514 (1944); *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 226 N.C. 371, 38 S.E.2d 214 (1946); *Venus Lodge No. 62, F. & A.M. v. Acme Benevolent Ass'n*, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950); *Bame v. Palmer Stone Works, Inc.*, 232 N.C. 267, 59 S.E.2d 812 (1950); *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950); *Quevedo v. Deans*, 234 N.C. 618, 68 S.E.2d 275 (1951); *United States v. Lance, Inc.*, 95 F. Supp. 327 (W.D.N.C. 1951); *Wilson v. Chandler*, 235 N.C. 373, 70 S.E.2d 179 (1952); *Lyda v. Marion*, 239 N.C. 265, 79 S.E.2d 726 (1954); *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955); *Reuning v. Henkel*, 138 F. Supp. 492 (W.D.N.C. 1956); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958); *Piedmont Natural Gas Co. v. Day*, 249 N.C. 482, 106 S.E.2d 678 (1959); *Edwards v. Arnold*, 250 N.C. 500, 109 S.E.2d 205 (1959); *Styers v. City of Gastonia*, 252 N.C. 572, 114 S.E.2d 348 (1960); *Thurston Motor Lines, Inc. v. GMC*, 258 N.C. 323, 128 S.E.2d 413 (1962); *J.G. Dudley Co. v. Commissioner*, 298 F.2d 750 (4th Cir. 1962); *Clardy v. Duke Univ.*, 299 F.2d 368 (1962); *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965); *Brannock v. Fletcher*, 271 N.C. 65, 155 S.E.2d 532 (1967); *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 157 S.E.2d 693 (1967); *Jones v. Warren*, 274 N.C. 166, 161 S.E.2d 467 (1968); *In re Estate of Nixon*, 2 N.C. App. 422, 163 S.E.2d 274 (1968); *Estridge v. Crab Orchard Dev. Co.*, 5

N.C. App. 604, 169 S.E.2d 53 (1969); *Tippett v. Liggett & Myers Tobacco Co.*, 316 F. Supp. 292 (M.D.N.C. 1970); *Creasman v. First Fed. Sav. & Loan Ass'n*, 279 N.C. 361, 183 S.E.2d 115 (1971); *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971); *Webb v. Nolan*, 361 F. Supp. 418 (M.D.N.C. 1972), *aff'd*, 484 F.2d 1049 (4th Cir. 1973); *Henry v. Henry*, 18 N.C. App. 60, 196 S.E.2d 33 (1973); *Hodges v. Johnson*, 22 N.C. App. 308, 206 S.E.2d 318 (1974); *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975); *Poore v. Norfolk-Southern Ry.*, 30 N.C. App. 104, 226 S.E.2d 170 (1976); *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978); *Bank of N.C. v. Cranfill*, 37 N.C. App. 182, 245 S.E.2d 538 (1978); *Earls v. Link, Inc.*, 38 N.C. App. 204, 247 S.E.2d 617 (1978); *Harris v. Family Medical Center*, 38 N.C. App. 716, 248 S.E.2d 768 (1978); *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Bank of N.C. v. Cranfill*, 297 N.C. 43, 253 S.E.2d 1 (1979); *Troy's Stereo Center, Inc. v. Hodson*, 39 N.C. App. 591, 251 S.E.2d 673 (1979); *Snyder v. Freeman*, 40 N.C. App. 348, 253 S.E.2d 10 (1979); *Danielson v. Cummings*, 43 N.C. App. 546, 259 S.E.2d 332 (1979); *Feibus & Co. v. Godley Constr. Co.*, 44 N.C. App. 133, 260 S.E.2d 665 (1979); *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979); *Pinehurst Airlines v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979); *Poston v. Morgan-Schultheiss, Inc.*, 46 N.C. App. 321, 265 S.E.2d 615 (1980); *Central Systems v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 268 S.E.2d 822 (1980); *Chears v. Robert A. Young & Assocs.*, 49 N.C. App. 669, 272 S.E.2d 402 (1980); *Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 1980); *Gaskins v. McCotter*, 52 N.C. App. 322, 278 S.E.2d 302 (1981); *Tyson v. North Carolina Nat'l Bank*, 53 N.C. App. 189, 280 S.E.2d 478 (1981); *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E.2d 559 (1981); *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188 (1981); *Terry v. Lowrance Hosp.*, 54 N.C. App. 663, 284 S.E.2d 128 (1981); *Lea Co. v. North Carolina Bd. of Transp.*, 57 N.C. App. 392, 291 S.E.2d 844 (1982); *Shepherd v. Shepherd*, 57 N.C. App. 680, 292 S.E.2d 169 (1982); *North Carolina State Treas. v. City of Asheville*, — N.C. App. —, 300 S.E.2d 283 (1983); *Lamb v. Wedgewood S. Corp.*, — N.C. —, 302

S.E.2d 868 (1983); Biesecker v. Biesecker, — N.C. App. —, 302 S.E.2d 826 (1983).

II. CONTRACTS.

A. In General.

Statute Begins to Run when Breach Occurs. — The three-year period of the statute of limitations governing actions based on express contracts does not begin to run until the alleged breach occurs and the cause of action accrues. *Silver v. North Carolina Bd. of Transp.*, 47 N.C. App. 261, 267 S.E.2d 49 (1980); *Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 284 S.E.2d 523 (1981).

The statute begins to run on the date the promise is broken. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960); *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E.2d 234, cert. granted, 295 N.C. 552, 248 S.E.2d 725 (1978).

Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in § 1-17. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

The statute of limitations does not begin to run until the contract is breached. *Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E.2d 620 (1982).

It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

Or That Consequences Are Not Discovered or Discoverable When Cause of Action Accrues. — It is unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

A new promise to pay fixes a new date from which the statute runs. Such promise, to be binding, must be in writing as required by § 1-26. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960).

Effect of Partial Payment. — A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the

debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 238 S.E.2d 607 (1977).

Payment after Statute Had Run. — Where a chattel mortgage on crops secured payment of the maker's note and the mortgagee endorsed the note, and mortgaged to another, the bar of the three-year statute of limitations which had otherwise run would not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser was not sufficient. *Nance v. Hulin*, 192 N.C. 665, 135 S.E. 774 (1926).

Effect of Exercise of Acceleration Clause in Note. — Where the holder of a note exercised the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause was effective as to a third comaker, even though he was not made a party to the action, and action on the note against the third comaker was barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. *Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 127 S.E.2d 767 (1962).

Necessity for Demand where Fiduciary Relation Exists. — Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. *Efird v. Sikes*, 206 N.C. 560, 174 S.E. 513 (1934).

Running of Statute as between Partners. — As between partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership

and his refusal to account. *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963); *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

When Statute Begins to Run as to Express Trust. — In the case of an express trust, the statute begins to run when the trustee disavows the trust with the knowledge of the cestui que trust. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations running, unless and until such repudiation and claim are made known to the beneficiary of the trust so as to require him to assert his rights. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E.2d 582 (1963); *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E.2d 764 (1947); *Speights v. Carraway*, 247 N.C. 220, 100 S.E.2d 339 (1957).

Or when Contract Is Abandoned. — Where it was agreed that services were to be rendered during the life of recipient and compensation was to be provided in the will of recipient, and the contract is abandoned, the cause of action accrues at the time of abandonment of the contract. *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Accrual of Action for Compensation for Services Absent Arrangement as to Time for Compensation. — Where recovery of compensation for services rendered is sought upon implied contract or quantum meruit, and the arrangement is for indefinite and continuous service, without any definite arrangement as to time for compensation, and payment may be required toties quoties, the implied promise is to pay for services as they are rendered, and payment may be required whenever any are rendered; thus the statute is silently

and steadily excluding so much as are beyond the prescribed limitation. *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

As to the running of the statute on the amount unpaid on subscriptions to the capital stock of a corporation, see *Windsor Redrying Co. v. Gurley*, 197 N.C. 56, 147 S.E. 676 (1929).

Accrual of Action against Guarantor. — A plaintiff's cause of action against a guarantor arises when the principal refuses to make further payments on the promissory note. If the guaranty of payment is absolute, the right to sue upon the guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity. *Better Adv., Inc. v. Peace*, 43 N.C. App. 534, 259 S.E.2d 359 (1979), cert. denied, 299 N.C. 328, 265 S.E.2d 393 (1980).

Accrual of Action on Obligation to Indemnify. — North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss. *Premier Corp. v. Economic Research Analysts, Inc.*, 578 F.2d 551 (4th Cir. 1978).

Where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not start running against his right to indemnity from the party who is primarily liable until he has paid damages to the injured party. *Hager v. Brewer Equip. Co.*, 17 N.C. App. 489, 195 S.E.2d 54 (1973).

Action on Uninsured Motorist Provisions of Insurance Policy. — The cause of action accrued, and the statute of limitations began running, with respect to plaintiff's claim under the uninsured motorist provisions of the insurance policy issued by defendant, at the time damages were sustained, and not, as plaintiff contended, when demand for payment under the policy was made and refused by defendant. *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

Warranty that Subject Matter of Sale Is Sound. — Where there is a warranty that the subject matter of a sale is sound at the date of sale, then the statute of limitations begins to run at the date of the warranty and not thereafter. *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969). See also, *Hall v. Gurley Milling Co.*, 347 F. Supp. 13 (E.D.N.C. 1972).

As to accrual of action based upon breach of warranty of fitness and safety of tobacco curer, see *Lewis v. Godwin Oil Co.*, 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Sale of House with Defective Furnace. — Defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs occurred when he delivered to them a house with a furnace that lacked a draft regulator and had been installed too close to combustible joists. *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965).

An action ex contractu brought by a municipal corporation to recover the cost of rebuilding a bridge, upon a breach by defendant of his contract with plaintiff to replace it, was an action to enforce private, corporate or proprietary rights of the municipal corporation, and as such the three-year statute of limitations could be interposed as a defense by defendant. *City of Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967).

Plea of Statute Held Available to Distributee against Administrator. — In an action by plaintiff to recover his distributive share of an estate, where defendant administrator set up and pleaded debts due intestate by plaintiff as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff had no application, and the plea of the statute of limitations was available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. First-Citizens Bank & Trust Co.*, 223 N.C. 642, 27 S.E.2d 636 (1943).

Ancillary Remedy of Claim and Delivery also Barred. — Where there had been no new promise or payment on purchase price for over three years prior to institution of action, three-year statute of limitations under this section barred the ancillary remedy of claim and delivery. *Lester Piano Co. v. Loven*, 207 N.C. 96, 176 S.E. 290 (1934).

Statute Not Suspended by War Measures. — An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads was barred by the statute of limitations after three years from the time of its accrual. *Vanderbilt v. Atlantic Coast Line R.R.*, 188 N.C. 568, 125 S.E. 387 (1924), appeal dismissed, 270 U.S. 625, 46 S. Ct. 204, 70 L. Ed. 767 (1926).

As to admissibility of parol evidence to show in what capacity parties signed note under seal, see *Furr v. Trull*, 205 N.C. 417, 171 S.E. 641 (1933).

B. Actions to Which Section Applies.

Actions against Sureties on Sealed Instruments. — The three-year statute of limitations is applicable to sureties on sealed instruments, as well as on instruments not under seal. *Lee v. Chamblee*, 223 N.C. 146, 25 S.E.2d 433 (1943).

This section applies to actions upon all sealed instruments not referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until 10 years by § 1-47(2), that provision does not refer to sureties. *Welfare v. Thompson*, 83 N.C. 276 (1880); *Redmond v. Pippen*, 113 N.C. 90, 18 S.E. 50 (1893); *Flippen v. Lindsey*, 221 N.C. 30, 18 S.E.2d 824 (1942).

This section applies to sureties on a note under seal, and as to such sureties the right of action on the note is barred after the lapse of three years. *Barnes v. Crawford*, 201 N.C. 434, 160 S.E. 464 (1931).

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety. *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934).

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and the right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor; suit against the guarantors is barred by this section after three years from maturity of the note. *Wachovia Bank & Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334 (1932).

Guarantee of Prior Indorsement. — The statute of limitations within which to institute an action upon a guarantee of prior indorsement is three years after payment of the check. *United States v. National City Bank*, 28 F. Supp. 144 (S.D.N.Y. 1939).

Indemnity Arising from Primary-Secondary Liability. — Since indemnity arising from primary-secondary liability is a quasi-contractual right, it is subject to the three-year statute of limitations under subdivision (1) of this section. *Ingram v. Garner*, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. *Hertford Banking Co. v. Stokes*, 224 N.C. 83, 29 S.E.2d 24 (1944).

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. *Jackson v. Martin*, 136 N.C. 196, 48 S.E. 672 (1904).

Agreement to Arbitrate. — An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, is governed by the three-year statute of limitations. *Sprinkle v. Sprinkle*, 159 N.C. 81, 74 S.E. 739 (1912).

Action for Money Had and Received. — An action by a county board of school directors for fines and penalties collected by a city was in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and subdivision (1) of this section applied. *School Dirs. v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901).

Action on Check Given for Taxes. — A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes when the action is not instituted within three years of the date the check was issued. *Miller v. Neal*, 222 N.C. 540, 23 S.E.2d 852 (1943).

Breach of Express Trust. — Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. *Teachy v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938).

Where a trust is based on an agreement or transaction operating as an express trust, the limitation applicable is the statute of three years set out in this section. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

Breach of Fiduciary Duty of Executor and Trustee under Will. — The fiduciary duties of an executor and trustee under a will are essentially contractual in nature and any failure to perform in compliance with the duties as a fiduciary is tantamount to a breach of contract; hence, a beneficiary's action to enforce the terms of the arrangement and to recover damages sustained by reason of defendant's breach of fiduciary duty being essentially grounded in contract, is subject to the three-year limitation of subdivision (1) of this section. *Tyson v. North Carolina Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982).

Action Based on Implied Contract. — An action based on an implied contract is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract, and the limitation applicable to both such actions is three years. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

Claims for Services. — In absence of a special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. *Grady v. Faison*, 224 N.C. 567, 31 S.E.2d 760 (1944); *Johnson v. Sanders*, 260 N.C. 291, 132 S.E.2d 582 (1963).

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon oral contract to devise when action is instituted more than three years after the death of the promisor and the statute of limitations is pleaded in bar. *Dunn v. Brewer*, 228 N.C. 43, 44 S.E.2d 353 (1947).

This section bars a claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, and in view of § 1-22, the contention that this section bars the claim for all services rendered more than three years prior to the institution of the action is untenable. *Hodge v. Perry*, 255 N.C. 695, 122 S.E.2d 677 (1961).

C. Actions to Which Section Not Applicable.

Action against Principal on Sealed Instrument. — Where contract for the management and division of profits of a business was held to be an instrument as that term is used in § 1-47(2), and where

it was held that there was no ambiguity in the wording of the contract as to the intent of the parties that it be under their respective seals, plaintiff's right to bring his action was governed by § 1-47, and not by this section. *Hutchinson v. Hutchinson*, 49 N.C. App. 687, 272 S.E.2d 146 (1980).

When the promisor in an indemnity bond has a personal, immediate, and pecuniary interest in the transaction in which third party is the original obligor, the courts will always give effect to his promise as an original and direct promise to pay, and this section will not be applicable. *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 64 S.E.2d 826 (1951).

Where liability of insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity, for this is a statute of limitations and can have no effect upon valid contractual relations existing between the indemnitor and indemnitee. *Hood v. Rhodes*, 204 N.C. 158, 167 S.E. 558 (1933).

Action under Uninsured Motor Vehicle Policy. — Action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy, to recover damages for death caused by the wrongful act of an uninsured motorist, is subject to the two-year statute of limitations for wrongful death by § 1-53(4), and not the three-year limitation prescribed for actions on contract by subdivision (1) of this section. *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974).

D. Actions Held Barred.

Action on New Promise. — Where plaintiff, payee and holder of a note, alleged that the debtor advised him not to enter his claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note, plaintiff's cause of action was on the new promise and not the original note, and as the new promise was made more than three years prior to the institution of the action, plaintiff's cause was barred by the statute of limitations. *Westall v. Jackson*, 218 N.C. 209, 10 S.E.2d 674 (1940).

Where land was conveyed to an individual with condition that he pay certain sums to his brothers, and he

accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. *Rice v. Rice*, 115 N.C. 43, 20 S.E. 185 (1894).

E. Actions Not Barred.

Promissory Notes under Seal. — A civil action to recover on six promissory notes under seal executed on December 3, 1929, and maturing one each year for five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or by the 10-year statute of limitation in § 1-47. *Bell v. Chadwick*, 226 N.C. 598, 39 S.E.2d 743 (1946).

Action for Dividends Accrued on Cumulative Preferred Stock. — The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of reorganization of corporation declared and paid in accordance with the stipulation of the certificate before dividends were set aside or paid on any other stock were based on contract, and her request for injunctive relief was merely ancillary thereto; plaintiff's cause of action arose when dividends were paid on the new stock before accrued dividends on her stock were paid, and her action instituted within three years thereafter was not barred. *Clark v. Henrietta Mills*, 219 N.C. 1, 12 S.E.2d 682 (1941).

Suit on Indemnity Contract. — Where an issuer of securities brought suit against a broker on an indemnity contract several months after the issuer reimbursed investors to whom the broker had illegally sold the securities, the issuer's claim for indemnity based upon its contract with the broker was not barred by North Carolina's statute of limitations. *Premier Corp. v. Economic Research Analysts, Inc.*, 578 F.2d 551 (4th Cir. 1978).

Where guarantors were liable under a continuing guaranty which could only be revoked in writing, the time for bringing the action was not limited by the three-year statute of limitations. *Cities Serv. Oil Co. v. Howell Oil Co.*, 34 N.C. App. 295, 237 S.E.2d 921 (1977).

Where an agreement contained a contract insuring a carrier from loss and also a contract of suretyship in regard to claims of third persons under § 62-111, provisions of the insurance contract that action be commenced

within a specified time were not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it did not arise until such payment; hence, an action brought within three years of such payment was not barred either under the contract or by the three-year statute of limitations. *American Nat'l Fire Ins. Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963).

Collection of Rent by Trustee from Cestui Que Trust. — Where the relation of landlord and tenant has been established between trustee and cestui que trust, evidenced by voluntary payment of rent by the cestui que trust to the trustee, such relation ordinarily suffices to set the statute of limitations running against the cestui que trust. But where the object of the trust was to hold and preserve title for the benefit of an unincorporated association whose personnel was constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, was not enough to start the statute running. To set the statute in motion it would have been necessary to show that all the members of the unincorporated association had knowledge, or in law were charged with knowledge, that the trustee was exacting and the association officers were paying rent. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

Action for Damages against Carrier. — Where written demand against a carrier for damages was made within 30 days, and an action was brought within three years, such action was not barred by this section. *United States Watch Case Co. v. Southern Express Co.*, 120 N.C. 351, 27 S.E. 74 (1897).

III. LIABILITY CREATED BY STATUTES.

After the time prescribed, the statute is an absolute bar to the next of kin. *Spruill v. Sanderson*, 79 N.C. 466 (1878); *Vaughan v. Hines*, 87 N.C. 445 (1882).

Application of Section to Claims under Fourteenth Amendment. — Liability alleged in a claim under the Fourteenth Amendment to the United States Constitution, while it is created not by federal statute but by the Constitution itself, is more akin to "liability created by statute" than to common-law

assault and battery, so that subdivision (2) of this section is applicable. *Feilder v. Moore*, 423 F. Supp. 62 (W.D.N.C. 1976).

This section is applicable to 42 U.S.C. § 1981 actions arising in North Carolina. *Wilson v. Continental Group, Inc.*, 451 F. Supp. 1 (M.D.N.C. 1978).

Regardless of whether an action brought under 42 U.S.C. § 1981 is considered an action in contract or an action in tort, the appropriate North Carolina statute of limitations is three years under this section. *Lattimore v. Loews Theatres, Inc.*, 410 F. Supp. 1397 (M.D.N.C. 1975).

The federal courts entertaining 42 U.S.C. § 1981 claims have adopted the most closely analogous State statute of limitations, and since 42 U.S.C. § 1981 guarantees equal contract rights to black citizens, the most closely analogous State statute of limitations is this section. *Pittman v. Anaconda Wire & Cable Co.*, 408 F. Supp. 286 (E.D.N.C. 1976).

The statute of limitations for 42 U.S.C. § 1981 is the most analogous statute of limitations of the state where the deprivation occurred; in this State, the most analogous statute of limitations is either subdivision (1) or subdivision (2) of this section. *Lilly v. Harris-Teeter Supermarket*, 545 F. Supp. 686 (W.D.N.C. 1982).

And Filing Charge with E.E.O.C. on Same Facts Does Not Toll Running of Limitations. — The mere filing of a charge with the Equal Employment Opportunity Commission under 42 U.S.C. § 2000e-5(e) does not toll the running of the statute of limitations on a 42 U.S.C. § 1981 claim based upon the same set of facts. *Camack v. Hardee's Food Sys.*, 410 F. Supp. 469 (M.D.N.C. 1976); *Wilson v. Continental Group, Inc.*, 451 F. Supp. 1 (M.D.N.C. 1978).

Subdivision (2) of this section is applicable to claims asserted under 42 U.S.C. § 1983. *Feilder v. Moore*, 423 F. Supp. 62 (W.D.N.C. 1976); *Gardner v. King*, 464 F. Supp. 666 (W.D.N.C. 1979); *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980).

It is proper to apply the limitation fixed for actions based upon "a liability created by statute" to actions brought under 42 U.S.C. § 1983 within this State. *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977), cert. denied, 444 U.S. 842, 100 S. Ct. 83, 62 L. Ed. 2d 54 (1979).

As well as Claims under 42 U.S.C. § 1985(3). — For actions brought under 42 U.S.C. §§ 1983 and 1985 (3), the applicable limitations period is deter-

mined by reference to state law, and is three years, which is the time limitation prescribed by subdivision (2) of this section for actions founded on a liability created by statute, either state or federal. *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982).

Federal Rule Governs Accrual of Action under 42 U.S.C. § 1983. — While the time limitation is borrowed from State law in an action under 42 U.S.C. § 1983, the federal rules fix the time of accrual of the right of action. *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977), cert. denied, 444 U.S. 842, 100 S. Ct. 83, 62 L. Ed. 2d 54 (1979).

Effect of Denial of in forma Pauperis Status upon Tolling Statute in 42 U.S.C. § 1983 Action. — Receipt from a pro se state prisoner of a complaint under 42 U.S.C. § 1983 and affidavit in support of in forma pauperis status is sufficient to "commence" the action, and to toll the statute of limitations, notwithstanding the denial of in forma pauperis status, where the initial filing is in good faith, not interposed for dilatory purposes, based on the reasonable expectation that in forma pauperis status would be granted, and followed by reasonably prompt action to continue the prosecution of the action after in forma pauperis status is denied. *Gardner v. King*, 464 F. Supp. 666 (W.D.N.C. 1979).

Application of Section to Title VII Litigation. — The three-year limitations period found in this section is the appropriate limitations period for employment discrimination claims where there is no specific federal statute of limitations. *Chisholm v. United States Postal Serv.*, 516 F. Supp. 810 (W.D.N.C. 1980), vacated in part on other grounds and aff'd in part, 665 F.2d 482 (1981).

While a State statute of limitations may have some relation to the degree of relief afforded in Title VII litigation, the crucial time limitation for the original filing of the Title VII claim is determined by Title VII itself. *Pittman v. Anaconda Wire & Cable Co.*, 408 F. Supp. 286 (E.D.N.C. 1976).

On the issue of whether Title VII actions are barred by State statutes of limitations, courts have ruled in favor of the tolling when Equal Employment Opportunities Commission charges are filed. *Pittman v. Anaconda Wire & Cable Co.*, 408 F. Supp. 286 (E.D.N.C. 1976).

Action for Treble Damages under Unfair Trade Practices Statutes. — An action under § 75-16 to recover treble

damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1979, was governed by the three-year limitation of subdivision (2) of this section, and not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

An action to enforce liability under § 49-15 is barred after three years under subdivision (2) of this section; and since each time a mother makes an expenditure reasonably incurred for the support of a child such expenditure creates in her a new right to reimbursement, subdivision (2) begins to run against each expenditure on the date when the expenditure was made. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976).

Creditor's Action for Relief under § 23-1. — The three-year statute of limitation applies to a creditor's action for relief under § 23-1. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E.2d 606 (1945).

Failure of Court Clerk to Index Judgment. — In a tort action against a clerk of the superior court for failing to index a docketed judgment as required by § 1-233, this section is applicable. *Shackelford v. Staton*, 117 N.C. 73, 23 S.E. 101 (1895).

Action against Bank for Failure to Collect Check. — An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former was barred as against the latter bank by this section where it was not commenced until five years after the transaction and four years after the transfer of the assets. *Standard Trust Co. v. Commercial Nat'l Bank*, 240 F. 303 (4th Cir. 1917).

Liability of National Bank Stockholder for Assessment. — Though the original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a

stock assessment fixing his amount of liability is "statutory" and not contractual as respects the running of limitations. And partial payments by the stockholder on the stock assessment did not toll the running of this section against his liability. *Briley v. Crouch*, 115 F.2d 443 (4th Cir. 1940).

Section Held Inapplicable to Private Action for Treble Damages under Antitrust Laws. — A private action brought by theater owners for treble damages under federal antitrust laws was an action to recover a penalty or forfeiture within the meaning of § 1-54(2), to which a one-year period of limitations applied, and subdivision (2) of this section was inapplicable thereto. *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1969), decided prior to the prescription of a period of limitations by federal law.

Petition to Have Damages Assessed against Railroad. — Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation on such action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of subdivisions (2) and (3) of this section, and the refusal of the trial judge to submit an issue upon the statute of limitations was not error. *Land v. Wilmington & W.R.R.*, 107 N.C. 72, 12 S.E. 125 (1890); *Utey v. Wilmington & W.R.R.*, 119 N.C. 720, 25 S.E. 1021 (1896).

Action to Recover Delinquent Taxes. — Neither the three nor the 10-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9 (1898).

IV. TRESPASS UPON REALTY.

Meaning of "Continuing Trespass". — The term, "continuing trespass" was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a dis-

tinct and separate renewal of wrong. *Sample v. John L. Roper Lumber Co.*, 150 N.C. 161, 63 S.E. 731 (1909); *Teeter v. Postal Telegraph-Cable Co.*, 172 N.C. 783, 90 S.E. 941 (1916).

For interpretation of what constitutes a continuing trespass in water diversion cases, see *Galloway v. Pace Oil Co.*, — N.C. App. —, 302 S.E.2d 472 (1983).

The law will not permit recovery for negligence which has become a fait accompli at a remote time not within the period specified by subdivision (3) of this section, even though injury may result from it within the period of limitation. *Hooper v. Carr Lumber Co.*, 215 N.C. 308, 1 S.E.2d 818 (1939); *Davenport v. Pitt County Drainage Dist. No. 2*, 220 N.C. 237, 17 S.E.2d 1 (1941).

Presumption as to Date of Conversion. — Absent proof as to the date of conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker v. Harden*, 121 N.C. 57, 28 S.E. 20 (1897).

Application of Section to Construction and Maintenance of Telegraph Lines. — Where a telegraph company had constructed its line of poles and wires along a railroad right-of-way on the lands of the owner more than three years before commencement of the owner's action for trespass, but within three years constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones in the same holes, plaintiff's right to damages for the construction of the old line was barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages could be awarded. *Teeter v. Postal Telegraph-Cable Co.*, 172 N.C. 783, 90 S.E. 941 (1916).

Where landowner sought to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of transmission lines over his land, the action for trespass was barred by the three-year statute of limitations, the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement was not barred until defendant had been in continuous use thereof for a period of 20 years so as to acquire the right by pre-

scription. *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942).

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Western Union Tel. Co.*, 133 N.C. 225, 45 S.E. 572 (1903).

The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. *Geer v. Durham Water Co.*, 127 N.C. 349, 37 S.E. 474 (1900).

Wrongful Diversion of Water onto Land of Another. — The injury caused by wrongfully ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass, and unless sustained in a manner and for sufficient length of time to establish an easement, damages therefor, accruing within three years next before action brought, can be recovered, though the injury may have taken its rise at a more remote period. *Whitfield v. Winslow*, 48 N.C. 206, 268 S.E.2d 245, cert. denied, 301 N.C. 405, 273 S.E.2d 451 (1980).

Negligence in Widening Canal. — In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where the entire wrong was done in 1898 and 1899, the action was barred under subdivision (3) of this section. *Cherry v. Canal Co.*, 140 N.C. 422, 53 S.E. 138 (1906).

Flooding Caused by Canal. — Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, stated a cause of action for continuing trespass, and the right of action for damages to crops for all the years was barred after the lapse of three years from the original trespass. *Davenport v. Pitt County Drainage Dist. No. 2*, 220 N.C. 237, 17 S.E.2d 1 (1941).

Improper Drainage Caused by Construction of Dam. — Where plaintiffs alleged that construction of a dam caused progressive injury to their land

from improper drainage, and that the mere construction was the cause of the injury, the action, being limited to "injury and damage" caused by the "construction" of the dam, rested in tort, and as the trespass was a continuous rather than a renewing or intermittent one, and as the action was not for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. *Tate v. Western Carolina Power Co.*, 230 N.C. 256, 53 S.E.2d 88 (1949).

Negligence in Logging Operations.

— Where plaintiff instituted an action to recover for damages to his lands resulting from the overflow of waters of a river, alleged to have been caused by the negligent acts and omissions of defendant in its logging operations, even if it was conceded that the alleged negligence constituted a continuing omission of duty toward plaintiff by defendant, plaintiff still had to show that defendant was in possession and control of the upper lands within the statutory period. *Hooper v. Carr Lumber Co.*, 215 N.C. 308, 1 S.E.2d 818 (1939).

Action for Cutting Timber. — The three-year statute applies to actions to recover damages for trespass in cutting and removing trees from the land. *Tillery v. Whiteville Lumber Co.*, 172 N.C. 296, 90 S.E. 196 (1916).

Damages from Gasoline Seepage.

— Where plaintiff instituted action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank, and after defendant pleaded the statute in his answer, plaintiff alleged in his reply that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of institution of the action, the reply, liberally construed, was sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. *Oakley v. Texas Co.*, 236 N.C. 751, 73 S.E.2d 898 (1953).

Damages Resulting from Sewage Disposal Plant.

— Where plaintiff executed a deed of trust and deeded his equity of redemption to his sons and the deed of trust was foreclosed, all more than three years before institution of the action, and plaintiff did not again acquire title until less than a year before

the action, it was held in an action to recover damages to the land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of institution of the action and the date three years prior thereto constituted reversible error. *Ballard v. Town of Cherryville*, 210 N.C. 728, 188 S.E. 334 (1936).

Burden of Proof. — Where defendant pleads this section to an action for trespass, the burden is on the plaintiff to prove that he commenced his action within the time prescribed. *Tillery v. Whiteville Lumber Co.*, 172 N.C. 296, 90 S.E. 196 (1916).

Allegations Held Properly Stricken Where No Damages for Trespass Were Claimed. — In an action to remove a cloud on title, in which defendants claimed title by adverse possession, allegations in their answer pleading that plaintiffs' cause of action for trespass accrued more than three years prior to the commencement of the action were properly stricken as irrelevant, as there was no claim of damages for trespass. *Williams v. North Carolina State Bd. of Educ.*, 266 N.C. 761, 147 S.E.2d 381 (1966).

V. GOODS OR CHATTELS.

Possession of a chattel for a sufficient period to bar recovery under this section does not confer title. The prior law, c. 65, s. 20 Revised Code, so provided, but it has been repealed. *Pate v. Hazell*, 107 N.C. 189, 11 S.E. 1089 (1890).

Running of Statute as to Funds Held by Trustee. — When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitations begins to run, so that the cause of action is barred in three years. *County Bd. of Educ. v. State Bd. of Educ.*, 107 N.C. 366, 12 S.E. 452 (1890).

In an action against statutory receiver of an insolvent bank to recover bonds held by the bank as trustee for safekeeping, where there was evidence that plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds,

and that the action was instituted within three years from the receipt of this letter, the action was not barred by this section, since under the facts the cause of action did not accrue until the disavowal or repudiation of the trust. *Bright v. Hood*, 214 N.C. 410, 199 S.E. 630 (1938).

Proceeding to Recover Furniture from Home of Mother. — In a claim and delivery proceeding instituted in 1971 to recover furniture from the home of plaintiff's mother, who died in 1960, where the trial judge made no finding of fact as to when plaintiff's cause of action accrued, there was no basis on which to conclude as a matter of law that plaintiff's cause of action had been barred by the three-year statute of limitation. *Hodges v. Johnson*, 18 N.C. App. 40, 195 S.E.2d 579 (1973).

Burden of Proof. — Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32 (1922).

Charging in Conjunction with § 1-56 Not Error. — Where if an action had not been barred by the provisions of subdivisions (4) and (9) of this section, it would have been barred under § 1-56, it was not error to tell the jury that the action was barred in three years or in 10 years. *Osborne v. Wilkes*, 108 N.C. 651, 13 S.E. 285 (1891).

VI. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Editor's Note. — As to accrual of cause of action for personal injury or property damage, see analysis line XII below and the cases cited thereunder.

Section 1-50(5) must be interpreted in conjunction with subdivision (5) of this section so that both statutes may be given effect. So interpreted, § 1-50(5) provides an outside limit of six years for bringing an action coming within the terms of that statute. Within that outside limit, subdivision (5) of this section continues to operate, and § 1-50(5) does not serve to extend the time for bringing an action otherwise barred by the three-year statute. *Smith v. American Radiator & Std. San. Corp.*, 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on other grounds, *Love*

v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Applicability of Three-Year Statute to Actions for Personal Injuries. — The three-year statute of limitations applied in an action for personal injuries allegedly received by the plaintiff as the result of negligence on the part of the defendant. *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

Subdivision (5) of this section applies to a cause of action to recover for personal injuries negligently inflicted. *Stamey v. Rutherfordton Elec. Membership Corp.*, 249 N.C. 90, 105 S.E.2d 282 (1958).

Intentional Infliction of Mental Distress. — Subdivision (5) of this section would apply to a complaint seeking recovery for the intentional infliction of mental distress, not the one-year statute of limitations for assault and battery, § 1-54(3). *Dickens v. Puryear*, 45 N.C. App. 696, 263 S.E.2d 856 (1980), rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, subdivision (5) of this section, and not by the one-year statute, § 1-54(3). *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

A cause of action for malicious prosecution is subject to a three-year limitation period under subdivision (5) of this section. *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982).

Where plaintiff's cause of action, based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. *Jackson v. Parks*, 216 N.C. 329, 4 S.E.2d 873 (1939).

Action for Negligent Manufacture and Installation of Heating and Cooling Equipment. — An action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property was governed by subdivision (5) of this section, the three-year statute of limitations, rather than § 1-50(5), the six-year statute. *Sellers v. Freidrich Refrigerators, Inc.*, 283 N.C. 79, 194 S.E.2d 817 (1973), decided prior

to the 1981 amendment to § 1-50(5).

Failure to make a proper disclosure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982). As to action accrual of cause of action for professional malpractice, see § 1-15(c).

Amended Complaint. — Where the pending action in which an amended complaint was filed had been instituted prior to the expiration of three years from the date of the alleged events, and the amended complaint related back to the date of the original pleading, the plaintiff's action for malicious prosecution was not barred by the statute of limitations. *Clary v. Nivens*, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

VII. SURETIES OF EXECUTORS, ETC.

Purpose of Section. — This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. *Andres v. Powell*, 97 N.C. 155, 2 S.E. 235 (1887).

Subdivision (6) Only Applies to Sureties. — While § 1-50(2) expressly applies to actions on the "official bond," subdivision (6) of this section applies to sureties only. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Sureties also Protected by § 1-50(2). — In addition to the protection of § 1-50(2), the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

While the sureties have the protection of six years under § 1-50 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Presence of Seal Immaterial. — This section creates the statute of limitations for sureties, notwithstanding the fact that a seal may appear after their names. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E.2d 323 (1960).

Section 1-56 Not Affected. — Section 1-56, limiting the time for the bringing of an action to 10 years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of this section as to actions on their

official bonds. *Pierce v. Faison*, 183 N.C. 177, 110 S.E. 857 (1922).

Effect of Surety Being Foreign Corporation. — The statute of limitations is not suspended against the surety on a guardian bond by reason of the fact that such surety is a foreign corporation, when it is shown that it continuously had a general agent within the jurisdiction of North Carolina courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Commissioner of Insurance. *State ex rel. Anderson v. United States Fid. Co.*, 174 N.C. 417, 93 S.E. 948 (1917).

Effect of Payment by Principal. — Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. *Moore v. Goodwin*, 109 N.C. 218, 13 S.E. 772 (1891).

The running of the statute under this section as against plaintiffs and in favor of sureties was not suspended by payment of interest by guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason, the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations, which began to run against each of his wards when she became of age. *State ex rel. Finn v. Fountain*, 205 N.C. 217, 171 S.E. 85 (1933).

Effect of Estate Being Unrepresented. — When there was no one in esse, from the death of the first administrator until the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N.C. 524, 14 S.E. 73 (1891).

As to the effect of intervening disabilities, see *Kennedy v. Cromwell*, 108 N.C. 1, 13 S.E. 135 (1891). See § 1-17 and note.

Running of Statute from Demand and Refusal. — Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. *Kennedy v.*

Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to comply, this section began to run in favor of the defendant sureties on the administration bond. *Gill v. Cooper*, 111 N.C. 311, 16 S.E. 316 (1892); *Stonestreet v. Frost*, 123 N.C. 290, 31 S.E. 718 (1898).

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Action by Cestui against Trustee after Settlement or Court Decree. — Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of court, the trust is closed, and an action will be barred within three years from a demand and refusal. *Whedbee v. Whedbee*, 58 N.C. 393 (1860); *Barham v. Lomax*, 73 N.C. 78 (1875); *Spruill v. Sanderson*, 79 N.C. 466 (1878); *Wyrick v. Wyrick*, 106 N.C. 84, 10 S.E. 916 (1890).

Action to Reopen Account and Readjust Settlement. — An action or proceeding to reopen an account stated by an executor and to readjust a settlement made under the supervision of a court and sanctioned by a decree must be brought within three years from the rendition of such decree if the plaintiff is under no disability and the case involves no equitable element improper for the consideration of a court of law. *Spruill v. Sanderson*, 79 N.C. 466 (1878).

Action against guardian and bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. *State ex rel. Anderson v. United States Fid. Co.*, 174 N.C. 417, 93 S.E. 948 (1917).

Action to recover for alleged breach of bond as administratrix accrues at the time the alleged breach is committed, subdivision (6) of this section having no provision relating to discovery of the breach of the official bond as is provided for in cases under subdivision (9). *Hicks v. Purvis*, 208 N.C. 657, 182 S.E. 151 (1935).

Cause of action by the administrator d.b.n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until

three years subsequent to his appointment. *Dunn v. Dunn*, 206 N.C. 373, 173 S.E. 900 (1934).

Ward's Suit against Sureties. — A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three-year limit. *Norman v. Walker*, 101 N.C. 24, 7 S.E. 468 (1888).

Burden of Proof. — Where this section was pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. *Hussey v. Kirkman*, 95 N.C. 63 (1886); *Moore v. Garner*, 101 N.C. 374, 7 S.E. 732 (1888); *Hobbs v. Barefoot*, 104 N.C. 224, 10 S.E. 170 (1889); *Nunnery v. Averitt*, 111 N.C. 394, 16 S.E. 683 (1892). See also, *Norman v. Walker*, 101 N.C. 24, 7 S.E. 468 (1888); *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889); *Kennedy v. Cromwell*, 108 N.C. 1, 13 S.E. 135 (1891); *Brawley v. Brawley*, 109 N.C. 524, 14 S.E. 73 (1891); *Koonce v. Pelletier*, 115 N.C. 233, 20 S.E. 391 (1894).

VIII. BAIL.

Application of Section where Principal Is out of State. — The language and meaning of this section is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. *Albemarle Steam Nav. Co. v. Williams*, 111 N.C. 35, 15 S.E. 877 (1892).

IX. FEES ADJUDGED DUE TO CLERK, SHERIFF OR OTHER OFFICER.

Plaintiff in a judgment on which only costs are due is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not in favor of the officers of the court. *Cowles v. Hall*, 113 N.C. 359, 18 S.E. 329 (1893).

The claim of a referee for payment for services rendered in a cause which was still pending in the courts upon exceptions to his report was not barred by this section. *Farmers Bank v. Merchants & Farmers Bank*, 204 N.C. 378, 168 S.E. 221 (1933).

X. FRAUD OR MISTAKE.

A. In General.

Meaning of "Relief on the Ground

of Fraud". — The words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress and undue influence. *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 113 S.E.2d 270 (1960).

It will be noted from the language, "relief on the ground of fraud" that subdivision (9) of this section has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and clearly applies to any and all actions, legal or equitable, where fraud is the basis of an essential element of the action. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970). See also, *Little v. Bank of Wadesboro*, 187 N.C. 1, 121 S.E. 185 (1924).

Where there is concealment of fraud or continuing fraud, the statute does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

Nature of Substantive Right Determinative of Period of Limitations. — The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. A declaration that one is a constructive trustee may be an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that plaintiff seeks it is irrelevant to the question of limitations. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

Actions for fraud are not subject to the 10-year limitation of § 1-15(b), since subdivision (9) of this section is a statute that otherwise provides as to the time of accrual of such actions. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (9) Applicable to All Actions Grounded on Fraud or Mistake. — While subdivision (9) of this section originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of North Carolina courts it now applies to

all actions for relief on the ground of fraud or mistake. *Stancill v. Norville*, 203 N.C. 457, 166 S.E. 319 (1932).

Fraud or Mistake Prerequisite to Application. — Subdivision (9) of this section has no application to an action to recover money, where there is no evidence or allegation of fraud and mistake. *Barden v. Stickney*, 132 N.C. 416, 43 S.E. 912 (1903); *Bonner v. Stotesbury*, 139 N.C. 3, 51 S.E. 781 (1905).

Forgery as Fraud. — An action to set aside a deed on the grounds of forgery is an action for relief on the grounds of fraud, and such an action is barred after three years from the date of knowledge of the forgery. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

Section Held Applicable — Action to Set Aside Guardian's Settlement. — The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. *Wheeler v. Piper*, 56 N.C. 249 (1857); *Whedbee v. Whedbee*, 58 N.C. 392 (1860); *Spruill v. Sanderson*, 79 N.C. 466 (1878); *State v. Smith*, 83 N.C. 306 (1880).

Same — Action to Set Aside Conveyance of Equity of Redemption. — An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee was an action based on fraud and had to be instituted within three years from the discovery of the acts constituting the fraud, and the 10 year statute had no application. *Massengill v. Oliver*, 221 N.C. 132, 19 S.E.2d 253 (1942).

Same — Action for Damages for Obtaining Deed by Fraud. — In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. *Modlin v. Roanoke R.R. & Nav. Co.*, 145 N.C. 218, 58 S.E. 1075 (1907).

Same — Inadequate Consideration Due to Fraudulent Influence. — This section applied to suit to recover the difference between grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor, and the reasonable value thereof, and it was reversible error for the trial judge to hold, as a matter of law, that the 10-year statute relating to actions to impress a trust upon property

only was applicable. *Little v. Bank of Wadesboro*, 187 N.C. 1, 121 S.E. 185 (1924).

Same — False Material Statements in Insurance Application. — Whether considered fraud in the broad sense or mistake, subdivision (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 113 S.E.2d 270 (1960).

Same — Embezzlement by Court Clerk. — Where a clerk of the superior court embezzled funds and such fraud was not discovered until about 90 days prior to institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 1-50 applied. *State v. Gant*, 201 N.C. 211, 159 S.E. 427 (1931); *State ex rel. Pasquotank County v. American Sur. Co.*, 201 N.C. 325, 160 S.E. 176 (1931).

Section Not Applicable to Action to Remove Cloud from Title. — The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. *Cauble v. Trexler*, 227 N.C. 307, 42 S.E.2d 77 (1947).

Nor to Resulting or Constructive Trusts. — A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year and not the three-year statute of limitations. *Bowen v. Darden*, 241 N.C. 11, 84 S.E.2d 289 (1954).

Actions involving fraud or mistake shall not be deemed to have accrued until discovery. *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966); *Hice v. Hi-Mil, Inc.*, 47 N.C. App. 427, 267 S.E.2d 507 (1980), *aff'd*, 301 N.C. 647, 273 S.E.2d 268 (1981).

Or from when Fraud or Mistake Should Have Been Discovered. — The statute runs from the discovery of the fraud or mistake, or from when it should have been discovered in the exercise of ordinary care. *Sinclair v. Teal*, 156 N.C. 458, 72 S.E. 487 (1911). See also, *Stubbs v. Motz*, 113 N.C. 458, 18 S.E. 387 (1893); *Peacock v. Barnes*, 142 N.C. 215, 55 S.E. 99 (1906).

In an action grounded on fraud, 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. *Wimberly v. Washington Furn. Stores*,

Inc., 216 N.C. 732, 6 S.E.2d 512 (1940); Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Wilson v. Crab Orchard Dev. Co., 276 N.C. 19, 171 S.E.2d 873 (1970); Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973); Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976); Cowart v. Whitley, 39 N.C. App. 662, 251 S.E.2d 627 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980); Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

In actions for relief from real estate transactions infected by mistake or fraud, the cause of action accrues when discovery was or should have been made by the exercise of ordinary diligence. *Fulcher v. United States*, 696 F.2d 1073 (4th Cir. 1982).

Regardless of Length of Time between the Act and the Discovery. — Under subdivision (9) of this section, the three-year limitation for an action for fraud accrues at the time of discovery, regardless of the length of time between the fraudulent act or mistake and discovery of it. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Knowledge of Law Not Required for Action to Accrue. — Knowledge of the law governing alleged fraud is not included in the requirement under subdivision (9) of this section as to knowledge of the facts constituting the alleged fraud. *Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 286 S.E.2d 566, cert. denied, 305 N.C. 395, 290 S.E.2d 365 (1982).

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake, and not from the discovery by a party of rights hitherto unknown to him. *Bonner v. Stotesbury*, 139 N.C. 3, 51 S.E. 781 (1905).

Burden on Plaintiff to Show Both Ignorance of Facts and Diligence. — It is incumbent upon plaintiff to show not only that he was ignorant of the facts upon which he relies in his action, but also, that he could not have discovered them in the exercise of proper diligence or reasonable business prudence. *Latham v. Latham*, 184 N.C. 55, 113 S.E.

623 (1922). See also *Johnson v. Pilot Life Ins. Co.*, 219 N.C. 202, 13 S.E.2d 241 (1941); *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

The burden is on the plaintiffs to show that neither they nor their predecessor in title knew of the fraud, or would have discovered it in the exercise of reasonable business prudence. *Sanderlin v. Cross*, 172 N.C. 234, 90 S.E. 213 (1916).

As to plaintiff's burden of proof, see also *Hooker v. Worthington*, 134 N.C. 283, 46 S.E. 726 (1904); *Taylor v. Edmunds*, 176 N.C. 325, 97 S.E. 42 (1918); *Willetts v. Willetts*, 254 N.C. 136, 118 S.E.2d 548 (1961).

Effect of Confidential Relationship or Duty to Use Diligence. — Failure to discover the facts constituting fraud may be excused where a confidential relationship exists between the parties, yet failure of the defrauded party to use diligence in discovering the fraud is not wholly excused merely because a relation of trust and confidence exists between the parties. *Shepherd v. Shepherd*, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 143 S.E.2d 312 (1965).

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951).

Whether Plaintiff Should Have Discovered Facts Is Ordinarily for Jury. — In an action to reform a deed on grounds of mistake, whether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E.2d 159 (1976); *Johnson v. Phoenix Mut. Life Ins. Co.*, 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980).

Whether plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury. *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

When Due Diligence Determined as Matter of Law. — In an action to reform a deed on grounds of mistake, failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

Mere registration of a deed, standing alone, will not be imputed for constructive notice. *Elliott v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959).

When Registration of Deed Is Notice of Fraud. — The mere registration of a deed containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to discovery of the facts constituting the fraud. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951). See also, *Stubbs v. Motz*, 113 N.C. 458, 18 S.E. 387 (1893); *Modlin v. Roanoke R.R. & Nav. Co.*, 145 N.C. 218, 58 S.E. 1075 (1907); *Tuttle v. Tuttle*, 146 N.C. 484, 59 S.E. 1008 (1907); *Ewbank v. Lyman*, 170 N.C. 505, 87 S.E. 348 (1915).

This statute begins to run from time of discovery of breach of trust relationship and not from the time the relation was brought to an end. *Egerton v. Logan*, 81 N.C. 172 (1879).

Running of Statute against Action to Reform Instrument for Mutual Mistake. — The three-year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence; conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. *Lee v. Rhodes*, 231 N.C. 602, 58 S.E.2d 363 (1950).

In an action to reform a timber deed for an alleged mutual mistake of the parties,

the statute will run three years after the plaintiff had knowledge of the mistake alleged. *Jefferson v. Roanoke R.R. & Lumber Co.*, 165 N.C. 46, 80 S.E. 882 (1914). See also, *Lanning v. Commissioners of Transylvania County*, 106 N.C. 505, 11 S.E. 622 (1890).

Effect of Nonresidence of Plaintiff. — The nonresidence of a plaintiff claiming lands here under an allegation of fraud, etc., did not affect the running of the statute of limitations adverse to his demand in his action. *Latham v. Latham*, 184 N.C. 55, 113 S.E. 623 (1922).

A nonresident creditor who sought to set aside a deed of his debtor for fraud was not excused by his absence for not complying with the provisions of this section requiring that he must bring his action within three years from the discovery of the fraud. *Ewbank v. Lyman*, 170 N.C. 505, 87 S.E. 348 (1915).

Dismissal of Crossaction Filed More than Three Years from Discovery of Fraud. — Where defendant in his answer alleged that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and filed a crossaction against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the crossaction on motion upon the plea of the three-year statute of limitations was upheld. *Speas v. Ford*, 253 N.C. 770, 117 S.E.2d 784 (1961).

Newly Discovered Evidence Held Necessary in Action to Reconsider. — Plaintiff could derive no aid from this section in an action to reconsider a case which had been sanctioned by the court and settled by a decree from it in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at the time of the first action, the first action would stand notwithstanding this section. *Spruill v. Sanderson*, 79 N.C. 466 (1878).

B. Actions Held Barred.

Where as early as 1971 plaintiff had warning that supposed husband was still married to another woman, her action for fraud filed in January, 1980, was barred by this section. *Shepherd v. Shepherd*, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

Proceedings before clerk to sell trust lands to make assets to pay the

debts of the deceased, and the open, notorious and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any, committed by the executor, and would bar their right of action within three years therefrom. *Latham v. Latham*, 184 N.C. 55, 113 S.E. 623 (1922).

Foreclosure Sale where Timber Sold Separately. — Where a foreclosure sale of lands was attacked for fraud upon the ground that the trustee sold the timber on the land separately from the land and made deeds to each to separate parties, which were duly recorded, the record itself gave notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claimed, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and barred their recovery after three years. *Sanderlin v. Cross*, 172 N.C. 234, 90 S.E. 213 (1916).

Where plaintiff acquired title to real estate, subject to a contract to cut timber within three years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was three years, the action was barred by this section. *Blankenship v. English*, 222 N.C. 91, 21 S.E.2d 891 (1942).

Cause of action for reformation of bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. *Moore v. Fidelity & Cas. Co.*, 207 N.C. 433, 177 S.E. 406 (1934). See also, in this connection, *Hargett v. Lee*, 206 N.C. 536, 174 S.E. 498 (1934); *Hood v. Paddison*, 206 N.C. 631, 175 S.E. 105 (1934).

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk, it was held that insured should have been put on notice thereby that company's agent's promise to redeliver a second policy within seven months after it was tendered to insured and refused

because of illness was false, and that insured's claim, if he had any, had atrophied as a result of his procrastination and was barred by this section. *Jones v. Bankers Life Co.*, 131 F.2d 989 (4th Cir. 1942).

Where plaintiffs contended that usurious interest was paid by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although it was instituted more than two years after the last usurious payment, it was held that plaintiffs were not entitled to invoke the statute, as they did not institute action until more than three years after they had executed a note bearing six percent interest in renewal of the original note upon which usury was paid, and that they were negligent in asserting their rights, if any. *Ghormley v. Hyatt*, 208 N.C. 478, 181 S.E. 242 (1935).

Cause of Action to Set Aside Deed for Fraud and Undue Influence. — Where it was established that the person under whom plaintiffs claimed was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim was barred. *Muse v. Muse*, 236 N.C. 182, 72 S.E.2d 431 (1952).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged cause of action for fraud, the action was barred by subdivision (9) of this section. *Nowell v. Hamilton*, 249 N.C. 523, 107 S.E.2d 112 (1959).

C. Actions Not Barred.

Where a reversionary clause was omitted from a deed by mistake of the draftsman, the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. *Ollis v. Board of Educ.*, 210 N.C. 489, 187 S.E. 772 (1936).

Where defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land, and he surreptitiously substituted a

description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor, and the grantor died some three years and seven months thereafter, there being nothing to rebut the inference that she retained possession of the property until her death, it was held that as there was nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, was not barred. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951).

In an action to recover damages for fraudulent representations as to amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered or should have been discovered by them in the exercise of reasonable diligence. *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 73 S.E.2d 785 (1953), overruled on other grounds, *Newton v. Standard Tire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976).

XI. FAIR LABOR STANDARDS ACT.

Purpose of Subdivision (11). — Subdivision (11) of this section was passed in order to enlarge the period of limitations for the recovery of penalties under the Fair Labor Standards Act, which would otherwise have been limited to the period of one year under subdivision (2) of § 1-54. *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960).

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

Editor's Note. — Many of the cases cited below were decided prior to the 1979 enactment of subdivision (16) of this section. As to limitations of actions for injury to the person or rights of another under subdivision (5) of this section, see analysis line VI, above, and the cases cited thereunder.

There is no difference between a cause of action for negligent damage to property and one for negligent injury to person insofar as the time of accrual of the cause of action for commencement of the running of the statute

of limitations is concerned. *Land v. Neill Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E.2d 537 (1969).

Defendant's negligence conferred no right of action upon plaintiff's intestate until he suffered an injury proximately caused thereby. Until then, his cause of action was not complete and, nothing else appearing, the three-year statute would not begin to run against his right to sue. *Rafferty v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976).

The statute of limitations by its terms begins to run after the action has "accrued." A suit does not involve an "injury to the person or rights of another" until the plaintiff is hurt. Where plaintiff was injured in an accident allegedly caused by failure of a tire, there was no "injury" and no basis for action until the wreck occurred. *Stell v. Firestone Tire & Rubber Co.*, 306 F. Supp. 17 (W.D.N.C. 1969).

Statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product, not the date of the ultimate failure of the product or the injury. *Employers Com. Union Co. of America v. Westinghouse Elec. Corp.*, 15 N.C. App. 406, 190 S.E.2d 364 (1972); *Davis v. E.I. DuPont DeNemours & Co.*, 400 F. Supp. 1347 (W.D.N.C. 1974).

For case holding the continuing course of treatment exception applicable in a medical malpractice action, see *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978). As to accrual of cause of action for malpractice, see now § 1-15(c).

Failure to make proper disclosure of risks involved in a medical procedure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

As to accrual of cause of action against an architect for negligence arising out of a construction project under former § 1-15(b) and subdivision (5) of this section, see *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980).

Whether Discovery Was Timely Held a Jury Question. — In an action for tort and breach of warranties, the trial court erred in dismissing plaintiffs' negligence and strict liability claims

instituted in 1979 for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground that the claims were barred by the three-year limitation of former § 1-15(b) (replaced by subdivision (16) of this section), where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until

1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. *Gillespie v. American Motors Corp.*, 51 N.C. App. 535, 277 S.E.2d 100 (1981).

§ 1-53. Two years.

Within two years —

- (1) An action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. This subdivision shall not apply to actions based upon bonds, notes and interest coupons or when a different period of limitation is prescribed by this Article.
- (2) An action to recover the penalty for usury.
- (3) The forfeiture of all interest for usury.
- (4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought. (1874-5, c. 243; 1876-7, c. 91, s. 3; Code, ss. 756, 3836; 1895, c. 69; Rev., s. 396; C.S., s. 442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2; 1979, c. 654, s. 3; 1981, c. 777, s. 3.)

Local Modification. — Carteret: 1933, c. 386; Cherokee, Clay: 1933, c. 318; Haywood: 1933, c. 386.

Cross References. — As to pleading affirmative defense of usury, see Rule 8 of the Rules of Civil Procedure (§ 1A-1). As to penalty and forfeiture for usury, see § 24-2. As to power of county to be sued, see § 153A-11. As to power of municipality to be sued, see § 160A-11.

Editor's Note. — Session Laws 1979, c. 654, which rewrote subdivision (4), provides in s. 6: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17." Session Laws 1979, c. 654, s. 7, provides: "This act shall not affect pending litigation."

Session Laws 1981, c. 777, which rewrote subdivision (1), provides in s. 5:

"This act is effective upon ratification, but shall not apply to pending claims."

Legal Periodicals. — As to necessity for presenting tort claims, see 27 N.C.L. Rev. 145.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

- I. In General.
- II. Contractual Obligations of Local Governmental Units.
- III. Penalty for Usury.
- IV. Forfeiture of All Interest for Usury.
- V. Death by Wrongful Act.

I. IN GENERAL.

Applied in *Rogers v. Bank of Oxford*, 108 N.C. 574, 13 S.E. 245 (1891); *Hall v. Carroll*, 253 N.C. 220, 116 S.E.2d 459 (1960); *Preyer v. Parker*, 257 N.C. 440, 125 S.E.2d 916 (1962); *Hardbarger v. Deal*, 258 N.C. 31, 127 S.E.2d 771 (1962); *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282 (1967); *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969); *Groce v. Rapidair, Inc.*, 305 F. Supp. 1238 (W.D.N.C. 1969); *Baer v. Davis*, 47 N.C. App. 581, 265 S.E.2d 581 (1980).

Stated in *Long v. Coble*, 11 N.C. App. 624, 182 S.E.2d 234 (1971).

Cited in *Roberts v. Life Ins. Co.*, 118 N.C. 429, 24 S.E. 780 (1896); *McNeill v. Suggs*, 199 N.C. 477, 154 S.E. 729 (1930); *Smith v. Finance Co. of Am.*, 207 N.C. 367, 177 S.E. 183 (1934); *Ghormley v. Hyatt*, 208 N.C. 478, 181 S.E. 242 (1935); *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973); *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E.2d 243 (1976).

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Prior Law. — Prior to its amendment in 1981, subdivision (1) of this section provided for the presentation of claims against counties, cities, and towns within two years to certain officers thereof. For cases decided under subdivision (1) as it read prior to the 1981 amendment, see *Wharton v. Commissioners of Currituck*, 82 N.C. 11 (1880); *Moore v. Commissioners of Greene*, 87 N.C. 209 (1882); *Royster v. Board of Comm'rs*, 98 N.C. 148, 3 S.E. 739 (1887); *Lanning v. Commissioners of Transylvania County*, 106 N.C. 505, 11 S.E. 622 (1890); *Board of Educ. v. Town of Greenville*, 132 N.C. 4, 43 S.E. 472 (1903); *Dockery v. Town of Hamlet*, 162 N.C. 118, 78 S.E. 13 (1913); *Moore v. City of Charlotte*, 204 N.C. 37, 167 S.E. 380 (1933); *Lightner v. City of Raleigh*, 206 N.C. 496, 174 S.E. 272 (1934); *Fletcher v. Parlier*, 206 N.C. 904, 173 S.E. 343 (1934); *Mebane Graded School Dist. v. County of Alamance*, 211 N.C. 213, 189

S.E. 873 (1937); *Reed v. Madison County*, 213 N.C. 145, 195 S.E. 620 (1938); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88 (1939); *Grimes v. County of Beaufort*, 218 N.C. 164, 10 S.E.2d 640 (1940); *Valleytown Tp. v. Women's Catholic Order of Foresters*, 115 F.2d 459 (4th Cir. 1940); *Rivers v. Town of Wilson*, 233 N.C. 272, 63 S.E.2d 544 (1951); *Dennis v. City of Albemarle*, 242 N.C. 263, 87 S.E.2d 561 (1955); *Styers v. Gastonia*, 252 N.C. 572, 114 S.E.2d 348 (1960); *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966); *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966); *Brodfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967); *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855 (1971); *Williams v. GMC*, 393 F. Supp. 387 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976); *Wheeler v. Roberts*, 45 N.C. App. 311, 262 S.E.2d 829 (1980); *Messer v. American Gems, Inc.*, 612 F.2d 1367 (4th Cir.), *cert. denied*, 446 U.S. 956, 100 S. Ct. 2927, 64 L. Ed. 2d 815 (1980); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

III. PENALTY FOR USURY.

Right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. *Roberts v. Life Ins. Co.*, 118 N.C. 429, 24 S.E. 780 (1896).

The right to recover interest is governed by § 24-2, which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. *Roberts v. Life Ins. Co.*, 118 N.C. 429, 24 S.E. 780 (1896).

Section Not Retroactive. — The right added by the Act of 1876-77 to recover interest paid could not apply to contracts made prior to its passage. *Moore v. Beaman*, 112 N.C. 558, 17 S.E. 676 (1893).

The Act of 1895, c. 69, which provided for the recovery of usurious interest if the action was brought within two years after the payment in full of the indebtedness, by its express terms did not apply to

contracts antedating its ratification. *Roberts v. Life Ins. Co.*, 118 N.C. 429, 24 S.E. 780 (1896).

When Statute Begins to Run. — The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made. Each payment of usurious interest gives rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968); *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E.2d 598 (1980). See also, *Sloan v. Piedmont Fire Ins. Co.*, 189 N.C. 690, 128 S.E. 2 (1925).

As to the running of the statute where the transaction constitutes a mutual running account, see *English Lumber Co. v. Wachovia Bank & Trust Co.*, 179 N.C. 211, 102 S.E. 205 (1920).

This two-year prescription is subject to the provisions of § 1-21 that when a cause of action accrues against a person who is out of the State or thereafter departs therefrom and resides out of the State, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action. *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887); *Williams v. Iron Belt Bldg. & Loan Ass'n*, 131 N.C. 267, 42 S.E. 607 (1902).

As to actions against foreign corporations, see *Williams v. Iron Belt Bldg. & Loan Ass'n*, 131 N.C. 267, 42 S.E. 607 (1902).

For case holding an attorney's fee not usurious, see *Woody v. Prudential Life Ins. Co. of Am.*, 209 N.C. 364, 183 S.E. 296 (1936).

Counterclaim Held Barred. — Where more than two years had elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged was barred. *Farmers Bank & Trust Co. v. Redwine*, 204 N.C. 125, 167 S.E. 687 (1933).

IV. FORFEITURE OF ALL INTEREST FOR USURY.

This section is prospective only, and is applicable only to a forfeiture under § 24-2, which has occurred, or shall occur, since its ratification on April 1, 1931. *Farmers Bank & Trust Co. v. Redwine*, 204 N.C. 125, 167 S.E. 687 (1933).

When Statute Begins to Run. — The two-year statute of limitations on the forfeiture of all interest for usury begins to run at the time an agreement or charge for usurious interest is first made. *Haanebrink v. Meyer*, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

A junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a bona fide controversy as to the amount due under the prior debt was settled was not entitled to invoke the forfeiture of all interest, but was required to tender the principal of the debt plus legal interest. Hence, a decree continuing injunction to the final hearing was not error, notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, even if it was conceded that an action for forfeiture of the interest was barred by the statute. *Pinnix v. Maryland Cas. Co.*, 214 N.C. 760, 200 S.E. 874 (1939).

V. DEATH BY WRONGFUL ACT.

Two-Year Period Is Now a Statute of Limitations and Not a Condition Precedent. — The two-year period now prescribed for the commencement of a wrongful death action is not a condition precedent annexed to the cause of action as was the one-year limitation specified in former § 28-173 prior to its amendment in 1951. It is a statute of limitations. *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974); *Rafferty v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). See also, *McCrater v. Stone & Webster Eng'r Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958); *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963); *Kinlaw v. Norfolk S. Ry.*, 269 N.C. 110, 152 S.E.2d 329 (1967).

Section Bars Remedy, Not Right. — The two-year limitation period for wrongful death actions is an ordinary statute of limitation; it bars the remedy and not the right. *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980), cert. dismissed, 448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1141 (1980).

Qualification as Ancillary Administrator Held to Relate Back. — Where defendants had full notice of the transactions and occurrences upon which a wrongful death claim was based when the claim was originally filed within the period of limitations by plaintiff in her capacity as foreign administrator, plaintiff's motion to file a supplemental

pleading to show a change in her capacity to that of locally qualified ancillary administrator, which change occurred after the period of limitations had run, should have been granted and allowed to relate back to the commencement of her action. *Burcl v. North Carolina Baptist Hosp.*, 306 N.C. 214, 293 S.E.2d 85 (1982).

For cases holding that commencement of a wrongful death action by a foreign administrator would not bar the running of this statute or relate back, see *Reid v. Smith*, 5 N.C. App. 646, 169 S.E.2d 14 (1969); *Merchants Distrib., Inc. v. Hutchinson*, 16 N.C. App. 655, 193 S.E.2d 436 (1972); *Johnson v. Wachovia Bank & Trust Co.*, 22 N.C. App. 8, 205 S.E.2d 353 (1974); *Sims v. Rea Constr. Co.*, 25 N.C. App. 472, 213 S.E.2d 398 (1975), decided prior to *Burcl v. North Carolina Baptist Hosp.*, 306 N.C. 214, 293 S.E.2d 85 (1982).

Applicability to Action under Uninsured Motor Vehicle Policy. — An action against an insurer brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist is subject to the two-year statute of limitations prescribed for the commencement of a tort action for wrongful death, and not the

three-year limitation prescribed for actions on contract. *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974).

Wrongful Death Due to Defect in Machinery. — A cause of action for wrongful death due to a defect in machinery is governed by subdivision (4) of this section and accrues on the date of decedent's death. *Pinkston v. Baldwin, Lima, Hamilton Co.*, 29 N.C. App. 604, 225 S.E.2d 147 (1976), *aff'd*, 292 N.C. 260, 232 S.E.2d 431 (1977).

Although a cause of action was available to plaintiff under § 109-34 with its attendant six-year statute of limitations, where plaintiff chose to bring an action for wrongful death allegedly caused by the negligence of defendant officers in not providing medical attention for plaintiff's jailed intestate, the two-year statute of limitations provided for in subdivision (4) of this section was applicable; therefore, plaintiff was entitled to his day in court on his wrongful death action where plaintiff's intestate was imprisoned on September 13, 1971, and died the next day and the action was commenced on September 12, 1973. *State ex rel. Williams v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975).

Cited in *Stamey v. Rutherfordton Elec. Membership Corp.*, 249 N.C. 90, 105 S.E.2d 282 (1958).

§ 1-54. One year.

Within one year an action or proceeding —

- (1) Repealed by Session Laws 1975, c. 252, s. 5.
- (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.
- (3) For libel, slander, assault, battery, or false imprisonment.
- (4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.
- (5) For the year's allowance of a surviving spouse or children.
- (6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern.

- (7) Repealed by Session Laws 1971, c. 939, s. 2.
- (7a) For recovery of damages under Article 1A of General Statutes Chapter 18B.
- (8) As provided in G.S. 105-377, to contest the validity of title to real property acquired in any tax foreclosure action or to reopen or set aside the judgment in any tax foreclosure action. (C.C.P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C.S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2; 1975, c. 252, s. 5; 1977, c. 886, s. 3; 1983, c. 435, s. 38.)

Cross References. — For present limitation as to claims for loss covered by insurance policies subject to three-year limitation in lines 158 through 161 of N.C. Standard Fire Insurance Policy, see § 1-52(12). For present limitation on action against a public officer for trespass under color of office, see § 1-52(13). As to permitting escape of prisoners, see § 14-257. As to widow's year's allowance and application therefor, see § 30-15. As to liability for escape under civil process, see § 162-21.

Editor's Note. — Session Laws 1983, c. 435, s. 1, provides that the act shall be known as the Safe Roads Act of 1983.

Section 41.1 of the act provides: "The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons."

Section 42 of the act provides: "Prosecutions for offenses occurring before the

effective date of this act and administrative actions affecting drivers' licenses based on these offenses are not abated or affected by the repeal or amendment in this act of statutes creating or punishing the offense or authorizing administrative action concerning a driver's license, and the statutes that would be applicable but for the amendments and repealers in this act remain applicable to those prosecutions and administrative actions."

Section 43 of the Act provides that s. 38, which amended this section, applies only to acts and omissions occurring on or after the effective date of the act.

Section 45 of the act is a severability clause.

Section 46 of the act provides that except as provided in ss. 42 and 43 the act shall become effective Oct. 1, 1983.

Effect of Amendments. — The 1983 amendment added subdivision (7a).

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

- I. In General.
- II. Actions for Penalty or Forfeiture.
- III. Libel, Slander, Assault, Battery and False Imprisonment.
- IV. Deficiency Judgments.

I. IN GENERAL.

As to the application of former subdivision (1) of this section, relating to actions against public officers for trespass under color of office, see *Brown v. Walker*, 188 N.C. 52, 123 S.E. 633 (1924).

The unpled affirmative defense of the statute of limitations could be heard for the first time on motion for summary judgment where both parties were aware of the defense. *Dickens v. Puryear*, 45 N.C. App. 696, 263 S.E.2d

856 (1980), rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

When plaintiff attempts to allege an entirely different transaction by amendment, as for example, the separate publication of a libelous statement, the new claim will be subject to the defense of statute of limitations. *Price v. J.C. Penney Co.*, 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

Applied in *Lewis v. Shaver*, 236 N.C.

510, 73 S.E.2d 320 (1952); *Moser v. Fulk*, 237 N.C. 302, 74 S.E.2d 729 (1953); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955); *Nowell v. Neal*, 249 N.C. 516, 107 S.E.2d 107 (1959); *Clary v. Nivens*, 12 N.C. App. 690, 184 S.E.2d 374 (1971); *Priddy v. Cook's United Dep't Store*, 17 N.C. App. 322, 194 S.E.2d 58 (1973); *Feilder v. Moore*, 423 F. Supp. 62 (W.D.N.C. 1976); *Harris v. Atlantic-Richfield Co.*, 469 F. Supp. 759 (E.D.N.C. 1978); *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 266 S.E.2d 861 (1980); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

Stated in *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960); *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980); *Selby v. Taylor*, 57 N.C. App. 119, 290 S.E.2d 767 (1982).

Cited in *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922); *United States v. Lance, Inc.*, 95 F. Supp. 327 (W.D.N.C. 1951); *Reid v. Holden*, 242 N.C. 408, 88 S.E.2d 125 (1955); *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Johnson v. Graye*, 251 N.C. 448, 111 S.E.2d 595 (1959); *Waldron Buick Co. v. GMC*, 254 N.C. 117, 118 S.E.2d 559 (1961); *Jocie Motor Lines v. International Bhd. of Teamsters*, 260 N.C. 315, 132 S.E.2d 697 (1963); *Little v. Stevens*, 267 N.C. 328, 148 S.E.2d 201 (1966); *B.B. Walker Co. v. Ashland Chem. Co.*, 474 F. Supp. 651 (M.D.N.C. 1979); *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982); *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

II. ACTIONS FOR PENALTY OR FORFEITURE.

An action against a court clerk for a penalty, if not brought within one year, is barred by the statute of limitations. *State ex rel. Hewlett v. Nutt*, 79 N.C. 263 (1878).

Section Held Inapplicable to Action for Treble Damages under Unfair Trade Practices Statutes. — An action under § 75-16 to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1979, was governed by the three-year limitation of § 1-52(2), not the one-year limitation of subdivision (2) of this section applicable to actions to recover a statutory penalty. *Holley v.*

Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

III. LIBEL, SLANDER, ASSAULT, BATTERY AND FALSE IMPRISONMENT.

Libel or Slander Action Accrues on Date of Publication. — To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, and the action accrues at the date of publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date. *Price v. J.C. Penney Co.*, 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

A libel action must be brought within one year of the date it accrues, which is the date of publication. *Pressley v. Continental Can Co.*, 39 N.C. App. 467, 250 S.E.2d 676, cert. denied, 297 N.C. 177, 254 S.E.2d 37 (1979).

Relation Back of Supplementary Pleadings in Slander Actions. — There can be no relation back of supplementary pleadings where at the time suits were instituted no actionable damages existed, and where the claims alleged did not become actionable within the time provided by statute for the instituting of suits in slander actions. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Action for Libel Not Barred. — Where, in an action for libel, defendant admitted that the article in question was published in defendant's magazine on a certain date, and plaintiff showed that the action was instituted one day less than a year thereafter, defendant was not entitled to nonsuit upon his plea of the one-year statute of limitations. *Harrell v. Goerch*, 209 N.C. 741, 184 S.E. 489 (1936).

Where the gist of a claim is assault and battery, courts have applied the statute of limitations applicable to assault and battery, despite allegations in the complaint that it was some other tort. This is particularly true where it appears the purpose in the use of a label different from assault and battery is to provide a different and longer statute of limitations. In such cases, courts have been particularly careful to use the statute of limitations applicable to the facts and not the label. *Dickens v. Puryear*, 45 N.C. App. 696, 263 S.E.2d 856 (1980),

rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

Subdivision (3) Not Applicable to Action for Intentional Infliction of Mental Distress. — No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, § 1-52(5), and not by subdivision (3) of this section. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Disability Preventing Bar against Action for Assault and Battery. — An action for assault and battery is barred upon the plea of this section, if not commenced within one year; but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. *Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530 (1931).

Cause of action for false imprisonment is barred after expiration of one year from plaintiff's release from custody by the giving of bond, notwithstanding the fact that the criminal prosecution in which the arrest took place continues within the limitation period. *Mobley v. Broome*, 248 N.C. 54, 102 S.E.2d 407 (1958).

Action for False Imprisonment Not Barred. — Where it appeared that plaintiff's cause of action based upon alleged wrongful act of defendant in

causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane, plaintiff's cause of action was not barred. *Jackson v. Parks*, 216 N.C. 329, 4 S.E.2d 873 (1939).

IV. DEFICIENCY JUDGMENTS.

Who May Assert Subdivision (6) as Bar. — The one-year statute of limitations under subdivision (6) of this section is not available as a defense to a party liable as a maker on an underlying note who is not a mortgagor of the property on which the creditor has foreclosed. Only a party with an interest in mortgaged property may assert subdivision (6) of this section as a bar to an action for a deficiency judgment. *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

An action for a deficiency judgment after foreclosure was not barred when it was instituted less than one year after the expiration of the 10-day period for an increase in bid, even though it was instituted more than one year after the date the property was exposed for sale. *Shelby Bldg. & Loan Ass'n v. Black*, 215 N.C. 400, 2 S.E.2d 6 (1939), decided under the former statute which became § 1-48 and was subsequently rewritten as subdivision (6) of this section.

§ 1-54.1. Nine months.

Within nine months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Article 160A of the General Statutes or other applicable law. (1981, c. 705, s. 1; c. 891, s. 4.)

Editor's Note. — Session Laws 1981, c. 705, which added "or adopted by a city under Article 160A of the General Statutes or other applicable law," provides:

"Sec. 3. This act shall not affect pending litigation.

"Sec. 4. A cause of action as to the

validity of any zoning ordinance, or amendment thereto, adopted under Article 18, Part 1 of G.S. Chapter 153A or other applicable law, enacted prior to the effective date of this act [June 26, 1981] shall be brought within nine months of the effective date of this act."

§ 1-55. Six months.

Within six months an action —

- (1) Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitations shall commence from the date of the execution of such instrument.
- (2) For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof.
- (3) For wrongful discharge or demotion because of proceedings under the North Carolina Workmen's Compensation Act as prohibited by G.S. 97-6.1. (C.C.P., s. 36; Code, s. 157; Rev., s. 398; C.S., s. 444; 1931, c. 168; 1943, c. 642, s. 2; 1969, c. 1001, s. 1; 1979, c. 738, s. 2.)

Local Modification. — Cleveland, Rutherford: 1933, c. 167.

Editor's Note. — Section 97-1.1 provides that references to the "Workmen's Compensation Act" shall be deemed to refer to the "Workers' Compensation

Act," which is now codified as § 97-1 et seq.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

For cases decided under a former subdivision (1) of this section, relating to actions for slander, see Hanna v. Ingram, 53 N.C. 55 (1860); Pegram v. Stoltz, 67 N.C. 144 (1872);

Hester v. Mullen, 107 N.C. 724, 12 S.E. 447 (1890); Gordon v. Fredle, 206 N.C. 734, 175 S.E. 126 (1934).

Cited in Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued. (C.C.P., s. 37; Code, s. 158; Rev., s. 399; C.S., s. 445; 1951, c. 837, s. 3.)

CASE NOTES

- I. In General.
- II. Actions to Which Section Applies.
- III. Actions to Which Section Does Not Apply.
- IV. Actions Held Barred.
- V. Actions Held Not Barred.

I. IN GENERAL.

Purpose of Section. — This is a catch-all section, designed to place an outer time limit on all actions not specifically covered by other sections of this Subchapter of the General Statutes. *Lattimore v. Loews Theatres, Inc.*, 410 F. Supp. 1397 (M.D.N.C. 1975).

As to the purpose of this section, see also, *Wyrick v. Wyrick*, 106 N.C. 84, 10 S.E. 916 (1890); *Ex parte Smith*, 134 N.C. 495, 47 S.E. 16 (1904).

This statute does not begin to run until there is a person in esse competent to begin suit. *Godley v. Taylor*, 14 N.C. 178 (1831); *Lynn v. Lowe*, 88 N.C. 478 (1883).

When Statute Begins Running — Breach of Covenant. — Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section began running against an action for such breach from the time of the delivery. *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Action by Vendor to Recover Possession. — This section begins to run against an action by vendor to recover possession from vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. *Overman v. Jackson*, 104 N.C. 4, 10 S.E. 87 (1889).

Same — Action to Impeach Final Account. — An action to impeach the final account of a personal representative must be brought within 10 years from the filing and auditing thereof as provided in this section. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Same — Where Mortgagee Sells and Repurchases. — Where the mortgagee sells and conveys to one who reconveys to him, the mortgagor or his representatives can call upon the mortgagee for an account at any time within 10 years after the cause of action accrues. *Bruner v. Threadgill*, 88 N.C. 361 (1883).

Same — Action to Impose Constructive Trust. — In the absence of a demand and refusal, the statute of limitations in an action to impose a constructive trust upon an administrator does not begin to run until the administrator completes and closes the administration. *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E.2d 437 (1971).

Same — Action against Former Administrator and by Guardian. — Where individual defendant was removed as guardian for an incompetent,

and plaintiff was appointed as guardian and duly qualified, plaintiff's cause of action against former administrator for money due the incompetent and against former administrator's surety accrued to plaintiff upon his qualification as guardian; and there was no merit to the surety's contention that recovery was limited to the amounts removed by the guardian during the three years prior to the date suit was brought, less any sums returned during that period. *State ex rel. Duckett v. Pettee*, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

In an action by one who claimed as enterer of "Cherokee Lands," the cause of action was barred in 10 years from registration of the grant. *Frazier v. Gibson*, 140 N.C. 272, 52 S.E. 1035 (1905); *Philips v. Buchanan Lumber Co.*, 151 N.C. 519, 66 S.E. 603 (1909).

Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the 10-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. *Gentry v. Gentry*, 187 N.C. 29, 121 S.E. 188 (1924).

In action to remove cloud on title, in which defendants claim title by adverse possession, allegations in the answer pleading this section upon the assertion that plaintiffs' action accrued more than 10 years prior to the commencement of the action were properly stricken as irrelevant. *Williams v. North Carolina State Bd. of Educ.*, 266 N.C. 761, 147 S.E.2d 381 (1966).

Section Not Affected by § 1-52. — This section, applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of § 1-52, as to actions on their official bonds. *Pierce v. Faison*, 183 N.C. 177, 110 S.E. 857 (1922).

Charge of Section along with § 1-52. — Where, if an action had not been barred by the provisions of subdivisions (4) and (9) of § 1-52, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years or in 10 years. *Osborne v. Wilkes*, 108 N.C. 651, 13 S.E. 285 (1891).

Statutes Runs between Spouses. — Statutes of limitation run as well between spouses as between strangers. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Action Barred by Laches. — Where an action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. *Howell v. Alexander*, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Action to Test Validity of Stockholder's Election. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

Applied in *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938); *Barbee v. Edwards*, 238 N.C. 215, 77 S.E.2d 646 (1953); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957).

Cited in *Smith v. Smith*, 72 N.C. 139 (1875); *Ross v. Henderson*, 77 N.C. 170 (1877); *McDonald v. Dickson*, 85 N.C. 248 (1881); *Mauney v. Coit*, 86 N.C. 464 (1882); *Burgwyn v. Daniel*, 115 N.C. 115, 20 S.E. 462 (1894); *Bradsher v. Hightower*, 118 N.C. 399, 24 S.E. 120 (1896); *Williams v. Scott*, 122 N.C. 545, 29 S.E. 877 (1898); *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904); *Frazier v. Eastern Band of Cherokee Indians*, 146 N.C. 477, 59 S.E. 1005 (1907); *Dayton v. City of Asheville*, 185 N.C. 12, 115 S.E. 827 (1923); *Spence v. Foster Pottery Co.*, 185 N.C. 218, 117 S.E. 32 (1923); *Marshall v. Hammock*, 195 N.C. 498, 142 S.E. 776 (1928); *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857 (1930); *United States v. Pastell*, 91 F.2d 575 (4th Cir. 1937); *Creech v. Creech*, 222 N.C. 656, 24 S.E.2d 642 (1943); *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E.2d 610 (1946); *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E.2d 764 (1947); *Lee v. Rhodes*, 231 N.C. 602, 58 S.E.2d 363 (1950); *Quevedo v. Deans*, 234 N.C. 618, 68 S.E.2d 275 (1951); *Scott Poultry Co. v. Graves*, 272 N.C. 22, 157 S.E.2d 608 (1967); *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 157 S.E.2d

693 (1967); *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *In re Will of Spinks*, 7 N.C. App. 417, 173 S.E.2d 1 (1970); *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E.2d 437 (1971); *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977); *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397 (1978); *Hill v. Lassiter*, 51 N.C. App. 34, 275 S.E.2d 237 (1981); *Lea Co. v. North Carolina Bd. of Transp.*, 57 N.C. App. 392, 291 S.E.2d 844 (1982).

II. ACTIONS TO WHICH SECTION APPLIES.

The 10-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is 10 years. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

Resulting or Constructive Trust. — A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year and not the three-year statute of limitations. *Bowen v. Darden*, 241 N.C. 11, 84 S.E.2d 289 (1954); *Howell v. Alexander*, 3 N.C. App. 371, 165 S.E.2d 256 (1969). See also, *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965).

The institution of an action to enforce a resulting trust is governed by the 10-year statute. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

Actions seeking to impose a constructive trust or to obtain an accounting involve conduct which approaches the level of fraud, and for that reason the 10-year statute, this section, applies. *Tyson v. North Carolina Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982).

Action by Children against Trustee. — Where testator created his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," this constituted an active trust during the life of the son, which would become passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after 10 years,

especially when the relationship of trustee had been openly repudiated. *Latham v. Latham*, 184 N.C. 55, 113 S.E. 623 (1922).

Impeachment of Final Account of Representative. — When a final account of a representative is filed and audited, an action to impeach it must be brought within 10 years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. *Woody v. Brooks*, 102 N.C. 334, 9 S.E. 294 (1889).

Release of Right to Surcharge and Restate Final Account. — There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been 10 years, the same length of time which is now required by this section to bar such action. *Nunnery v. Averitt*, 111 N.C. 394, 16 S.E. 683 (1892).

Action by Vendor to Recover Possession. — In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. *Overman v. Jackson*, 104 N.C. 4, 10 S.E. 87 (1889).

Contract Action for Breach of Covenant. — An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by § 1-52, subdivision (9), but by this section. *Shankle v. Ingram*, 133 N.C. 254, 45 S.E. 578 (1903).

Suit to Declare Defendant in Execution Equitable Owner. — A suit to declare one of the defendants in execution to be the equitable owner of lands for the purchase of which he furnished the price, and his codefendants trustees, is barred by the 10-year statute of limitations. *Sexton v. Farrington*, 185 N.C. 339, 117 S.E. 172 (1923).

An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. *Hunter v. West*, 172 N.C. 160, 90 S.E. 130 (1916).

Action to Declare Trust in Land. — This section was applicable to plaintiff's right of action to declare a trust in land. *Marshall v. Hammock*, 195 N.C. 498, 142 S.E. 776 (1928).

Action to Declare Trust in Stock. — An action by the beneficiaries of a trust to establish a constructive or resulting

trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within 10 years from the date of the accrual of the cause of action. *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949).

III. ACTIONS TO WHICH SECTION DOES NOT APPLY.

Where an action is for breach of contract and not one to establish a constructive or resulting trust, the action is barred after three years from defendant's categorical denial of plaintiff's rights. *Parsons v. Gunter*, 266 N.C. 731, 147 S.E.2d 162 (1966).

Damages for Breach of Fiduciary Duty. — The three-year statute of limitations, and not the 10-year statute provided in this section, applied to a claim for damages for breach of fiduciary duty in the administration of a deceased's estate. *Tyson v. North Carolina Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982).

Recovery of Real Estate. — This section does not apply to actions for the recovery of real estate, because §§ 1-39 and 1-40 apply to its exclusion. *Williams v. Scott*, 122 N.C. 545, 29 S.E. 877 (1898).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of § 1-52, and not by this section. *Reynolds v. Whitin Mach. Works*, 167 F.2d 78 (4th Cir.), cert. denied, 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948).

Action for Delinquent Taxes. — Neither the three-year nor the 10-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes, unless such act expressly so provides. *City of Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9 (1898).

IV. ACTIONS HELD BARRED.

Action to Have Claimants under Senior Grantee Declared Trustees. — An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred by this section, where not brought within 10 years from the registration of the senior grant. *Ritchie v.*

Fowler, 132 N.C. 788, 44 S.E. 616 (1903).

Action for Balance Due Heirs. — Where the distributees, who until they became of age had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either § 1-50, subdivision (2) or this section. *Culp v. Lee*, 109 N.C. 675, 14 S.E. 74 (1891).

Action by Widow to Enforce Claim. — Where a petition in partition was filed, and the petitioners entered into possession of their respective shares in accordance with the judgment of partition therein entered, and it was therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum was made a lien upon the lands, an action by the widow to enforce her claim against the land was barred after the lapse of more than 10 years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, did not alter this result. *Aldridge v. Dixon*, 205 N.C. 480, 171 S.E. 777 (1933).

V. ACTIONS HELD NOT BARRED.

Action for Injunction Prohibiting Practice of Podiatry. — The 10-year statute of limitations of this section did not bar an action by the Board of

Podiatry Examiners seeking an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some 30 years earlier, since defendant's violation of the podiatry statutes was an ongoing violation, and defendant was unlawfully practicing podiatry at the time the action was filed. *Costin v. Shell*, 53 N.C. App. 117, 280 S.E.2d 42, cert. denied, 304 N.C. 193, 285 S.E.2d 97 (1981).

Foreclosure of Mortgage against Remainderman. — Where a remainderman, not being in possession, executed a mortgage, the foreclosure of the mortgage was not barred after 10 years from the forfeiture thereof or from the last payment, where such action was brought within 10 years from the time of acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N.C. 162, 48 S.E. 578 (1904).

Recovery of Amount Due on Final Account. — Where administrator of decedent died eight years after filing an ex parte account, and plaintiff qualified as his executor within one month and within 17 months began a proceeding to make real estate assets, to which the administrator de bonis non of the initial decedent became a party and filed a complaint to recover the amount due on said final account, it was held, that although this section applied, it did not bar the action. *Wyrick v. Wyrick*, 106 N.C. 84, 10 S.E. 916 (1890).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

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

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any setoff or other defense, existing

at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (C.C.P., s. 55; 1874-5, c. 256; Code, s. 177; Rev., s. 400; C.S., s. 446.)

Cross References. — As to real parties in interest, see also Rule 17 of the Rules of Civil Procedure, § 1A-1.

Legal Periodicals. — For case law surveys on pleading and parties, see 43 N.C.L. Rev. 873 (1965) and 44 N.C.L. Rev. 897 (1966).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

- I. In General.
- II. Parties Held Real Parties in Interest.
- III. Parties Held Not Real Parties in Interest.
- IV. Actions by Grantees of Real Estate.
- V. Assignments.
 - A. In General.
 - B. Setoffs and Defenses.

I. IN GENERAL.

Purpose of Section. — The provision requiring every action to be prosecuted in the name of the real party in interest is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a resort to another action, so as to harmonize with the North Carolina Constitution. *Abrams v. Cureton*, 74 N.C. 523 (1876).

Section as Enabling Act. — The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. *Usury v. Suit*, 91 N.C. 406 (1884).

Strict Compliance Required. — Under this section there is no middle ground; for whenever an action can be brought in the name of the real party in interest, it must be so done. *Rogers v. Gooch*, 87 N.C. 442 (1882). See also, *McGuinn v. City of High Point*, 219 N.C. 56, 13 S.E.2d 48 (1941).

A motion in the cause is the prosecution of an action within the meaning of this section. *Howard v. Boyce*, 266 N.C. 572, 146 S.E.2d 828 (1966).

A real party in interest is a party who will be benefited or injured by the judgment in the case. *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 139 S.E.2d 723 (1965).

Interest Must Be in Subject of Litigation. — The requirement that an action must be maintained by the real

party in interest means some interest in the subject matter of the litigation and not merely an interest in the action. *Choate Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609 (1936).

An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 455, 139 S.E.2d 723 (1965).

Plaintiff Must Be Real Party in Interest. — Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest. *State ex rel. East Lenoir San. Dist. v. City of Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958). See also, *Hyatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927); *Howard v. Boyce*, 266 N.C. 572, 146 S.E.2d 828 (1966).

Under this section and § 1A-1, Rule 17(a), only the real party in interest can prosecute a claim. *Crowell v. Chapman*, 306 N.C. 540, 293 S.E.2d 767 (1982).

And Cannot Redress Wrong Done to Another. — A right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to a contract. *Walker v. Nicholson*, 257 N.C. 744, 127 S.E.2d 564 (1962).

Presumption from Possession of Chose in Action. — The possession of a chose in action raises a presumption that

the person producing it on trial is the real party in interest. *Jackson v. Love*, 82 N.C. 408 (1880); *Pate v. Brown*, 85 N.C. 166 (1881).

Right to Jury Trial on Question of Plaintiff's Status. — On the issue of whether the plaintiff was the real party in interest he was entitled to a trial by jury. *Hershey Corp. v. Atlantic Coast Line R.R.*, 207 N.C. 122, 176 S.E. 265 (1934).

Dismissal where Plaintiff Is Not Real Party in Interest. — When it appears that the real party in interest is not before the court, the proceeding should be dismissed. *Howard v. Boyce*, 266 N.C. 572, 146 S.E.2d 828 (1966). See also, *Chapman v. McLawhorn*, 150 N.C. 166, 63 S.E. 721 (1909).

Where plaintiff sued a class of defendants pursuant to § 1A-1, Rule 23, but thereafter lost her status as a real party in interest by conveying the property that was the subject of the suit and filed a notice of voluntary dismissal under § 1A-1, Rule 41(a), upon which the new owners were joined as plaintiffs, the trial judge should have dismissed the original plaintiff as no longer a real party in interest on that ground alone. *Crowell v. Chapman*, 306 N.C. 540, 293 S.E.2d 767 (1982).

Continuance for Bringing in Necessary Parties. — Absence of necessary parties does not merit nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

As to the right to bring an action for quo warranto, see *Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892); *Hines v. Vann*, 118 N.C. 3, 23 S.E. 932 (1896).

As to contracts for the benefit of third parties, see *Shoaf v. Palatine Ins. Co.*, 127 N.C. 308, 37 S.E. 451 (1900); *Voorhees v. Porter*, 134 N.C. 591, 47 S.E. 31 (1904).

Actions by Executor or Administrator in Representative Capacity. — An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. *Rogers v. Gooch*, 87 N.C. 442 (1882). See also, *Sitzer v. Lewis*, 69 N.C. 133 (1873); *Danis v. Fox*, 69 N.C. 435 (1873).

Administrator of deceased guardian cannot maintain an action to collect a note payable to intestate as guardian unless it is shown that the

money due thereon had become the property of the intestate's estate. *Alexander v. Wriston*, 81 N.C. 193 (1879).

Making Landowner a Party in Tenant's Action for Trespass. — Under this section, the court has the power to order the owner of the title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. *Tripp v. Little*, 186 N.C. 215, 119 S.E. 225 (1923).

Applied in *Hood v. Mitchell*, 206 N.C. 156, 173 S.E. 61 (1934); *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554, 200 S.E. 1 (1938); *First Union Nat'l Bank v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965); *Community Bank v. McKenzie*, 32 N.C. App. 68, 230 S.E.2d 788 (1977); *In re Estate of Etheridge*, 33 N.C. App. 585, 235 S.E.2d 924 (1977).

Stated in *Lawson v. Langley*, 211 N.C. 526, 191 S.E. 229 (1937); *Ionic Lodge #72 F. & A.A.M. v. Ionic Lodge F. & A.A.M. #72 Co.*, 232 N.C. 648, 62 S.E.2d 73 (1950).

Cited in *Holly v. Holly*, 94 N.C. 670 (1886); *Thompson v. Wiggins*, 109 N.C. 508, 14 S.E. 301 (1891); *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892); *Scarlett v. Norwood*, 115 N.C. 284, 20 S.E. 459 (1894); *Woodcock v. Bostic*, 118 N.C. 822, 24 S.E. 362 (1896); *Williford v. Bailey*, 132 N.C. 402, 43 S.E. 928 (1903); *Snider v. Newell*, 132 N.C. 614, 44 S.E. 354 (1903); *Vaughan & Barnes & Moseley Bros v. Davenport*, 157 N.C. 156, 72 S.E. 842 (1911); *Tillaston v. Currin*, 176 N.C. 479, 97 S.E. 395 (1918); *Cunningham v. Long*, 188 N.C. 613, 125 S.E. 265 (1923); *Lawshe v. Norfolk & S.R.R.*, 191 N.C. 473, 132 S.E. 160 (1926); *Hunt v. State*, 201 N.C. 37, 158 S.E. 703 (1931); *First Nat'l Bank v. Thomas*, 204 N.C. 599, 169 S.E. 189 (1933); *McCarley v. Council*, 205 N.C. 370, 171 S.E. 323 (1933); *Betts v. Southern Ry.*, 71 F.2d 787 (4th Cir. 1934); *Buckner v. United States Fire Ins. Co.*, 209 N.C. 640, 184 S.E. 520 (1936); *In re Wallace*, 212 N.C. 490, 193 S.E. 819 (1937); *John P. Nutt Corp. v. Southern Ry.*, 214 N.C. 19, 197 S.E. 534 (1938); *Atlantic Joint Stock Land Bank v. Foster*, 217 N.C. 415, 8 S.E.2d 235 (1940); *Riddick v. Davis*, 220 N.C. 120, 16 S.E.2d 662 (1941); *Kemp v. Funderburk*, 224 N.C. 353, 30 S.E.2d 155 (1944); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673 (1951); *Bizzell v. Bizzell*, 237 N.C. 535, 75 S.E.2d 536 (1953); *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E.2d 688 (1955); *Hendrix v. B. & L. Motors*,

Inc., 241 N.C. 644, 86 S.E.2d 448 (1955); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Adams v. Flora Macdonald College, 251 N.C. 617, 111 S.E.2d 859 (1960); Branch Banking & Trust Co. v. Bank of Washington, 255 N.C. 205, 120 S.E.2d 830 (1961); Gulf Life Ins. Co. v. Waters, 255 N.C. 553, 122 S.E.2d 387 (1961); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

II. PARTIES HELD REAL PARTIES IN INTEREST.

Subrogated Insurer. — When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured, and he alone, under this section, as the real party in interest, may maintain an action against the wrongdoer. Cunningham v. Railroad, 139 N.C. 427, 51 S.E. 1029 (1905).

Where the insurance paid to an insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under this section. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); commented on in 31 N.C.L. Rev. 224 (1953); Milwaukee Ins. Co. v. McLean Trucking Co., 256 N.C. 721, 125 S.E.2d 25 (1962); Shambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965). See also, Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955); Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Where insured property is destroyed or damaged by the tortious act of a third party and the insurance company pays its insured, the owner, the full amount of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case, the insurance company as the real party in interest under this section, may maintain such action in its name and for

its benefit. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961); Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963).

An insurance company, as plaintiff, could bring suit in its own name against parents of minor who set fire to school property upon a claim to which it had become subrogated by payment in full of its loss to the school board under the provisions of its policy of insurance. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Where an insurance company pays the insured in part only for the loss sustained, it is subrogated pro tanto in equity to the rights of the insured against the tort-feasor, and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Endorser Subrogated to Rights of Payee. — Where a person presenting a note to a bank was required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check was not paid and was charged by the bank to the endorser's account therein, the endorser so paying the check was subrogated to the rights of the payee bank and became the real party in interest, and could prosecute an action against the drawer, payee, and collecting banks under the provisions of this section to determine the liability of the parties. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Sole Stockholder. — In a suit instituted by a corporation wherein all the stock was owned by one person, the sole stockholder was a real party in interest, and was a necessary party plaintiff. Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956).

Ward as Equitable Owner of Bond Payable to Guardian. — A bond made payable to a guardian was in equity the property of the ward, and suit could be brought upon it by the ward when the same was turned over in the guardian's settlement, notwithstanding the fact

that the legal title had been transferred by the guardian's endorsement to another. *Usry v. Suit*, 91 N.C. 406 (1884). See also, *Melbane v. Melbane*, 66 N.C. 334 (1872).

Undisclosed Principal on Contract.

— An undisclosed principal holding the business rights and interests under a contract may sustain an action thereon. *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R.R.*, 155 N.C. 148, 71 S.E. 71 (1911); *Williams v. Honeycutt*, 176 N.C. 102, 96 S.E. 730 (1918).

Where directors of a bank had paid the liability of others under an agreement, each one of them could maintain his action against each of the defaulting members under this section, and such was not a misjoinder of parties prohibited by statute. *Taylor v. Everett*, 188 N.C. 247, 124 S.E. 316 (1924).

Action on Note by Liquidating Agent. — In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security were both interested parties and could jointly sue the makers of the note. *Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc.*, 209 N.C. 36, 182 S.E. 694 (1935).

Action on Fidelity Bond of Defaulting Cashier. — Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrendered nor assigned the fidelity bond of the defaulting cashier, the bank was the real party in interest and was entitled to maintain an action upon the bond. *Peoples' Bank v. Fid. & Deposit Co.*, 4 F. Supp. 379 (M.D.N.C. 1933), *aff'd*, 72 F.2d 932 (4th Cir.), *cert. denied*, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1934).

Suit by State Officer. — Where a State officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, as the State is the real party in interest, appearing in the name of its successive agents. *Lacy v. Webb*, 130 N.C. 545, 41 S.E. 549 (1902). See also, *Peebles v. Boone*, 116 N.C. 57, 21 S.E. 187, 44 Am. St. R. 429 (1895).

Where a bond for payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator *de bonis non* of the

testator. *Ballinger v. Curriton*, 104 N.C. 474, 10 S.E. 664 (1889).

Widow who paid an account for burial expenses of her husband was the proper party plaintiff in an action against the administrator, being the real party in interest. *Ray v. Honeycutt*, 119 N.C. 510, 26 S.E. 127 (1896).

Negligent Mutilation of Dead Body.

— In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. *Floyd v. Atlantic Coast Line Ry.*, 167 N.C. 55, 83 S.E. 12 (1914).

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. *Barbee v. Cannady*, 191 N.C. 529, 132 S.E. 572 (1926).

Suit to Remove Cloud on Title where Land Conveyed Pendente Lite. — Where landowner sought to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite he conveyed the land to another with full warranty deed, he could continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. *Plotkin v. Merchants Bank & Trust Co.*, 188 N.C. 711, 125 S.E. 541 (1924).

Action to Vacate Grant when State Not Interested. — Where the State has no interest in the land, as where title would not revert in the State, an action to vacate a grant must be brought by the party in interest in his own name, the State not being such a party. *State ex rel. Attorney Gen. v. Bland*, 123 N.C. 739, 31 S.E. 475 (1898). See also, *State v. Bevers*, 86 N.C. 588 (1882); *Carter v. White*, 101 N.C. 30, 7 S.E. 473 (1888); *Henry v. McCoy*, 131 N.C. 586, 42 S.E. 955 (1902).

Action by Tenant Cultivating Land. — Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. *Bridgers v. Dill*, 97 N.C. 222, 1 S.E. 767 (1887); *State v. Higgins*, 126 N.C. 1112, 36 S.E. 113 (1900).

Where the grantor of land reserved hunting rights and later leased them, and defendant successor to grantee refused to permit lessee to enter upon the property for the purpose of hunting, the lessee and not the lessor was the proper

party to maintain an action against defendant for damages. *Jones v. Neisler*, 228 N.C. 444, 45 S.E.2d 369 (1947).

A suit by mortgagor to correct a mortgage which, through fraud or mistake or the negligence of the register of deeds in cross-indexing, failed to give a priority of lien to one of several mortgages entitled thereto, would be entertained in equity, as he was a real party in interest. *Gray v. Mewborn*, 194 N.C. 348, 139 S.E. 695 (1927).

Where the agent of a manufacturer was obligated to pay freight charges on shipments made to him, pursuant to an agreement with his principal, and upon demand of the carrier he paid its unlawful charges on a shipment, he was the party aggrieved, within the meaning of this section, and could maintain his actions to recover the excess, and also the penalty when entitled thereunto. *Tilley v. Southern Ry.*, 172 N.C. 363, 90 S.E. 309 (1916).

Generally an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. *Lammonds v. Aleo Mfg. Co.*, 243 N.C. 749, 92 S.E. 143 (1956).

III. PARTIES HELD NOT REAL PARTIES IN INTEREST.

An agent is not the real party in interest and cannot maintain an action. *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963); *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 139 S.E.2d 723 (1965).

An agent for another cannot maintain an action in his name for the benefit of his principal. *Howard v. Boyce*, 266 N.C. 572, 146 S.E.2d 828 (1966).

An agent for the collection of rents is not the real party in interest. *Martin v. Mask*, 158 N.C. 436, 74 S.E. 343 (1912).

A rental agent may not maintain a suit in ejection or for the collection of rents, the owner being the real party in interest under this section. *Home Real Estate Loan & Ins. Co. v. Locker*, 214 N.C. 1, 197 S.E. 555 (1938).

Lessor Must Bring Action of Summary Ejectment. — Although an agent of the lessor could make the oath in writing required by statute in summary ejectment, the action had to be prosecuted in the name of the lessor as the real party in interest, and it could not be

maintained in the name of the lessor's rental agent. *Choate Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609 (1936).

Where land has broom sage growing thereon, the tenant is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except for its value for farming purposes on the leased premises. *Chauncy v. Atlantic Coast Line R.R.*, 195 N.C. 415, 142 S.E. 327 (1928).

Plaintiff taxpayers could not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs were not the real parties in interest. *Freeman v. Board of County Comm'rs*, 217 N.C. 209, 7 S.E.2d 354 (1940).

Purchaser of Bond Transferred without Authority by Special Agent. — When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. *McMinn v. Freeman*, 68 N.C. 342 (1873).

Parties to Interpretation, etc., of Will. — Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under writing propounded as a will are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. *Citizens Bank & Trust Co. v. Dustowe*, 188 N.C. 777, 125 S.E. 546 (1924).

Where notes were bequeathed to testator's widow for life and she, as executrix, distributed them to herself, and there was no evidence that they were not endorsed or that such distribution did not pass title to the notes from her as representative, plaintiff, as testator's administrator c.t.a., did not show that he was the real party in interest under this section to recover the notes from the widow's administrators. Upon distribution the property had inured to the benefit of the life tenant and remaindermen and was not subject to further administration. *Darden v. Boyette*, 247 N.C. 26, 100 S.E.2d 359 (1957).

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. *Blount v. Johnson*, 165 N.C. 25, 80 S.E. 882 (1914).

Slander of Wife. — Where an action was brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleged no special damages, his action would not lie because he was not the real party in interest. *Harper v. Pinkston*, 112 N.C. 293, 17 S.E. 161 (1893).

In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship could be inferred, disclosed that plaintiff was not the real party in interest and that he was without any right to maintain the action. *Skinner v. Empresa Transformador De Productos Agropecuarios, S.A.*, 252 N.C. 320, 113 S.E.2d 717 (1960).

Where carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party, and that the shippers would be the real parties in interest, not the contract truck carriers. *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

IV. ACTIONS BY GRANTEEES OF REAL ESTATE.

Constitutionality. — This section, permitting a grantee of real estate to maintain an action in his own name, is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. *Buie v. Carver*, 75 N.C. 559 (1876); *Justice v. Eddings*, 75 N.C. 581 (1876).

An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the fact that the person in actual possession claims under

a title adverse to that of such grantor. *Buie v. Carver*, 75 N.C. 559 (1876); *Osborne v. Anderson*, 89 N.C. 263 (1883); *Johnson v. Prairie*, 94 N.C. 775 (1886); *Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907).

V. ASSIGNMENTS.

A. In General.

"Assignment" Defined. — An "assignment" is substantially a transfer, actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963).

Effect of Section. — This section abrogates the principle of the common law that a chose in action cannot be assigned. It confers an unlimited right to assign "anything in action" arising out of contract, and subjects the assignee to any setoff or other defense existing at the time of or before notice of the assignment; the only saving being in regard to "negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due." This language is as broad as it can be, so that a note assigned after it is due, a half dozen times, will be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof. *Harris v. Burnwell*, 65 N.C. 584 (1871); *Standard Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E.2d 398 (1958).

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. *American Sur. Co. v. Baker*, 172 F.2d 689 (4th Cir. 1949).

Judgments Not Embraced by Section. — While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising ex delicto, and they are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. *Winbury v. Koonce*, 83 N.C. 351 (1880); *Moore v. Norvell*, 94 N.C. 270 (1886).

When Executory Contracts Assignable. — As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust or confidence of or in the other party, cannot be assigned. *Atlantic & N.C.R.R. v. Atlantic & N.C. Co.*, 147 N.C. 368, 61 S.E. 185 (1908).

A claim for unpaid wages is a chose in action which may be assigned and, when assigned the assignee may maintain an action thereon in his own name. *Morton v. Thornton*, 257 N.C. 259, 125 S.E.2d 464 (1962).

Installments of a pension payable in the future are not assignable. *Gill v. Dixon*, 131 N.C. 87, 42 S.E. 538 (1902).

The one to whom there has been an absolute assignment is the "real party in interest" rather than the assignor who has parted with all interest therein. *Commerce Mfg. Co. v. Blue Jeans Corp.*, 146 F. Supp. 15 (E.D.N.C. 1956).

An assignee of a contractual right is a real party in interest and may maintain the action. *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963).

Assignee Sues in Own Name. — An assignee may sue in his own name, under this section, as an equitable assignee or cestui que trust could formerly have done in equity. *Miller v. Tharel*, 75 N.C. 148 (1876). See also, *Sutton v. Owen*, 65 N.C. 124 (1871); *Safeco Ins. Co. of Am. v. Nationwide Mut. Ins. Co.*, 264 N.C. 749, 142 S.E.2d 694 (1965).

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. *North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484 (1931).

Action on Assigned Nonnegotiable Note. — The assignee of a nonnegotiable note may maintain an action thereon, as may the owner where there is no written assignment. *Wilcoxon v. Logan*, 91 N.C. 452 (1884).

In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal

title, the equitable owner being the real party in interest may sue in his own name. *Andrews v. McDaniel*, 68 N.C. 385 (1873); *Milley v. Gatling*, 70 N.C. 410 (1874); *Egerton v. Carr*, 94 N.C. 653 (1886); *Tyson v. Joyner*, 139 N.C. 69, 51 S.E. 803 (1905); *Ball-Thrash & Co. v. McCormick*, 162 N.C. 471, 78 S.E. 303 (1913).

The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, prima facie, the equitable title, and can maintain a suit thereon. *Bresee v. Crumpton*, 121 N.C. 122, 28 S.E. 351 (1897).

Assignment of Note by One of Several Joint Payees. — A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. *Johnson v. Mangum*, 65 N.C. 148 (1871).

Assignor of Bank Deposit May Not Maintain Action. — As a consequence of the requirement that every action be prosecuted in the name of the real party in interest, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. *Lipe v. Guilford Nat'l Bank*, 236 N.C. 328, 72 S.E.2d 759 (1952).

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific performance. *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d 916 (1949).

Assignment of a Judgment Pending Appeal. — Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should have been substituted as plaintiff. *Field v. Wheeler*, 120 N.C. 270, 26 S.E. 810 (1897).

An assignee for purposes of collection is not a "real party in interest." *Abrams v. Cureton*, 74 N.C. 523 (1876); *Morefield v. Harris*, 126 N.C. 626, 36 S.E. 125 (1900); *Third Nat'l Bank v. Exum*, 163 N.C. 199, 79 S.E. 498 (1913); *First Nat'l Bank v. Rochamora*, 193 N.C. 1, 136 S.E. 259 (1927); *Federal Reserve Bank v. Whitford*, 207 N.C. 267, 176 S.E.

584 (1934); *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Where plaintiff transferred claim upon which action was subsequently brought to an attorney at law for collection, with directions to apply the proceeds to demands which he held for collection against the plaintiff, an action would not lie in the name of the plaintiff on the claim, as he was not the real party in interest. *Wynne v. Heck*, 92 N.C. 415 (1885).

B. Setoffs and Defenses.

Assignment of Negotiable and Non-negotiable Notes Distinguished. —

The assignee of a promissory note or bill of exchange endorsed before maturity takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a nonnegotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between the original parties at the time of the assignment; bonds or sealed notes are on the same footing with nonnegotiable instruments. *Hanens v. Potts*, 86 N.C. 31 (1882); *Spence v. Tabscott*, 93 N.C. 248 (1885); *Clinton Loan Ass'n v. Merritt*, 112 N.C. 243, 17 S.E. 296 (1893). See also, *Andrews v. McDaniel*, 68 N.C. 385 (1873); *First Nat'l Bank v. Bynum*, 84 N.C. 24 (1881).

Assignee Takes Subject to Setoffs and other Defenses. — An assignee of a chose in action is by this section given the right to maintain the action in his name, but that right is circumscribed by

the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment. *Overton v. Tarkington*, 249 N.C. 340, 106 S.E.2d 717 (1959).

The assignee of a nonnegotiable instrument for value and in good faith before maturity takes the same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. *William Iselin & Co. v. Saunders*, 231 N.C. 642, 58 S.E.2d 614 (1950).

Lease Taken Subject to Lessees' Defenses. — Where plaintiff, according to the allegations of its complaint, became the assignee of a lease, a nonnegotiable chose in action, it took it subject to any setoff or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. *Standard Amusement Co. v. Tarkington*, 247 N.C. 444, 101 S.E.2d 398 (1958).

Past Due Notes Subject to Defenses. — A note taken after it is due is subject to any setoff or any other defense existing at the time of or before notice of assignment. *Vaughan v. Jeffreys*, 119 N.C. 135, 26 S.E. 94 (1896); *Guthrie v. Moore*, 182 N.C. 24, 108 S.E. 334 (1921). See also, *Mosby v. Hodge*, 76 N.C. 387 (1877); *Capell v. Long*, 84 N.C. 17 (1881).

§ 1-58. Suits for penalties.

Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by anyone who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the State. (R.C., c. 35, ss. 47, 48; Code, ss. 1212, 1213; Rev., ss. 401, 402; C.S., s. 447.)

CASE NOTES

Constitutionality. — This section does not conflict with the Constitution. *Katzenstein v. Raleigh & G.R.R.*, 84 N.C. 688 (1881); *State ex rel. Hodge v. Marietta & N. Ga. R.R.*, 108 N.C. 24, 12 S.E. 1041 (1891); *Sutton v. Phillips*, 116 N.C. 502, 21 S.E. 968, *aff'd on rehearing*, 117 N.C. 228, 23 S.E. 264 (1895); *State ex*

rel. Goodwin v. Caraleigh Phosphate & Fertilizer Works, 119 N.C. 120, 25 S.E. 795 (1896).

For case holding that suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, see *Norman v. Dunbar*, 53 N.C. 319 (1861).

For case holding that suit should be prosecuted in the name of the State for the use of the person claiming the penalty, see *Duncan v. Philpot*, 64 N.C. 479 (1870). But see the following cases, in which suit was brought in the name of the person suing and not in the name of the State: *Branch v. Wilmington & W.R.R.*, 77 N.C. 347 (1877); *Katzenstein v. Raleigh & G.R.R.*, 24 N.C. 688 (1881); *Keeter v. Wilmington & W.R.R.*, 86 N.C. 346 (1882); *Whitehead v. Wilmington & W.R.R.*, 87 N.C. 255 (1882); *Branch v. Wilmington & W.R.R.*, 88 N.C. 570 (1883); *Middleton v.*

Wilmington & W.R.R., 95 N.C. 167 (1886); *Maggett v. Roberts*, 108 N.C. 174, 12 S.E. 890 (1891); *State ex rel. Carter v. Wilmington & W.R.R.*, 126 N.C. 437, 36 S.E. 14 (1900).

Penalty against Railroads. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the State. *State ex rel. Hodge v. Marietta & N. Ga. R.R.*, 108 N.C. 24, 12 S.E. 1041 (1891).

Applied in *State v. Briggs*, 203 N.C. 158, 165 S.E. 339 (1932).

§ 1-59. Suit for penalty, plaintiff may reply fraud to plea of release.

If an action be brought in good faith by any person to recover a penalty under a law of this State, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual. (4 Hen. VII, c. 20; R.C., c. 31, s. 100; Code, s. 932; Rev., s. 1521; C.S., s. 447(a); 1925, c. 21.)

Editor's Note. — The provision permitting plaintiff to reply fraud to a plea of release in a suit for penalty was § 932 of the Code of 1883 and § 1521 of

the Revisal of 1905. It was left out of the Consolidated Statutes, but was again inserted by Public Laws 1925, c. 21.

§ 1-60. Suit on bonds; defendant may plead satisfaction.

When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond,

though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (4 Hen. VII, c. 20; R.C., c. 31, s. 101; Code, s. 933; Rev., s. 1522; C.S., s. 147(b); 1925, c. 21.)

Editor's Note. — The provision permitting the defendant to plead satisfaction in a suit on bonds was § 933 of the Code of 1883 and § 1522 of the

Revisal of 1905. It was left out of the Consolidated Statutes, but was again inserted by Public Laws 1925, c. 21.

§ 1-61: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-62. Action by purchaser under judicial sale.

Anyone given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (1858-9, c. 50; Code, s. 942; Rev., s. 403; C.S., s. 448.)

CASE NOTES

The bidder at a judicial sale acquires no right before confirmation of the report of the commissioner who made the sale under the order of the court. *State ex rel. Attorney Gen. v. Roanoke Nav. Co.*, 86 N.C. 408 (1882); *Vanderbilt v. Brown*, 128 N.C. 498, 39 S.E. 36 (1901).

Where a sale has not been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with. In *re Dickerson*, 111 N.C. 108, 15 S.E. 1025 (1892); *Vanderbilt v. Brown*, 128 N.C. 498, 39 S.E. 36 (1901).

When confirmation is made, the

bargain is complete, and it relates back to the day of sale. *Vass v. Arrington*, 89 N.C. 14 (1883).

All that a purchaser at a judicial sale is required to know is that the court has jurisdiction of the subject matter and the person. *Cord v. Finch*, 142 N.C. 140, 54 S.E. 1009 (1906); *Hackley v. Roberts*, 147 N.C. 201, 60 S.E. 975 (1908); *Harris v. Bennett*, 160 N.C. 339, 76 S.E. 217 (1912).

Collection of Purchase Price. — The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. *Davis v. Pierce*, 167 N.C. 135, 83 S.E. 182 (1914).

§ 1-63: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section,

see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-64: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-65 to 1-65.4: Repealed by Session Laws 1967, c. 954, s. 4.

Editor's Note. — Session Laws 1955, c. 1366, amended former § 1-65 by changing its number to 1-65.1 and by adding §§ 1-65.2 to 1-65.4. Former § 1-65.1 was amended by Session Laws 1957, c. 249. For provisions similar to those of the repealed sections, see section (b) of Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-65.5: Repealed by Session Laws 1969, c. 895, s. 19.

Editor's Note. — Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

§ 1-66: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section, see Rule 17 of the Rules of Civil Procedure (§ 1A-1).

§ 1-67: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-68: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-69: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1). As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

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

All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual mem-

bers composing it. Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated. Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68. (1955, c. 545, s. 3; 1975, c. 393, ss. 1, 2.)

CASE NOTES

This section does not apply to actions filed prior to its effective date. *Youngblood v. Bright*, 243 N.C. 599, 91 S.E.2d 599 (1956).

The words "sue" and "be sued" include the natural and appropriate incidents of legal proceedings, and embrace all civil process incident to the commencement or continuance of legal proceedings. *J.A. Jones Constr. Co. v. Local Union 755*, 246 N.C. 481, 98 S.E.2d 852 (1957).

Effect of Section. — This section allows an unincorporated association to sue and be sued under its common name, but does not affect the character of the association as merely the aggregate of its members. Any attempt by the aggregate to sue a member, a part of itself, in tort necessarily must fail, since a person cannot be both plaintiff and defendant in the same action. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 266 S.E.2d 18 (1980).

Method of Service Not Covered by Section. — No provision of this section purports to prescribe the manner in which service of process is to be made on an unincorporated association. *Melton v. Hill*, 251 N.C. 134, 110 S.E.2d 875 (1959).

Suits by and against Unincorporated Labor Union. — An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. *Martin v. Local 71, Int'l Bhd. of Teamsters*, 248 N.C. 409, 103 S.E.2d 462 (1958); *Gainey v. Local 71, Int'l Bhd. of Teamsters*, 252 N.C. 256, 113 S.E.2d 594 (1960).

An unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed, is suable in this State as a separate legal entity. *J.A. Jones Constr. Co. v. Local Union 755*, 246 N.C. 481, 98 S.E.2d 852 (1957).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. *R.H. Bouligny, Inc. v. United Steelworkers of Am.*, 270 N.C. 160, 154 S.E.2d 344 (1967).

Liability of Unincorporated Labor Union for Torts of Employees and Agents. — An unincorporated labor union, as a legal entity separate and apart from its members, may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. *R.H. Bouligny, Inc. v. United Steelworkers of Am.*, 270 N.C. 160, 154 S.E.2d 344 (1967).

For case holding evidence sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed, see *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E.2d 835 (1963).

Applied in *Sizemore v. Maroney*, 263 N.C. 14, 138 S.E.2d 803 (1964).

Cited in *Solon Lodge v. Ionic Lodge*, 245 N.C. 281, 95 S.E.2d 921 (1957); *Glover v. Brotherhood of Ry. & S.S. Clerks*, 250 N.C. 35, 108 S.E.2d 78 (1959); *Walker v. Nicholson*, 257 N.C. 744, 127 S.E.2d 564 (1962); *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969); *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 1-70: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to joinder of parties, see Rules 19 and 20 of the Rules of Civil Procedure (§ 1A-1). As to class

actions, see Rule 23 of the Rules of Civil Procedure (§ 1A-1).

§ 1-71: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to permissive joinder of parties, see Rule 20 of the Rules of Civil Procedure (§ 1A-1).

§ 1-72. Persons jointly liable.

In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (R.C., c. 31, s. 84; 1871-2, c. 24, s. 1; Code, s. 187; Rev., s. 413; C.S., s. 459.)

Cross References. — As to assertion of claims against all of the persons

making joint contracts, see also Rule 19 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

History. — Contracts made by copartners or other joint obligors were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, s. 84. This provision was not introduced into the Code of Civil Procedure and hence the principle governing contracts as construed at common law was restored. The necessity for remedy arose. The omitted section, which in *Merwin v. Ballard*, 65 N.C. 168 (1871), was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, c. 24, s. 1, which was § 187 of the Code, and now constitutes this section. See *Rufty v. Claywell*, 93 N.C. 306 (1885).

Effect of Section. — The result of this section is to render contracts that are joint in form several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint. The fact that the contract possesses the twofold quality of being joint as well as several in law cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy

is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. *Rufty v. Claywell*, 93 N.C. 306 (1885).

Partnership Liability, Generally. — Members of a partnership are jointly and severally bound for all its debts; because of the joint liability, the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. *Hanstein v. Johnson*, 112 N.C. 253, 17 S.E. 155 (1893). See also, *Bain v. Clinton Loan Ass'n*, 112 N.C. 248, 17 S.E. 154 (1893); *Daniel v. Bethell*, 167 N.C. 218, 83 S.E. 307 (1914).

Suit against One of Several Parties Permitted. — Where a firm in Maryland gave its promissory note to plaintiff, signed in the name of the firm, plaintiff was permitted to sue one of the partners alone. *Palyart v. Goulding*, 1 N.C. 691 (1796).

Effect of Judgment against One Partner Only. — Where a judgment was obtained in an action against a partnership and summons therein was issued and served on only one of the partners, and the other did not make himself a party or take proper steps by indepen-

dent action to prevent it, execution could issue on the partnership property and on the property of the individual member who had been served with process. *Daniel v. Bethell*, 167 N.C. 218, 83 S.E. 307 (1914).

New Action to Enforce Liability of Partner Not Previously Made a Party. — Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action, and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. *Davis v. Sanderlin*, 119 N.C. 84, 25 S.E. 815 (1896).

Nonsuit against Codefendant Not Party to Contract Not a Fatal Variance. — When an action was brought against more than one defendant on what was alleged to be a joint contract, and the evidence showed that the agreement was made with only one defendant, nonsuit against the other defendants did not constitute a variance which justified a nonsuit against the defendant with whom the agreement was made. The existence of other defendants was not an essential element of the contract. *Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 111 S.E.2d 606 (1959).

Cited in *Jones v. Rhea*, 198 N.C. 190, 151 S.E. 255 (1930).

§ 1-73: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the first sentence of repealed § 1-73, see Rule 19 of the Rules

of Civil Procedure (§ 1A-1). As to interpleader, see Rule 22 of the Rules of Civil Procedure (§ 1A-1).

§ 1-74: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of repealed § 1-74, see

Rule 25 of the Rules of Civil Procedure (§ 1A-1).

§ 1-75: Repealed by Session Laws 1967, c. 954, s. 4.

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

This Article shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Article. (1967, c. 954, s. 2.)

Cross References. — As to service of process, see Rule 4 of the Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For article on jurisdiction and process, see 5 *Wake Forest Intra. L. Rev.* 46 (1969).

CASE NOTES

The provisions of this Article are to be construed liberally in favor of finding personal jurisdiction, as long as such a finding is consistent with due process. *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976).

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in a matter. *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Rule 4(j), § 1A-1 is tied closely to this Article, and the two are complementary to one another. While this Article greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened to insure as much as possible that the defendant receives actual notice of the controversy. *Edwards v. Edwards*, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

Cited in *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

§ 1-75.2. Definitions.

In this Article the following words have the designated meanings:

- (1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.
- (2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this Article acts of the plaintiff are referred to, the reference includes the acts of his agent within the scope of the agent's authority.
- (3) "Defendant" means the person named as defendant in a civil action, and where in this Article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.
- (4) Where jurisdiction of the person is drawn into question in respect to any claim asserted under Rule 14 of the Rules of Civil Procedure, the terms "Plaintiff" and "Defendant" as above defined shall include a third-party plaintiff and a third-party defendant respectively. (1967, c. 954, s. 2.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Defendant Must Be Legal Entity. — The defendant in a civil action must be an existing legal entity, either natural or artificial; however, it is not necessary to allege in the complaint what type of legal

entity the defendant is. *Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 284 S.E.2d 697 (1981).

Applied in *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974).

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.

(a) Jurisdiction of Subject Matter Not Affected by This Article. — Nothing in this Article shall be construed to confer, enlarge or diminish the subject matter jurisdiction of any court.

(b) Personal Jurisdiction. — A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

- (1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or
- (2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

(c) Jurisdiction in Rem or Quasi in Rem. — A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to G.S. 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4(k) of the Rules of Civil Procedure. (1967, c. 954, s. 2; 1983, c. 231.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

amendment, effective April 28, 1983, inserted "or Rule 4(j1)" in subdivision (b)(1).

Effect of Amendments. — The 1983

CASE NOTES

The issue of in personam jurisdiction involves a two-stage inquiry: First, do the "long-arm" statutes allow the courts to assume jurisdiction over defendant? Second, assuming they do, does the exercise of such jurisdiction comport with due process? *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc.*,

36 N.C. App. 673, 245 S.E.2d 782 (1978).

Applied in *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 233 (W.D.N.C. 1972); *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 237 (W.D.N.C. 1972).

Quoted in *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

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

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:

- (1) Local Presence or Status. — In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
 - a. Is a natural person present within this State; or
 - b. Is a natural person domiciled within this State; or
 - c. Is a domestic corporation; or

- d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.
- (2) Special Jurisdiction Statutes. — In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.
- (3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.
- (4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
 - a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or
 - b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.
- (5) Local Services, Goods or Contracts. — In any action which:
 - a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
 - b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
 - c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
 - d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or
 - e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.
- (6) Local Property. — In any action which arises out of:
 - a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or
 - b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

- c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.
- (7) **Deficiency Judgment on Local Foreclosure or Resale.** — In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:
 - a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or
 - b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.
- (8) **Director or Officer of a Domestic Corporation.** — In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.
- (9) **Taxes or Assessments.** — In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.
- (10) **Insurance or Insurers.** — In any action which arises out of a contract of insurance as defined in G.S. 58-3 made anywhere between the plaintiff or some third party and the defendant and in addition either:
 - a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or
 - b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.
- (11) **Personal Representative.** — In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living.
- (12) **Marital Relationship.** — In any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State. (1967, c. 954, s. 2; 1981, c. 815, s. 4; 1983, c. 231.)

Editor's Note. — Session Laws 1981, c. 815, which added subdivision (12) of this section, provides in s. 7 that the act shall apply only when the action for an absolute divorce is filed on or after October 1, 1981.

The date of ratification of Session Laws 1967, c. 954, referred to above, was June 27, 1967. Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970.

The Rules of Civil Procedure are found in § 1A-1.

Effect of Amendments. — The 1983 amendment, effective April 28, 1983, inserted "or Rule 4(j1)" in the introductory paragraph.

Legal Periodicals. — For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1973 case law with regard to in personam jurisdiction over out-of-state corporations, see 52 N.C.L. Rev. 850 (1974).

For survey of 1976 case law on civil

procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For article on long-arm jurisdiction and minimum contacts, see 58 N.C.L. Rev. 407 (1980).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For comment discussing the conflict of this section with § 1-21 prior to the 1979 amendment to § 1-21, see 12 Wake Forest L. Rev. 1041 (1976).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

I. In General.

II. Cases in Which Minimum Contacts Requirement Met.

III. Cases in Which Minimum Contacts Requirement Not Met.

I. IN GENERAL.

This section is commonly referred to as the "long-arm" statute. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

And is based on the Wisconsin "long-arm" statute. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Purpose of Section. — Provisions of this section are 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. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds in United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zukerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied &

appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

This section is a procedural law which does not affect substantive rights. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Accordingly, it can properly be applied retroactively. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

This section should be liberally construed in favor of finding personal jurisdiction, subject to due process limitations. Munchak Corp. v. Riko Enter., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976),

rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); *Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc.*, 46 N.C. App. 235, 264 S.E.2d 753 (1980); *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981); *Kaplan School Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

There is a clear mandate that the North Carolina long-arm statute be given a liberal construction, making available to the North Carolina courts the full jurisdictional powers permissible under federal due process. *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982).

Both the wording of this section and applicable caselaw accord liberal construction to this long-arm statute, thereby favoring finding personal jurisdiction. Thus, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. *Southern Case, Inc. v. Management Recruiters Int'l, Inc.*, 544 F. Supp. 403 (E.D.N.C. 1982).

But Courts Cannot Expand Jurisdiction beyond Due Process Limitations. — While the provisions of the "long-arm" statute are to be liberally construed in favor of finding personal jurisdiction, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. *First Nat'l Bank v. General Funding Corp.*, 30 N.C. App. 172, 226 S.E.2d 527 (1976).

Legislature Intended Full Jurisdictional Powers Permissible under Federal Due Process. — From the enactment of subdivision (1)d of this section, it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Parris v. Garner Com. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

Subdivision (1)d of this section represents a legislative codification permitting the assertion of in personam

jurisdiction over nonresident defendants to the full extent allowed by due process. *Southern Case, Inc. v. Management Recruiters Int'l, Inc.*, 544 F. Supp. 403 (E.D.N.C. 1982).

This section was designed to extend jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Subsection (1)d of this section grants the courts of North Carolina the opportunity to exercise jurisdiction over a foreign corporation to the extent allowed by due process. *H.V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The legislature, by way of subdivision (8) of this section and § 55-33, has expressed a substantial interest in bringing nonresident directors of corporations before the North Carolina courts, and has given to the courts the fullest jurisdiction allowable under the Constitution. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

The resolution of the question of in personam jurisdiction involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant? Second, if so, does the exercise of this power by the North Carolina courts violate due process of law? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979); *Kaplan School Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 289 S.E.2d 607 (1982).

Before the court may exercise jurisdiction over a nonresident defendant, it must have statutory authorization and its exercise of such jurisdiction must comport with the requirements of due process. *United Buying Group, Inc. v. Coleman*, 37 N.C. App. 26, 245 S.E.2d 402 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 510, 251 S.E.2d 610 (1979).

Due process, and not language of statute, is ultimate test of "long-arm" jurisdiction over a nonresident. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974); *Dillon v. Numismatic Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980).

The crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the "long-arm" statute is due process. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Since the requisite 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 thereof comports with due process. *Kaplan School Supply Corp. v. Henry Wurst, Inc.*, 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

Once plaintiff has met requirements of this section, he must also satisfy constitutional requirement of due process by showing that defendant has sufficient minimum contacts with North Carolina to confer jurisdiction. *Speizman Knitting Mach. Co. v. Terrot Strickmaschinen*, 505 F. Supp. 200 (W.D.N.C. 1981).

In addition to meeting the statutory requirements, in order for a court to exercise its jurisdiction the defendant must be found to have certain minimum contacts with the State in compliance with due process requirements. *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." *First Nat'l Bank v. General Funding Corp.*, 30 N.C. App. 172, 226 S.E.2d 527 (1976); *Forman & Zukerman v. Schupak*, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied & appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976); *Telerent Leasing*

Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979); *Parris v. Garner Com. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

The North Carolina courts carefully follow the "minimum contacts" standards set in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Unless a nonresident defendant has had "minimum contacts" with the forum state, that state may not exercise jurisdiction over him. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974); *H.V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The existence of minimum contacts is a question of fact. *Parris v. Garner Com. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); *Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc.*, 46 N.C. App. 235, 264 S.E.2d 753 (1980); *Speizman Knitting Mach. Co. v. Terrot Strickmaschinen*, 505 F. Supp. 200 (W.D.N.C. 1981).

Determination of whether minimum contacts are present cannot be effected by using a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980); *Speizman Knitting Mach. Co. v. Terrot Strickmaschinen*, 505 F. Supp. 200 (W.D.N.C. 1981).

But Depends on the Particular Facts. — Whether the type of defendant's activity conducted within the State is adequate to satisfy the requirements of due process depends upon the facts of the particular case. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).

The presence of minimum contacts is not to be determined by automatic application of per se rules; rather, the exis-

tence of minimum contacts depends upon the particular facts of each case. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979); *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980); *H.V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The minimum contacts test is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present. *Southern Case, Inc. v. Management Recruiters Int'l, Inc.*, 544 F. Supp. 403 (E.D.N.C. 1982).

And Varies with the Quality and Nature of Defendant's Activities. — Application of the minimum contacts theory varies with the quality and nature of a particular defendant's activities. *Southern Case, Inc. v. Management Recruiters Int'l, Inc.*, 544 F. Supp. 403 (E.D.N.C. 1982).

Fairness to Both Plaintiff and Defendant Must Be Considered. — In determining whether subjection of a corporation to in personam jurisdiction in a foreign forum offends traditional notions of fair play and substantial justice, the interests of and fairness to both the plaintiff and the defendant must be considered and weighed. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977).

Factors in Determining Minimum Contacts and Fairness. — There are a number of factors, some essential and others only having some weight, to be considered in determining whether the tests of "minimum contacts" and "fair play" have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) There must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) The legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977).

The criteria for analyzing whether minimum contacts are present include: the quantity of the contacts, the nature

and quality of the contacts, the source and connection of the cause of action with those contacts, the interest of the forum state and convenience. *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Other factors to be considered in determining whether minimum contacts exist are: (1) Any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (2) An estimate of the inconvenience to the defendant in being forced to defend a suit away from his home; (3) The location of crucial witnesses and material evidence; and (4) The existence of a contact which has a substantial connection with the forum state. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

The United States Supreme Court has recognized the types of activities which can constitute sufficient contacts that would allow a state to exercise jurisdiction. First, a defendant may avail itself of the privileges and benefits of a state's laws; second, it may solicit business there either through sales persons or through advertising reasonably calculated to reach a particular state; and finally, a defendant may indirectly, through others, serve or seek to serve the state's market. The receipt of financial benefits from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that state. These considerations provide the paradigm through which any decision concerning a state's exercise of long-arm jurisdiction must be made. *Southern Case, Inc. v. Management Recruiters Int'l, Inc.*, 544 F. Supp. 403 (E.D.N.C. 1982).

Defendant Must Have Invoked Benefits and Protections of Law of Forum. — While application of the minimum contacts standard will vary with the quality and nature of defendant's activity, it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979); *Parris v. Garner Com. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256

S.E.2d 808 (1979); *Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc.*, 46 N.C. App. 235, 264 S.E.2d 753 (1980); *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980); *H.V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980); *Speizman Knitting Mach. Co. v. Terrot Strickmaschinen*, 505 F. Supp. 200 (W.D.N.C. 1981).

In cases of contract disputes, the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state. *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Where foreign corporation obviously uses, benefits or can easily use the laws of North Carolina, jurisdiction will lie. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

If a foreign company's activity is regular, or systematic, or continuous, minimum contacts exist. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

If a foreign corporation has never had any interest in North Carolina or contacts here, even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Attribution of Subsidiary's Contacts to Parent Corporation. — For case holding that the business relationship between an English corporation and its Tennessee subsidiary was sufficiently analogous to a manufacturer-distributor relationship to attribute the subsidiary's contacts with this State to the parent corporation, see *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

Principal May Be Subjected to "Long-Arm" Jurisdiction for Acts of Agent. — A principal may be subjected to "long-arm" jurisdiction on account of the acts of his agent within the course and scope of his authority, since this is reasonable and just according to our traditional conception of fair play and substantial justice. *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974).

Jurisdiction over Principal Shareholder Conducting Business as Agent for Corporation. — Where defendant is a principal shareholder of a corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979).

Test for Nonresidents Who Allegedly Abused High Governmental Powers. — For those who have allegedly abused high governmental powers, the test is whether they reasonably could have anticipated that their activity would have consequences in the forum state. *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D.N.C. 1974).

As to due process requirements for jurisdiction over nonresident directors of domestic corporations in shareholders' derivative actions, see *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Single Contract May Be Sufficient Minimal Contact. — A single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base in personam jurisdiction, with respect to the parties so contracting. *First-Citizens Bank & Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds, *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979); *Chadbourn, Inc. v. Katz*, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974).

A single contract is sufficient under subdivision (5)c of this section to satisfy the minimal contacts requirement. *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978).

If a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. *Staley v. Homeland, Inc.*, 368 F.

Supp. 1344 (E.D.N.C. 1974); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

But a Single Noncontractual Contact Is Not Sufficient. — If there is only one contact with North Carolina and such contact does not involve a contract to be performed here, there is no jurisdiction. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Cause of Action Need Not Be Related to Activities Giving Rise to Jurisdiction. — There is no requirement that the cause of action pursuant to which the jurisdictional claim is raised be related to the activities of the defendant which give rise to the in personam jurisdiction. *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973); *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

The burden is on the plaintiffs to prove the existence of jurisdiction, but that burden can be met by a prima facie showing that jurisdiction is conferred by a statute such as this one. *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976). See also, *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973); *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978).

The words "domicile" and "inhabitant" mean substantially the same thing. One is an inhabitant of or domiciled in a given place if he resides there actually and permanently. *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

The term "injury to the person or property," as used in subdivision (3) of this section, should be given a broad meaning, consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit actions thereunder to traditional claims for bodily injury and property damages. *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alimony on the ground of abandonment is a claim of "injury to person or property" under subdivision (3) of this section. *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alienation of affections and for criminal conversation is an action ex delicto and involves "injury to person or property" within the contemplation of this section. *Golding v. Taylor*, 19 N.C. App. 245, 198 S.E.2d 478, cert.

denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

The defendant need not be physically present in this State to solicit in this State within the meaning of this section. *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982).

Subdivision (4)(a) of this section requires that plaintiff only claim injury, not prove injury. *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982).

Activities of a nonresident corporation owning a basketball team are included within subdivision (4) of this section. *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Magazine advertisements are solicitations within the meaning of paragraph (4)a of this section. *Federal Ins. Co. v. Piper Aircraft Corp.*, 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Allegations Held Sufficient to Satisfy Subdivision (4). — The allegations that defendants were engaged in the business of selling wire art products, and that such products were sold and used in North Carolina in the ordinary course of trade to a substantial extent, were sufficient to satisfy subdivision (4) of this section and the requirements of due process. *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

This section was intended to embrace "intangible injuries." *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Execution of Guaranty Contract as Promise to Pay for Services under Paragraph (5)a. — The execution by the defendant of a guaranty contract by which he guaranteed performance and payment in the event that another defendant should default on a lease was a promise to pay for services to be performed in this State under paragraph (5)a. *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978).

Money payment is clearly a thing of value within the meaning of paragraph (5)c of this section. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Support Payments Are a "Thing of Value" under Paragraph (5)c. — Since support payments are exchanged for, and in consideration of, an asset or a thing of value, i.e., a release of marital rights, support payments are clearly a "thing of

value." *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Contract Right Is "Asset or Thing of Value". — A contract right is a property right. A fortiori, it is an "asset or thing of value." *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Situs of Contract Right. — Where the holder of the contract right alleged is a North Carolina resident, the situs of the "asset or thing of value" is in this State. *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

There is no need for a tolling statute when a nonresident defendant is amenable to process. But this does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

The application of a tolling statute such as § 1-21 when defendant has at all times been subject to the service of process under subdivision (5) of the present section by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. *Duke Univ. v. Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

Section 55-145 is an alternative ground for finding jurisdiction over foreign corporations. *Fiber Indus., Inc. v. Coronet Indus., Inc.*, 59 N.C. App. 677, 298 S.E.2d 76 (1982).

Applied in *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 233 (W.D.N.C. 1972); *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 237 (W.D.N.C. 1972); *McCoy Lumber Indus., Inc. v. Niedermeyer-Martin Co.*, 356 F. Supp. 1221 (M.D.N.C. 1973); *William R. Andrews Assocs. v. Sodibar Systems*, 25 N.C. App. 372, 213 S.E.2d 411 (1975); *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E.2d 579 (1975); *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978); *Gemini Enter., Inc. v. WFMV Television Corp.*, 470 F. Supp. 559 (M.D.N.C. 1979); *In re Smith*, 45

N.C. App. 123, 263 S.E.2d 23 (1980); *Russell v. Tenore*, 55 N.C. App. 84, 284 S.E.2d 521 (1981); *Robinson v. Robinson*, 56 N.C. App. 737, 289 S.E.2d 612 (1982); *Park v. Sleepy Creek Turkeys, Inc.*, — N.C. App. —, 299 S.E.2d 670 (1983).

Quoted in *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

Cited in *Spartan Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E.2d 574 (1972); *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E.2d 649 (1974); *Guthrie v. Ray*, 31 N.C. App. 142, 228 S.E.2d 471 (1976); *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978); *Broughton v. DuMont*, 43 N.C. App. 512, 259 S.E.2d 361 (1979).

II. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Breach of Contract for Sale of Real Estate. — Where the record showed that defendant entered into a contract to purchase real property situated in North Carolina, formed a corporation in this State to receive the title, and thus invoked the benefits and protection of its laws, and the suit in question arose out of an alleged breach of that contract, assumption of in personam jurisdiction over defendant by the courts of this State did not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment, and defendant's contacts with the State were sufficient to satisfy due process requirements. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974).

Promise to Pay Debt of Another. — Where nonresident defendant promised to pay the debt of another, which debt was owed to North Carolina creditors, such promise was a contract to be performed in North Carolina and was sufficient minimal contact upon which this State could assert personal jurisdiction over the defendant. *First-Citizens Bank & Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

Action for Alimony Based on Abandonment. — The trial court obtained personal jurisdiction over the nonresident defendant in an action for alimony based on abandonment and for child custody and support where defendant was served with process by registered mail, since an action for alimony on the ground of abandonment was a claim of "injury to person or property" under the long-arm statute, and defendant's

acts of living with and abandoning plaintiff-wife in this State met the "minimum contacts" test. *Brown v. Brown*, 47 N.C. App. 323, 267 S.E.2d 345 (1980), decided prior to enactment of subdivision (12).

Support Payment Arrearages. — Where the parties entered into a separation agreement in North Carolina while both parties were citizens and residents of this State, the agreement providing, among other things, that the defendant would pay \$350.00 per month to the plaintiff for support, the parties were divorced in North Carolina, and some time after the separation agreement was entered into, defendant moved to Florida and continued to reside there since that date, the court had in personam jurisdiction over the defendant under paragraph (5)c of this section in an action for arrearages. *Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978), decided prior to enactment of subdivision (12).

Production of Church Directories. — The courts of this State had in personam jurisdiction over defendant, an Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of a certain North Carolina corporation, which corporation had contracted with plaintiff, another North Carolina corporation, engaged in the printing business, for the production of certain church directories, and defendant agreed that it would pay plaintiff for its work in printing such directories; such conduct fell within that covered by paragraph (5)a of this section. Other conduct by defendant, including the writing of five memoranda on defendant's stationery requesting that plaintiff ship books to churches in five different states, also gave the courts of this State in personam jurisdiction over defendant. Moreover, defendant had sufficient minimum contacts with North Carolina so that the exercise of in personam jurisdiction would not violate due process of law. *Delprinting Corp. v. C.P.D. Corp.*, 49 N.C. App. 449, 271 S.E.2d 548 (1980).

Franchise Contract. — Where defendant agreed in a franchise contract to pay plaintiff a 20-cent royalty and service fee on every pound of materials essential to a manufacturing process, in exchange for plaintiff's development of the process and for technical services plaintiff would render to defendant, jurisdiction over defendant was conferred under subdivisions (5)a and b of this section in an action arising from

defendant's failure to pay the promised royalties. *Harrelson Rubber Co. v. Dixie Tire & Fuels, Inc.*, — N.C. App. —, 302 S.E.2d 919 (1983).

Manufacturing Contract. — In an action to recover a deposit paid pursuant to a manufacturing contract, jurisdiction existed over defendant, a foreign corporation, where plaintiff, a domestic corporation, had contracted with it to manufacture products using components supplied by plaintiff, and it was contemplated that some of the products would be sold in North Carolina. *Styleco, Inc. v. Stoutco, Inc.*, — N.C. App. —, 302 S.E.2d 888 (1983).

For additional cases holding the evidence sufficient to establish minimum contacts, see *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976); *Forman & Zuckerman v. Schupak*, 31 N.C. App. 62, 228 S.E.2d 503 (1976), appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); *Appelyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir.), cert. denied, 429 U.S. 1041, 97 S. Ct. 940, 50 L. Ed. 2d 753 (1976); *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977); *Stephenson v. Jordan Volkswagen, Inc.*, 428 F. Supp. 195 (W.D.N.C. 1977); *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977); *Parris v. Garner Com. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); *Mabry v. Fuller-Schuwayer Co.*, 50 N.C. App. 245, 273 S.E.2d 509, cert. denied, 302 N.C. 398, 279 S.E.2d 352 (1981); *Johnston v. Gilley*, 50 N.C. App. 274, 273 S.E.2d 513 (1981); *Speizman Knitting Mach. Co. v. Terrot Strickmaschinen*, 505 F. Supp. 200 (W.D.N.C. 1981).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

The mere act of entering into a contract with a resident will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendant's performance are to take place outside the forum. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

The mere ownership of property in the forum state is insufficient to establish the "minimum contacts" necessary

to satisfy the requirements of due process. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Contract to Perform Consulting Services. — Where a contract made in North Carolina required that defendant, a nonresident, perform certain consulting services for a company having its home office and two manufacturing plants in North Carolina, and in fact defendant did perform such services on two occasions via long distance telephone conversations placed outside the State, and the contract was silent as to whether services were to be performed in North Carolina, the court did not need to determine whether the contract was in accord with paragraph (5)a of this section, since even if such paragraph was satisfied, due process was not. *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980).

Signing of Guaranty or Endorsement. — Mere signing by a nonresident of a guaranty or endorsement of a debt owed to a North Carolina creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979), rejecting the rule adopted in *First-Citizens Bank & Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E.2d

556 (1973).

Placing of Advertisements in National Magazines. — Even assuming that the statutory requirement of "solicitation within the State" is satisfied, the placing of advertisements in national magazines, without more, is not sufficient contact to fall within "traditional notions of fair play and substantial justice" as a basis for the exercise of personal jurisdiction. *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Nonresident Holder of Part Interest in Note Secured by Deed of Trust on Property within State. — This section does not give a North Carolina district court jurisdiction in personam over the out-of-state holder of a part interest in a note secured by a deed of trust on property in North Carolina, for to do so would violate the rule expressed by the United States Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887, cert. denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

For additional cases holding the evidence insufficient to establish minimum contacts, see *Marshall Exports, Inc. v. Phillips*, 385 F. Supp. 1250 (E.D.N.C.), aff'd, 507 F.2d 47 (4th Cir. 1974); *William R. Andrews Assocs. v. Sodibar Sys.*, 28 N.C. App. 663, 222 S.E.2d 922, cert. denied, 289 N.C. 726, 224 S.E.2d 676 (1976); *First Nat'l Bank v. General Funding Corp.*, 30 N.C. App. 172, 226 S.E.2d 527 (1976); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976).

§ 1-75.5. Joinder of causes in the same action.

In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of G.S. 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under G.S. 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined. (1967, c. 954, s. 2.)

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

A court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4 may exercise personal jurisdiction over a defendant by service of process in accordance with the provisions of Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure. (1967, c. 954, s. 2; 1983, c. 231.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Effect of Amendments. — The 1983

amendment, effective April 28, 1983, inserted "or Rule 4(j1)".

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

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

- (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance; or
- (2) With respect to any counterclaim asserted against that person in an action which he has commenced in the State. (1967, c. 954, s. 2; 1975, c. 76, s. 1.)

Legal Periodicals. — For survey of 1974 case law on general appearance waiver, see 53 N.C.L. Rev. 1026 (1975).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

This section codifies the long-standing rule that a person making a voluntary appearance is subject to the court's jurisdiction irrespective of whether jurisdiction over his person has been acquired previously in the manner prescribed by law. *Spartan Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E.2d 574 (1972), rev'd on other grounds, 285 N.C. 689, 208 S.E.2d 649 (1974).

This section has no counterpart in federal practice. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974).

There is no counterpart to this section in the Federal Rules of Civil Procedure. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

This section and § 1A-1, Rule 12 must be construed together, since they are a part of the same enactment. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

In determining whether a general appearance was made in any proceeding,

this section must be construed with § 1A-1, Rule 12, since these statutes are part of the same enactment. *Lynch v. Lynch*, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Section 1A-1, Rule 12 Does Not Abolish Concept of General Appearance. — When § 1A-1, Rule 12 and this section are construed together, it is apparent that § 1A-1, Rule 12 does not abolish the concept of the voluntary or general appearance. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

If a general appearance is made in conjunction with or after a Rule 12(b)(2) motion, properly filed, the right to challenge personal jurisdiction is preserved. *Lynch v. Lynch*, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

"General Appearance" to Be Given Liberal Construction. — Although this section was amended specifically to allow motions for extensions of time, otherwise the concept of a "general appearance" remains the same, and the concept should be given a liberal interpretation.

Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

Meaning of "General Appearance".

— The term "general appearance," as used in this section, should be held to refer generally to appearances made either before the filing of jurisdictional motions under § 1A-1, Rule 12(b) before pleading or, if no such motions are filed, to appearances made before the defense is raised in responsive pleadings. *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977), vacated, 295 N.C. 92, 244 S.E.2d 260 (1978).

A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

An appearance for any purpose other than to question the jurisdiction of the court is general. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

Necessity of Service Obviated by General Appearance. — In this section the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons. Whether conduct which will dispense with the necessity of service of summons is denominated a general appearance or a submission to the jurisdiction or is left unlabeled is immaterial; the effect of such conduct remains the same. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974).

General Appearance Confers Jurisdiction Despite Defective Service. — If defendant makes a "general appearance," the court has jurisdiction over his person, even if service of process was defective. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

General appearance by a party's attorney will dispense with process and service. *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

But participation by defendant's counsel in a contempt hearing would not invoke personal jurisdiction over

the defendant, since a contempt proceeding is a collateral matter that does not directly bear upon the subject matter of the controversy. *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Waiver of Jurisdictional Defense by General Appearance. — After a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under § 1A-1, Rule 12(b). *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974); *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Where defendant made a general appearance before filing a motion contesting personal jurisdiction, he waived his right to challenge the court's exercise of personal jurisdiction over him from that date forward. *Lynch v. Lynch*, 303 N.C. 367, 279 S.E.2d 840 (1981).

Appearance as Executor. — Where husband died prior to a hearing on wife's motion to set aside a decree of absolute divorce, there was no merit to husband's executor's contention that he had not been served with process and was therefore not properly before the court, since his appearance, as executor, was a general appearance, and accordingly the trial court properly obtained jurisdiction over his person. *Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Motions To Disqualify Plaintiffs' Counsel. — The defendants waived service of process by entering general appearances where motions were made by the individual defendants to disqualify plaintiffs' counsel, since these motions requested affirmative relief from the court and necessarily invoked the judgment of the court as to the issues raised, and the jurisdictional defenses were not raised prior to the filing of these motions, nor were the motions grouped or joined with any jurisdictional motions. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Notice of Appeal and Demand for Jury Trial. — When a party gives notice of appeal and demands trial by jury prior to contesting the court's jurisdiction over his person, he has made a general appearance under this section. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

General Appearance in Child Custody Proceeding. — Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in Illinois. *Lynch v. Lynch*, 45 N.C. App. 391, 264 S.E.2d 114 (1980), *aff'd* in part and *rev'd* in part, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Defendant made a general appearance in a child custody action when his counsel participated in a conference with the plaintiff and the district court judge pertaining to an order enjoining defendant from taking the child out of the jurisdiction of the court, and the court had jurisdiction over defendant's person even though no service of process was made upon either defendant or his counsel. *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Motion for Extension of Time. — For the purposes of this section, a motion for extension of time in which to plead or otherwise answer will not constitute a general appearance; however, if the defendant, by motion or otherwise,

invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court, whether he intended to or not. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *cert. denied & appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

For cases holding that obtaining an extension of time in which to plead was a general appearance which waived any defect in the jurisdiction of the court for want of valid summons or proper service thereof, decided prior to the 1975 amendment to this section, see *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974); *Philpott v. Kerns*, 285 N.C. 225, 203 S.E.2d 778 (1974). But see, *Williams v. Hartis*, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Applied in *Wiles v. Welparnel Constr. Co.*, 34 N.C. App. 157, 237 S.E.2d 297 (1977); *Yale v. National Indem. Co.*, 602 F.2d 642 (4th Cir. 1979).

Quoted in *Southgate v. Russ*, 52 N.C. App. 364, 278 S.E.2d 313 (1981).

Cited in *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E.2d 649 (1974).

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

A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

- (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subdivision shall apply whether any such defendant is known or unknown.
- (2) When the action is to foreclose, redeem from or satisfy a deed of trust, mortgage, claim or lien upon real or personal property in this State.
- (3) When the action is for a divorce or for annulment of marriage of a resident of this State.
- (4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section.

- (5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised. (1967, c. 954, s. 2.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Legal Periodicals. — For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Subdivision (4) Is Not Constitutional. — Subdivision (4) of this section does not meet the due process standards of *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), which held that standards of fairness, reasonableness and substantial justice and minimum contacts should govern actions in rem as well as in personam, and is unconstitutional. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subdivision (5) Supports Jurisdiction If Due Process Standards Are Met. — Subdivision (5) of this section extends in rem and quasi in rem jurisdiction to any action "in which in rem or quasi in rem jurisdiction may be constitutionally exercised." This statute supports jurisdiction over the property within the state of a nonresident if due process standards are met. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Meaning of Subdivision (5). — Subdivision (5) of this section means that the ability to attach a nonresident defendant's property is not a sufficient predicate, standing alone, for the assertion of quasi in rem jurisdiction. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Effect of Subdivision (5). — The effect of subdivision (5) of this section is to permit the exercise of quasi in rem jurisdiction over the property interest of a defendant who has been served with process pursuant to § 1A-1, Rule 4(k) in any action where constitutionally permitted. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

This Section Is Based on Pennoyer v. Neff. — This section and the caselaw relating to in rem jurisdiction are based on the decision in *Pennoyer v. Neff*, 95

U.S. 714, 24 L. Ed. 565 (1878), which for 100 years has provided the conceptual framework for jurisdictional matters in the United States. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Application of Due Process Fairness Standard. — The mandates of the due process fairness standard apply with equal force to actions in rem and quasi in rem as well as to actions in personam. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

The inquiry to be used regarding jurisdiction in rem and quasi in rem is similar to that regarding in personam jurisdiction: First, do the "long-arm" statutes allow the courts to assume jurisdiction over defendant? Second, assuming they do, does the exercise of such jurisdiction comport with due process? *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978).

Minimum Contacts Required. — The exercise of both personal and quasi in rem jurisdiction is subject to the due process requirement that if the defendant is not present within the territory of the forum, he must have certain minimum contacts with it, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Existence of Minimum Contacts Depends on Facts. — Whether minimum contacts exist is not to be determined by the application of per se rules; rather, their presence depends upon the particular facts of each case, with particular scrutiny being given to the quality and the nature of defendant's contacts with the State. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Factors in Determining Existence of Minimum Contacts. — Other factors

to be considered in determining whether minimum contacts exist are: (1) Any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (2) An estimate of the inconveniences to the defendant in being forced to defend a suit away from his home; (3) The location of crucial witnesses and material evidence; and (4) The existence of a contract which has a substantial connection with the forum state. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Defendant Must Invoke Benefits and Protections of State's Laws. — In each case it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Mere ownership of property in the forum state is insufficient to establish "minimum contacts" necessary to satisfy the requirements of due process. *Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Jurisdiction Supported Where Real Property Has Relation to Controversy. — Where real property has some relation to the controversy, the

interest of the State in realty within its borders, and the defendant's substantial relationship with the forum, should support jurisdiction. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Discretion of Court. — The exercise of jurisdiction in rem or quasi in rem is a matter for the discretion of the court. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Jurisdiction Not Established. — The trial court did not have jurisdiction in an action to recover a money judgment on an account where both the plaintiff and the defendant were nonresidents, the cause of action arose in Maryland, and the defendant's realty in North Carolina had no relation to the account which was the subject matter of the action, since *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), held that the standards of fairness, reasonableness and substantial justice and minimum contacts should govern actions in rem as well as in personam. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Applied in *Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973).

Cited in *Finley v. Finley*, 15 N.C. App. 681, 190 S.E.2d 660 (1972); *Harris & Gurganus, Inc. v. Williams*, 37 N.C. App. 585, 246 S.E.2d 791 (1978).

§ 1-75.9. Jurisdiction in rem or quasi in rem — Manner of exercising.

A court of this State exercising jurisdiction in rem or quasi in rem pursuant to G.S. 1-75.8 may affect the interests of a defendant in such an action only if process has been served upon the defendant in accordance with the provisions of Rule 4(k) of the Rules of Civil Procedure, but nothing herein shall prevent the court from making interlocutory orders for the protection of the res while the action is pending. (1967, c. 954, s. 2.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Applied in *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

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

Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

- (1) Personal Service or Substituted Personal Service. —
 - a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or
 - b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.
- (2) Service of Publication. — In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.
- (3) Written Admission of Defendant. — The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.
- (4) Service by Registered or Certified Mail. — In the case of service by registered or certified mail, by affidavit of the serving party averring:
 - a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
 - b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
 - c. That the genuine receipt or other evidence of delivery is attached. (1967, c. 954, s. 2; 1969, c. 895, s. 14; 1973, c. 643; 1979, c. 525, s. 2; 1981, c. 540, ss. 9, 10.)

COMMENT

Paragraph b of subdivision (1) now provides that proof of service of process may, in the alternative, be made in accordance with the law of the place where service is effected. It is intended to

prevent technical objections to a return of service prepared by a foreign process server in accordance with the practices and requirements of his own jurisdiction.

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Legal Periodicals. — For article on legislative changes to the new rules of

civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Officer's Return as Proof of Service. — Where the defendant appears in an action and challenges the service of summons by the sheriff of the county where he was found, proof of service shall be "by the officer's certificate thereof, showing place, time and manner of service," and when the return upon its face shows legal service by an authorized officer, that return is sufficient, at least prima facie, to show service in fact. *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 265 S.E.2d 633 (1980).

Plaintiff Not Precluded from Offering Additional Proof of Service. — Although this section provides that an officer's return shall constitute proof of service in fact, and the better practice is for officers to make their return specifying in detail upon whom and in what manner process was served, the statute does not preclude a plaintiff, in a case where the return on its face does not affirmatively disclose facts showing nonservice, from offering additional proof to establish that service was made as required by law. *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 265 S.E.2d 633 (1980).

Officer's Return Held Insufficient on Its Face. — Homeowners were enti-

tled to attack foreclosure proceeding against their property either by a motion in the cause or by an independent action where the officer's return was insufficient on its face to show service upon homeowner husband in that the return did not show the place where the papers were left. *Hassel v. Wilson*, 301 N.C. 307, 272 S.E.2d 77 (1980).

Execution of Affidavit by Agent of Corporate Publisher. — Subdivision (2) of this section is satisfied where an agent executes an affidavit for a publisher which is a corporation, as shown in the affidavit. *Philpott v. Johnson*, 38 N.C. App. 380, 247 S.E.2d 781 (1978).

An affidavit signed by the "legal advertising manager" of a newspaper constitutes an affidavit of an agent of the publisher sufficient to satisfy the requirement of this section. *Love v. Nationwide Mut. Ins. Co.*, 45 N.C. App. 444, 263 S.E.2d 337, cert. denied, 300 N.C. 198, 269 S.E.2d 617 (1980).

Applied in *In re Phillips*, 18 N.C. App. 65, 196 S.E.2d 59 (1973); *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974).

Cited in *Edwards v. Edwards*, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

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

Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by G.S. 1-75.10 and, in addition, shall require further proof as follows:

- (1) **Where Personal Jurisdiction Is Claimed Over the Defendant.** — Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.
- (2) **Where Jurisdiction Is in Rem or Quasi in Rem.** — Where no personal claim is made against the defendant, the court

shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require. (1967, c. 954, s. 2.)

Cross References. — As to default judgments, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For article on

default judgments and motions to set aside, see 18 Wake Forest L. Rev. 683 (1982).

CASE NOTES

Compliance with § 1A-1, Rule 55 Required. — In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of § 1A-1, Rule 55, as well as this section. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Personal Jurisdiction Must Be Proved. — Personal jurisdiction over a nonappearing defendant for the purpose of the entry of a judgment by default is not presumed by the service of summons and an unverified complaint, but must be proved and appear of record as required by this section. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Before a court may enter judgment in a case where defendant fails to timely appear in an action, this section requires proof by affidavit or other evidence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over a defendant. *Bimac Corp. v. Henry*, 18 N.C. App. 539, 197 S.E.2d 262 (1973).

Judgment Held Void for Failure to Show Jurisdiction. — Where record failed to show personal jurisdiction of the defendant by the court, the judgment entered was void and could be considered and treated as a nullity. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

A plaintiff is not required to show that defendant is not an infant and not under disability before he is entitled to obtain an entry of default and a judgment by default. *General Foods Corp. v. Morris*, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Nor Is Clerk Required to Make Such Finding. — Section 1A-1, Rule 55 and this section do not require the clerk to make an affirmative finding that

defendant is not a minor and is under no legal disability in order to enter a default or a default judgment. *General Foods Corp. v. Morris*, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Default judgment by the clerk, provided for by § 1A-1, Rule 55(b)(1), is subject to the jurisdictional proofs required by this section and is still controlled by § 1-209(4), which empowers the clerk to enter all judgments by default and inquiry as are authorized by § 1A-1, Rule 55. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Requirements for Default Judgment against Nonappearing Defendant Served by Certified Mail. — This section basically requires two things before a default judgment can be entered against a nonappearing defendant who was served by certified mail. First, there must be proof of service of summons in the manner required by § 1-75.10(4). Second, where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. *North Brook Farm Lines v. McBrayer*, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Unlike entry of judgment by default, entry of default does not require submission of jurisdictional proof. *Silverman v. Tate*, — N.C. App. —, 301 S.E.2d 732 (1983).

The language of this section indicates that proof of jurisdiction is required only when a judgment is to be entered against a nonappearing defendant. Such proof is not required for an entry of default. *Silverman v. Tate*, — N.C. App. —, 301 S.E.2d 732 (1983).

Applied in *Sawyer v. Cox*, 36 N.C. App. 300, 244 S.E.2d 173 (1978).

Stated in *Hassell v. Wilson*, 301 N.C. 307, 272 S.E.2d 77 (1980).

Cited in *Highfill v. Williamson*, 19 N.C. App. 523, 199 S.E.2d 469 (1973); *Love v. Nationwide Mut. Ins. Co.*, 45 N.C. App. 444, 263 S.E.2d 337 (1980).

OPINIONS OF ATTORNEY GENERAL

Complaint Signed by an Attorney Is Not a Sufficient Basis for a Default Judgment. — See opinion of Attorney

General to the Honorable Edwin S. Preston, Jr., 41 N.C.A.G. 625 (1971).

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

(a) **When Stay May be Granted.** — If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

(b) **Subsequent Modification of Order to Stay Proceedings.** — In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

(c) **Review of Rulings on Motion.** — Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal. Whenever such a motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion. (1967, c. 954, s. 2.)

CASE NOTES

Discretion of Trial Judge. — The entry of an order under subsection (a) of this section is a matter within the sound discretion of the trial judge. *Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 93, 273 S.E.2d 299 (1980).

Relevant facts that may be considered in deciding whether to grant a stay pursuant to this section include: convenience and access to another forum; nature of case involved; relief sought; applicable law; possibility of jury view;

convenience of witnesses; availability of compulsory process to produce witnesses; cost of obtaining attendance of witnesses; relative ease of access to sources of proof; enforceability of judgment; burden of litigating matters not of local concern; desirability of litigating matters of local concern in local courts; choice of forum by plaintiff; and all other practical considerations which would make the trial easy, expeditious and inexpensive. *Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 93, 273 S.E.2d 299 (1980).

Applied in *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862 (1971).

Cited in *Allen v. Wachovia Bank & Trust Co.*, 35 N.C. App. 267, 241 S.E.2d 123 (1978).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

- (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
- (2) Partition of real property.
- (3) Foreclosure of a mortgage of real property.
- (4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded. (C.C.P., s. 66; Code, s. 190; 1889, c. 219; Rev., s. 419; C.S., s. 463; 1951, c. 837, s. 4.)

Cross References. — As to change of venue, see § 1-83. As to removal for fair and impartial trial, see § 1-84. As to venue in criminal actions, see § 15-129

et seq. As to venue in indictment for receiving stolen goods, see § 14-71. As to venue in partition proceedings, see § 46-2.

CASE NOTES

- I. In General.
- II. Actions Relating to Real Property.
 - A. In General.
 - B. Local Actions.
 - C. Transitory Actions.
- III. Partition of Realty.
- IV. Foreclosure of Mortgages of Real Property.
- V. Recovery of Personal Property.

I. IN GENERAL.

This Subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the State. *State ex rel. Snuggs v. Stone*, 52 N.C. 382 (1860).

The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N.C. 455, 66 S.E. 434 (1909).

Venue deals with procedure and is not jurisdictional, in the absence of

statutory provision to that effect. *State ex rel. McCullen v. Seaboard Air Line Ry.*, 146 N.C. 568, 60 S.E. 506 (1908); *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919); *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 128 S.E. 20 (1925).

Effect of Contract Stipulation Regarding Venue. — There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial

thereto in opposition to the will of the legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified will be denied. *Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, 109 S.E. 362 (1921).

As to applicability of venue provisions to trials before a justice, see *Fisher v. Bullard*, 109 N.C. 574, 13 S.E. 799 (1891); *Mohn v. Creesey*, 193 N.C. 568, 137 S.E. 718 (1927).

Venue Provisions Inapplicable to Habeas Corpus. — The sections of this Subchapter relating to venue refer to "actions" and have no reference to the writ of habeas corpus, which has been denominated a "high prerogative writ." *McEachern v. McEachern*, 210 N.C. 98, 185 S.E. 684 (1936).

An action by an administrator is not within any of the subdivisions of this section. *Whitford v. North State Life Ins. Co.*, 156 N.C. 42, 72 S.E. 85 (1911).

Applied in *Holden v. Totten*, 224 N.C. 547, 31 S.E.2d 635 (1944); *Dubose v. Harpe*, 239 N.C. 672, 80 S.E.2d 454 (1954); *Casstevens v. Wilkes Tel. Membership Corp.*, 254 N.C. 746, 120 S.E.2d 94 (1961).

Quoted in *Atkins v. Nash*, — N.C. App. —, 300 S.E.2d 880 (1983).

Stated in *Ridge Community Investors, Inc. v. Berry*, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Cited in *Askew v. Bynum*, 81 N.C. 350 (1879); *Falls of Neuse Mfg. Co. v. Brower*, 105 N.C. 440, 11 S.E. 313 (1890); *Lucas v. Carolina Cent. Ry.*, 121 N.C. 506, 28 S.E. 265 (1897); *Bridgers v. Ormond*, 148 N.C. 375, 62 S.E. 422 (1908); *Councill v. Bailey*, 154 N.C. 54, 69 S.E. 760 (1910); *Kanawha Hardwood Co. v. Waldo*, 161 N.C. 196, 76 S.E. 680 (1912); *Bohannon v. Virginia Trust Co.*, 198 N.C. 701, 153 S.E. 262 (1930); *Guy v. Gould*, 199 N.C. 820, 155 S.E. 925 (1930); *Carolina Mtg. Co. v. Long*, 205 N.C. 533, 172 S.E. 209 (1934); *Miller v. Miller*, 205 N.C. 753, 172 S.E. 493 (1934); *Guilford County v. Estates Admin., Inc.*, 212 N.C. 653, 194 S.E. 295 (1937); *Evans v. Morrow*, 233 N.C. 562, 64 S.E.2d 842 (1951); *Owens v. Boling*, 274 N.C. 374, 163 S.E.2d 396 (1968); *Smith v. Hudson*, 48 N.C. App. 347, 269 S.E.2d 172 (1980).

II. ACTIONS RELATING TO REAL PROPERTY.

A. In General.

Local and Transitory Actions Dis-

tinguished. — If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies, unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. *Thompson v. Horrell*, 272 N.C. 503, 158 S.E.2d 633 (1968); *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Principal Object Involved Determines Whether Action Is Local. — It is the principal object involved in the action which is determinative, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held local. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

An action is not necessarily local because it incidentally involves the title to land or a right or interest therein. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Title to realty must be directly affected by the judgment, in order to render the action local. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

When the title to real estate may be affected by an action, the action is local and is removable to the county where the land is situate by proper motion made in apt time. *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 154 S.E.2d 320 (1967); *Goodyear Mtg. Corp. v. Montclair Dev. Corp.*, 2 N.C. App. 138, 162 S.E.2d 623 (1968).

Action with Principal Object of Recovering Monetary Damages Is Not Local. — If the principal object involved in an action is monetary damages, and plaintiffs do not seek a judgment that would affect an interest in land, but seek a judgment in personam, the action is not a local action within the meaning of subdivision (1) of this section. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Docketed judgments confer no "estate or interest" in real estate within the meaning of this section, but merely the right to subject the realty to the payment of the judgments by sale under execution. *Baruch v. Long*, 117 N.C. 509, 23 S.E. 447 (1895); *Wise v.*

Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Notice of Claim of Lien Confers no Greater Right in Real Estate than Docketed Judgment. — Mere notice of a claim of lien would not confer a greater right or interest in the real estate than a docketed judgment and would not bring an action within the purview of subdivision (1) of this section. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

What Actions May Be Brought for Cutting and Removing of Timber. — The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass de bonis asportatis, for the value of the trees, both of which actions are transitory, or for trespass quare clausum fregit, which is local, and should be brought in the county wherein the land is situated. *Blevens v. Kitchen Lumber Co.*, 207 N.C. 144, 176 S.E. 262 (1934).

B. Local Actions.

An action to impress a parol trust upon lands and for an accounting involved a determination of an interest in lands, and the proper venue, under this section, was in the county in which the land was situated. *Williams v. McRackan*, 186 N.C. 381, 119 S.E. 746 (1923).

Suit by a purchaser of land to set aside the purchase and cancel certain notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land, without which he would not have purchased, involved an interest in land, required by this section to be brought in the county where the land was situated. *Vaughan v. Fallin*, 183 N.C. 318, 111 S.E. 513 (1922).

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involved an estate or interest therein, within the intent and meaning of this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N.C. 12, 103 S.E. 915 (1920).

Creditors' Bill to Set Aside Deed. — Where the wife of a debtor was made party defendant in an action in the nature of a creditors' bill in order to set aside debtor's deed to her for fraud and to subject the land to the satisfaction of the

demands of creditors, the suit to establish the plaintiffs' claims would be considered as incidental to the essential and controlling purpose of setting aside the deed, and venue would be governed by this section. *Wofford-Fain & Co. v. Hampton*, 173 N.C. 686, 92 S.E. 612 (1917).

An action for subrogation to the rights of the vendor had to be tried in the county where the land was situated. *Fraley v. March*, 68 N.C. 160 (1873).

Damages for Burning Land. — An action against a railroad company to recover damages for burning land was local in its nature and triable in the county in which the injury occurred, irrespective of § 1-81. *Perry v. Seaboard Air Line Ry.*, 153 N.C. 117, 68 S.E. 1060 (1910).

Trespass and Conversion. — Where the intent of the pleading was to sue for a trespass on land, and an allegation of a conversion was inserted in aggravation of damages, refusal of the lower court upon motion properly made in due time to remove the cause to the county in which the land was situated was erroneous. *Richmond Cedar Works v. J.L. Roper Lumber Co.*, 161 N.C. 603, 77 S.E. 770 (1913).

Action to Have Leasehold Interest Declared. — In an action by plaintiff lessees to have the court declare that they held a leasehold interest in a space in a trailer park, defendant was entitled to a change of venue as a matter of right to the county where the property in question was located pursuant to subdivision (1) of this section. *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 265 S.E.2d 922 (1980).

Venue of action against regional housing authority to determine respective rights of parties in certain land was properly the county in which the realty was situated and in which the authority had express power to act, notwithstanding that the principal office of the authority was in another county. *Powell v. Eastern Carolina Regional Hous. Auth.*, 251 N.C. 812, 112 S.E.2d 386 (1960).

C. Transitory Actions.

Usurious Loan Evidenced by Deed of Trust on Real Property. — The fact that an allegedly usurious loan was evidenced by a note secured by a deed of trust on real property did not make it an action affecting an interest in real property such that this section required a

change of venue. *River Dev. Corp. v. Parker Tree Farms, Inc.*, 12 N.C. App. 1, 182 S.E.2d 211 (1971).

Action to Enforce Contract Rights under Lease. — Where plaintiff brought an action to obtain a decree in personam to enforce contractual rights under a lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, the defendant's motion to remove as a matter of right to the county in which the land was situate was properly denied. *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 154 S.E.2d 320 (1967).

Damages for Fraudulent Representations Inducing Conveyance of Lands. — When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subdivision (1) of this section, and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under § 1-82. *Causey v. Morris*, 195 N.C. 532, 142 S.E. 783 (1928).

Action for Damages for Breach of Contract. — Where the plaintiff in his complaint did not undertake to allege facts to support a decree for specific performance, but on the contrary bottomed his action on the breach of the contract, and sought to recover damages resulting therefrom, such an action was not for the recovery of real property or any interest therein as contemplated by this section. *Lamb v. Staples*, 234 N.C. 166, 66 S.E.2d 660 (1951).

An action to recover monetary damages for breach of a contract to construct a house was transitory and not local within the meaning of subdivision (1) of this section, since plaintiff's purpose was not to recover real property, to determine an estate or interest in land, or to recover for damages to realty. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated. *Eames v. Armstrong*, 136 N.C. 392, 48 S.E. 769 (1904).

Action on Note Secured by Deed of Trust. — An action against the endorser of a negotiable note, secured by a deed of

trust on land, was not an action involving an estate or interest in land and did not have to be brought where the land was located. *White v. Rankins*, 206 N.C. 104, 173 S.E. 282 (1934).

Action to recover damages to real property is transitory. *Wheatley v. Phillips*, 228 F. Supp. 439 (W.D.N.C. 1964).

Action to recover for injuries to land caused by backing water upon it is transitory. *Cox v. Oakdale Cotton Mills, Inc.*, 211 N.C. 473, 190 S.E. 750 (1937).

An action to recover the value or "worth" of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass de bonis asportatis, and is therefore transitory. *Blevens v. Kitchen Lumber Co.*, 207 N.C. 144, 176 S.E. 262 (1934). See also, *Hilton Lumber Co. v. Estate Corp.*, 215 N.C. 649, 2 S.E.2d 869 (1939); *Bunting v. Henderson*, 220 N.C. 194, 16 S.E.2d 836 (1941).

Damages to Clay Mining Machine from Pollution of Stream. — An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine was not such as is contemplated by this section. *Harris Clay Co. v. Carolina China Clay Co.*, 203 N.C. 12, 164 S.E. 341 (1932).

Setting Aside Judgment. — An action to set aside judgments as fraudulent and for the appointment of a receiver did not need to be brought in the county where the property upon which such judgments were liens was situated. *Baruch v. Long*, 117 N.C. 509, 23 S.E. 447 (1895).

III. PARTITION OF REALTY.

Land situated in two counties could be sold for partition by a decree of the county of equity of either county. *In re Skinner's Heirs*, 22 N.C. 63 (1838), decided prior to the merger of the courts of law and equity.

IV. FORECLOSURE OF MORTGAGES OF REAL PROPERTY.

A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by subdivision (3) of this section. *King v. Portis*, 81 N.C. 382 (1879).

An action by the holder of certain notes given for the purchase of land

against the purchaser of the land and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which was substantially the same as an action "for the foreclosure of a mortgage of real estate," and had to be tried in the county in which the land was situate within the meaning of subdivision (3) of this section. *Fraley v. March*, 68 N.C. 160 (1873).

Where it appeared from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partook in substance of the nature of a suit for the foreclosure of a mortgage, and was within subdivision (3) of this section. *Councill v. Bailey*, 154 N.C. 54, 69 S.E. 760 (1910).

For additional cases relating to venue in foreclosure of mortgages of real property, see *Fraley v. March*, 68 N.C. 160 (1873); *Falls of Neuse Mfg. Co. v. Brower*, 105 N.C. 440, 11 S.E. 313 (1890); *McLean v. Shaw*, 125 N.C. 491, 34 S.E. 634 (1899); *Gammon v. Johnson*, 126 N.C. 64, 35 S.E. 185 (1900); *Connor v. Dillard*, 129 N.C. 50, 39 S.E. 641 (1901).

V. RECOVERY OF PERSONAL PROPERTY.

Venue of actions for recovery of personalty is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. *Brown v. Cogdell*, 136 N.C. 32, 48 S.E. 515 (1904).

But Recovery Must Be Sole or Chief Relief. — Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. *Marshburn v. Purifoy*, 222 N.C. 219, 22 S.E.2d 431 (1942).

Where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with an injunctive restraint as an incident thereto, the cause is within subdivision (4) of this section. *Fairley Bros. v. Abernathy*, 190 N.C. 494, 130 S.E. 184 (1925).

If an action is one in which the recovery of personal property is not the sole or

chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. *House Chevrolet Co. v. Cahoon*, 223 N.C. 375, 26 S.E.2d 864 (1943).

Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. *Woodard v. Sauls*, 134 N.C. 274, 46 S.E. 507 (1904); *Bowen Piano Co. v. Newell*, 177 N.C. 533, 98 S.E. 774 (1919).

Section Does Not Apply to Actions for Monetary Recovery. — This section applies to action for the recovery of specific tangible articles of personal property, and not to actions for monetary recovery. *Flythe v. Wilson*, 227 N.C. 230, 41 S.E.2d 751 (1947).

Where an action was brought for an accounting, and the question of ownership of notes and bonds was raised only incidentally, it was not necessary that it be brought in the county in which the notes and bonds were situated. *Clow v. McNeill*, 167 N.C. 212, 83 S.E. 308 (1914).

An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by subdivision (4) of this section. *Baruch v. Long*, 117 N.C. 509, 23 S.E. 447 (1895).

Action to Set Aside Contract or Recover for Breach of Fiduciary Relationship. — Where the subject of an action is a contract which plaintiff seeks to set aside, or a fiduciary relationship which plaintiff alleges was breached and for which he seeks monetary damages, and recovery of personal property is neither the sole nor the primary relief demanded, this section is not controlling. *Klass v. Hayes*, 29 N.C. App. 658, 225 S.E.2d 612 (1976).

In an action for wrongful conversion of oysters taken from oyster beds, the defendant was not entitled to a change of venue to the county in which the beds were situated. *Makely v. Boothe Co.*, 129 N.C. 11, 39 S.E. 582 (1901).

Removal for Convenience of Witnesses. — Once a cause involving recovery of personal property is properly

instituted, this section does not prevent the seeking of a removal for the convenience of witnesses, and whether the motion to remove should be granted is a matter in the discretion of the court. *Moody v. Warren-Robbins, Inc.*, 251 N.C. 172, 110 S.E.2d 866 (1959).

Prior Law. — For case holding that subdivision (4) of this section was restricted to personalty "distrained for any cause," prior to the 1889 amendment to this section, see *Smithdeal v. Wilkerson*, 100 N.C. 52, 6 S.E. 71 (1888).

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

Subject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated. (1977, c. 383, s. 1.)

§ 1-77. Where cause of action arose.

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

- (1) Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.
- (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (C.C.P., s. 67; Code, s. 191; Rev., s. 420; C.S., s. 464.)

Cross References. As to quo actions against registers of deeds, see warranto, see § 1-514 et seq. As to §§ 161-16 and 161-27.

CASE NOTES

- I. In General.
- II. Recovery of Penalty or Forfeiture.
- III. Against Public Officers, etc.

I. IN GENERAL.

Quo Warranto and Mandamus. — This section should apply in the writs of quo warranto (no longer used in this State) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitutes the charge, and in effect amounts to a criminal action, or an action to subject the parties to pains and penalties. *Johnston v. Board of Comm'rs*, 67 N.C. 101 (1872).

Applied in *State ex rel. McCullen v. Seaboard Air Line Ry.*, 146 N.C. 568, 60 S.E. 506 (1908).

Cited in *Harvey v. Rich*, 98 N.C. 95, 3 S.E. 912 (1887); *Shaver v. Huntley*, 107 N.C. 623, 12 S.E. 316 (1890); *Whitford v. North State Life Ins. Co.*, 156 N.C. 42, 72 S.E. 85 (1911); *McFadden v. Maxwell*, 198 N.C. 223, 151 S.E. 250 (1930); *Banks v. Joyner*, 209 N.C. 261, 183 S.E. 273 (1936); *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943); *Flythe v. Wilson*, 227 N.C. 230, 41 S.E.2d

751 (1947); *Mitchell v. Jones*, 272 N.C. 499, 158 S.E.2d 706 (1968).

II. RECOVERY OF PENALTY OR FORFEITURE.

Section Not Applicable to Actions within Jurisdiction of Justices of the Peace. — This section, providing that actions for recovery of penalties must be brought in the county where the cause of action arose, applies to those actions of which the superior court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace. *Fisher v. Bullard*, 109 N.C. 574, 13 S.E. 799 (1891); *Dixon v. Haar*, 158 N.C. 341, 74 S.E. 1 (1912).

An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. *Dixon v. Haar*, 158 N.C. 341, 74 S.E. 1 (1912).

III. AGAINST PUBLIC OFFICERS, ETC.

"By His Command or in His Aid". — The words "in his aid" were meant to extend the immunity to all who assisted and took part in the act with assent, though not by direct orders, for all such stand upon the same footing. *Harvey v. Brevard*, 98 N.C. 93, 3 S.E. 911 (1887).

Any consideration of subdivision (2) of this section involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965); *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Counties. — Actions against counties must be brought in the county sued. *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).

Municipal Corporations. — An action against a municipality is governed by this section where the cause of action is the factor controlling venue in such a case. *Pitts Fire Safety Serv., Inc. v. City of Greensboro*, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. *Murphy v. City of High Point*, 218 N.C. 597, 12 S.E.2d 1 (1940); *Godfrey v. Tidewater Power Co.*, 224 N.C. 657, 32 S.E.2d 27 (1944); *Lee v. Poston*, 233 N.C. 546, 64 S.E.2d 835

(1951). See also, *Jones v. Town of Statesville*, 97 N.C. 86, 2 S.E. 346 (1887); *Brevard Light & Power Co. v. Board of Light & Water Comm'rs*, 151 N.C. 558, 66 S.E. 569 (1909).

The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. *Murphy v. City of High Point*, 218 N.C. 597, 12 S.E.2d 1 (1940); *Godfrey v. Tidewater Power Co.*, 224 N.C. 657, 32 S.E.2d 27 (1944).

Officers of Counties and Cities. — Actions against county commissioners and other officers must be brought in the county of which they are officers; moreover, cities and towns are of like nature, and should stand upon the same footing as to actions against them. *Johnston v. Board of Comm'rs*, 67 N.C. 101 (1872); *Alexander v. Commissioners of McDowell*, 67 N.C. 330 (1872); *Jones v. Board of Comm'rs*, 69 N.C. 412 (1873); *Steele v. Commissioners of Rutherford*, 70 N.C. 137 (1874); *Jones v. Town of Statesville*, 97 N.C. 86, 2 S.E. 346 (1887).

Deputy sheriffs of a county are "public officers" for purposes of the change of venue statute. *Galligan v. Smith*, 10 N.C. App. 536, 179 S.E.2d 193 (1971).

Nature of Acts of Officer. — An action is controlled by this section irrespective of whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. *Brevard Light & Power Co. v. Board of Light & Water Comm'rs*, 151 N.C. 558, 66 S.E. 569 (1909).

Acts Done by Virtue of Office. — Where defendant is a public officer and the action arises from acts done or to be done by him in a county by virtue of his office, subdivision (2) of this section applies. *King v. Buck*, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Acts Not Done by Virtue of Office. — In an action in Catawba County, residence of plaintiff, for damages for an alleged wrongful conspiracy which occurred in Wilkes County, against a corporation and two individuals acting as a corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes County, a motion for change of venue to Wilkes County under this section was properly denied, as there was no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. *Potts v. United Supply Co.*, 222 N.C. 176, 22 S.E.2d 255 (1942).

For case holding a county hospital an agency of the county, see *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).

For case holding that this section was not applicable to a religious corporation, see *Lee v. Poston*, 233 N.C. 546, 64 S.E.2d 835 (1951).

This section does not apply to actions against the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Obligors on Bond. — The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such office." *Harvey v. Brevard*, 98 N.C. 93, 3 S.E. 911 (1887).

Cause of action arises in the county where the acts or omissions constituting the basis of the action occurred. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

When Cause of Action Accrues. — A cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Injurious Results Taking Effect in Another County. — Where the cause of an alleged grievance is situate or exists in one state or county, and the injurious results take effect in another, the courts of the former have jurisdiction. *Powell v. Eastern Carolina Regional Hous. Auth.*, 251 N.C. 812, 112 S.E.2d 386 (1960).

Trial of Whole Controversy in County where Offense Occurred. — Where in an action against the clerk of the superior court of one county and the sheriff of another county the clerk moved for removal of the cause as to him to the county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. *Kellis v. Welch*, 201 N.C. 39, 158 S.E. 742 (1931).

Right to Have Case Moved Does Not Preclude Change of Venue under

§ 1-83. — The fact that defendant is entitled under this section to have his case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under § 1-83. *King v. Buck*, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Recovery against City for Price of Equipment. — Proper venue in an action against a city to recover the price of equipment installed in its municipal building lies in the county in which the city is located, since the contract was performed and the failure to pay occurred in that county. *Pitts Fire Safety Serv., Inc. v. City of Greensboro*, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

A cause of action for damages for breach of a contract made by a board of a municipal corporation is within the meaning of this section. *Brevard Light & Power Co. v. Board of Light & Water Comm'rs*, 151 N.C. 558, 66 S.E. 569 (1909).

Negligent Operation of Sewage Disposal Plant. — Where complaint alleged damage to plaintiff's land resulting from negligent operation of defendant municipality's sewage disposal plant, and the action was instituted in the county in which the land was situated and in which the municipality maintained and operated its sewage disposal plant, the alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant, the cause of action arose there, and municipality's motion for change of venue was erroneously granted. *Murphy v. City of High Point*, 218 N.C. 597, 12 S.E.2d 1 (1940).

Damages from Emptying of Sewage into Stream. — Venue of an action to recover from an incorporated town damages to lands situated in another county, caused by emptying its sewage into an insufficient stream of water, was properly in the county wherein the town was situated, for such cause arose by reason of the official conduct of municipal officers and consequently was regulated by this section. *Cecil v. City of High Point*, 165 N.C. 431, 81 S.E. 616 (1914).

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

All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. (1868-9, c. 258; Code, s. 193; Rev., s. 421; C.S., s. 465.)

CASE NOTES

Legislative Intent. — It was the intent of the legislature to require all actions against executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, and if not, then the plaintiff's county. *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950); *Stanley v. Miller*, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact all the business of the estate in their hands. *Stanley v. Mason*, 69 N.C. 1 (1873); *Foy v. Morehead*, 69 N.C. 512 (1873); *Bidwell v. King*, 71 N.C. 287 (1874); *Farmers' State Alliance v. Murrell*, 119 N.C. 124, 25 S.E. 785 (1896).

This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. *Godfrey v. Tidewater Power Co.*, 224 N.C. 657, 32 S.E.2d 27 (1944).

Section Includes Guardians. — This section includes guardians, notwithstanding the only words used are "executors" and "administrators." *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963); see also, *State ex rel. Cloman v. Staton*, 78 N.C. 235 (1878).

And All Court-Appointed Fiduciaries Required to Account to Court Appointing Them. — The Legislature intended under this section to

encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

A personal action against an administrator is not within the meaning of this section. *Craven v. Munger*, 170 N.C. 424, 87 S.E. 216 (1915).

Representative Is Not Entitled to Removal if Not Sued in Official Capacity. — That fact that an executor or administrator is sued and is named as executor or administrator in the summons caption and complaint does not entitle such defendant to an order of removal to the county in which he qualified if the complaint discloses that the alleged cause of action is not against him in his official capacity. *Davis v. Singleton*, 256 N.C. 596, 124 S.E.2d 563 (1962); *Stanley v. Miller*, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

When Action Is against Representative in Official Capacity. — An action is against the representative in his official capacity if it (1) Asserts a claim against the estate; (2) Involves the settlement of his accounts; or (3) Involves the distribution of the estate. *Davis v. Singleton*, 256 N.C. 596, 124 S.E.2d 563 (1962).

Section Inapplicable to Actions by Administrators. — This section applies only to actions against administrators and not to actions brought by them. *Whitford v. North State Life Ins. Co.*, 156 N.C. 42, 72 S.E. 85 (1911). See also, *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

The proper venue for actions against executors and administrators is the county in which they qualify. *Lichtenfels v. North Carolina*

Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

This section applies to original actions "instituted," i.e., originally commenced, against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. *Evans v. Morrow*, 233 N.C. 562, 64 S.E.2d 842 (1951).

Section Not Applicable where Administrator Substituted as Party.

— This section has no application where an action is commenced in another county against a defendant, and upon his death his administrator is made a party. *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919).

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and defendant died prior to service of process, and thereupon defendant's administratrix was joined as a party defendant, the administratrix was not entitled to claim that the action was not properly pending because it was not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action; however, defendant administratrix could move for removal of the cause to the county of her residence and the scene of the collision for the convenience of witnesses and the promotion of the ends of justice. *Johnson v. Smith*, 215 N.C. 322, 1 S.E.2d 834 (1939).

Right to Move for Change of Venue. — The right of an administratrix in regard to motions for change of venue under this section may not be invoked by another party to the action. *Herring v. Queen City Coach Co.*, 231 N.C. 430, 57 S.E.2d 307 (1950).

Institution of Action in County Mandated Does Not Prevent Motion for Removal. — Where a plaintiff was compelled to institute his action in a particular county by reason of the mandate of this section, his act in doing so could not be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal under § 1-83, subdivision (2). *Pushman v. Dameron*, 208 N.C. 336, 180 S.E. 758 (1935).

The fact that an individual was joined as a defendant with an executor or administrator, and that the individual defendant was a resident of the county in which the cause of action was

brought was held not to affect the executor's or administrator's right of removal to the county in which it qualified. *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

Discretion of Judge to Remove Cause. — The trial judge in the exercise of a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the cause was instituted. *Pushman v. Dameron*, 208 N.C. 336, 180 S.E. 578 (1935).

Action for Account and Settlement.

— Where an action involves an account and settlement of an estate, by the express words of this section such an action must be instituted in the county where the administrator qualified. *Thomas v. Ellington*, 162 N.C. 131, 78 S.E. 12 (1913), distinguishing *Roberts v. Connor*, 125 N.C. 45, 34 S.E. 107 (1899).

Foreclosure of Tax Sale Certificate.

— An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. *Guilford County v. Estates Admin., Inc.*, 212 N.C. 653, 194 S.E. 295 (1937).

Action Dependent upon Settlement of Accounts. — In an action against defendant executors, where the ultimate determination of the rights of the respective parties in a joint savings account necessarily depended upon the proper settlement of the accounts of the defendant executors, the action was against the defendant executors in their representative capacity. *Stanley v. Miller*, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

Suits against Administratrix of Deceased Administrator. — Where A qualified as administrator of B in Halifax County, and gave bond there, and afterwards A died in Northampton, and C qualified as his administratrix in that county, and C, administratrix, along with D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a resident of Halifax, it was held that the action was properly brought in Halifax, under this section. *State ex rel. Clark v. Peebles*, 100 N.C. 348, 6 S.E. 798 (1888).

Action against executrix to recover on a guardianship bond executed by testator was properly brought in the county in which the bond was given and the sureties thereon resided and in which

the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified was properly denied, the primary and controlling intent of this section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond was in the county. *State ex rel. Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938).

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified was untenable, since the controlling factors were the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the

sureties. *State ex rel. Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938).

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting that is instituted against it in the county in which the will was probated removed to the county in which it maintains its principal office. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Applied in *Moseley v. Branch Banking & Trust Co.*, 19 N.C. App. 137, 198 S.E.2d 36 (1973).

Quoted in *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936); *Kimrey v. Dorsett*, 10 B.R. 466 (M.D.N.C. 1981).

Cited in *Evans v. Morrow*, 234 N.C. 600, 68 S.E.2d 258 (1951); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

§ 1-79. Domestic corporations.

For the purpose of suing and being sued the residence of a domestic corporation is as follows:

- (1) Where the registered or principal office of the corporation is located, or
- (2) Where the corporation maintains a place of business.
- (3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term "residence" shall include any place where the corporation is regularly engaged in carrying on business. (1903, c. 806; Rev., s. 422; C.S., s. 466; 1951, c. 837, s. 5; 1957, c. 492; 1973, c. 885; 1975, c. 111.)

Cross References. — As to actions against railroads, see § 1-81.

CASE NOTES

Purpose of Section. — The purpose of this section was not to change the provisions of § 1-81 or to deny plaintiff's right to sue a domestic corporation in the county of his residence, but to remedy the defect of § 1-81 so that a domestic corporation could be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by §§ 1-76, 1-77 and 1-78. *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N.C. 120, 68 S.E. 1064 (1910).

Residence Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the

governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business. *Garrett & Co. v. Bear*, 144 N.C. 23, 56 S.E. 479 (1907).

The residence of a corporation executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office and not the county of its qualification. *Branch Banking & Trust Co. v. Finch*, 232 N.C. 485, 61 S.E.2d 377 (1950).

The fact that the principal place of

business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

Domesticated foreign corporations are residents of the State for purposes of venue of the State courts. *Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E.2d 183 (1949).

A foreign corporation which duly domesticates in this State pursuant to § 55-138(a)(5) is to be treated like a domestic corporation for venue purposes. *Moore Golf, Inc. v. Shambley Wrecking Contractors*, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

A domesticated foreign corporation may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such a case, § 1-80 does not apply. *Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E.2d 183 (1949).

Section Does Not Apply to Foreign Insurance Companies. — While statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read in pari materia, the provisions of this section have no application to foreign insurance companies, since § 58-150 does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business. *Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 108 S.E.2d 122 (1959).

As to the domesticated foreign insurance corporation exception to the general rule that domesticated foreign corporations are treated like domestic corporations, see *Moore Golf, Inc. v. Shambley Wrecking Contractors*, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Section Held Inapplicable to Creditor's Bill. — This section is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. *Wofford-Fain & Co. v. Hampton*, 173 N.C. 686, 92 S.E. 612 (1917).

Removal Upheld. — Where a corporate administrator instituted suit in the county of its qualification, in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office, it was held that the action was properly removed upon motion to the county in which the corporate administrator maintained its principal office and in which defendant resided. *Branch Banking & Trust Co. v. Finch*, 232 N.C. 485, 61 S.E.2d 377 (1950).

As to venue in actions against domestic corporations prior to passage of this section, see *Cline v. Bryson City Mfg. Co.*, 116 N.C. 837, 21 S.E. 791 (1895); *Farmers' State Alliance v. Murrell*, 119 N.C. 124, 25 S.E. 785 (1896).

Applied in *Eastern Cotton Oil Co. v. New Bern Oil & Fertilizer Co.*, 204 N.C. 362, 168 S.E. 411 (1933); *First Union Nat'l Bank v. Northwestern Bank*, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

Stated in *Haworth v. GMAC*, 238 F.2d 203 (4th Cir. 1956); *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968).

Cited in *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N.C. 120, 68 S.E. 1064 (1910); *McCue v. Times-News Co.*, 199 N.C. 802, 156 S.E. 129 (1930); *Occidental Life Ins. Co. v. Lawrence*, 204 N.C. 707, 169 S.E. 636 (1933); *Howle v. Twin States Express, Inc.*, 237 N.C. 667, 75 S.E.2d 732 (1953); *Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 108 S.E.2d 122 (1959).

§ 1-80. Foreign corporations.

An action against a corporation created by or under the law of any other state or government may be brought in the appropriate trial court division of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

- (1) By a resident of this State, for any cause of action.
- (2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.
- (3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C.C.P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C.S., s. 467; 1971, c. 268, s. 1.)

Cross References. — As to domesticated foreign corporations, see case

notes to § 1-79. As to actions against railroads, see § 1-81.

CASE NOTES

Section Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; hence, under North Carolina decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of North Carolina courts of transitory causes of actions. *Ledford v. Western Union Tel. Co.*, 179 N.C. 63, 101 S.E. 533 (1919).

Effect of § 1-81. — The enactment of § 1-81 does not repeal this section, but this section will be confined to corporations other than railway companies which have been chartered by any other state, government or county. *Propst v. Railroad*, 139 N.C. 397, 51 S.E. 920 (1905).

Garnishment against Salesmen. — The courts of this State have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought in the State against its salesmen, the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. *Allen-Fleming Co. v. Southern Ry.*, 145 N.C. 37, 58 S.E. 793 (1907).

Suit to Recover for Value of Timber. — Where a nonresident plaintiff sued to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands were situated, and brought his action in the county where the

conversion was alleged to have occurred, to maintain his action in the latter county he had to show that the defendant conducted business or had property therein, or the cause would be removable to the county where the land was situated, that being the county wherein the cause of action arose. *Richmond Cedar Works v. J.L. Roper Lumber Co.*, 161 N.C. 603, 77 S.E. 770 (1913).

Suit against Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of venue, in which members were received, the usual business of such lodges was transacted and membership fees were collected and remitted to it, the transactions of the local lodge were such usual or continuous business as is contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. *Ange v. Sovereign Camp, W.O.W.*, 171 N.C. 40, 87 S.E. 955 (1916).

Claim of State for License Fees. — Where a receiver of an insolvent foreign corporation was appointed under the Corporation Act of 1901, a claim by the State which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, did not apply to the proceeding. *Holshouser v. Copper Co.*, 138 N.C. 248, 50 S.E. 650 (1905).

Action by Administrator for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. *Hannon v. Southern Power Co.*, 173 N.C. 520, 92 S.E. 353 (1917).

Quoted in *Troy Lumber Co. v. State Sewing Mach. Corp.*, 233 N.C. 407, 64 S.E.2d 415 (1951).

Cited in *Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 108 S.E.2d 122 (1959).

§ 1-81. Actions against railroads.

In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C.S., s. 468.)

CASE NOTES

History. — This section was first enacted as a proviso to § 424 of the Revisal. Section 424 of the Revisal is now § 1-82; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of § 1-76. In view of this pronouncement of the legislative intent, it is to be presumed that the language of § 1-82 still applies to this section, although the two sections are now apparently independent.

The act of 1905, c. 367, amending the Code, § 192 (Revisal, § 424), now §§ 1-81 and 1-82, expressly included actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify § 1-76, in regard to the venue of actions of this character, since it is for damages for personal injuries. *Propst v. Railroad*, 139 N.C. 397, 51 S.E. 920 (1905); *Perry v. Seaboard Air Line Ry.*, 153 N.C. 117, 68 S.E. 1060 (1910).

Effect of Section in General. — This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county where the defendant has a track for that purpose, unless the injury occurred, or plaintiff resides, therein. *Watson v. North Carolina R.R.*, 152 N.C. 215, 67 S.E. 502 (1910).

This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a non-resident plaintiff against a railroad company incorporated in North Carolina. *McGovern & Co. v. Atlantic Coast Line R.R.*, 180 N.C. 219, 104 S.E. 534 (1920).

This section applies to all railroad companies, both domestic and foreign. *Forney v. Black Mt. R.R.*, 159 N.C. 157, 74 S.E. 884 (1912).

As to actions against railroads under federal control, see *Alabama & V. Ry. v. Journey*, 257 U.S. 111, 42 S. Ct. 6, 66 L. Ed. 15 (1921).

Section Inapplicable where Railroad is Not Sole Defendant. — This section should be construed and held to apply to cases where a railroad company alone is defendant, and the venue in actions where there are other parties defendant is not controlled by the section. *Smith v. Patterson*, 159 N.C. 138, 74 S.E. 923 (1912).

Where both plaintiff and defendant were nonresident corporations, an action concerning land brought in a different county from the situs of the property, wherein neither had property nor conducted its business, fell within the intent and meaning of § 1-80 and this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N.C. 12, 103 S.E. 915 (1920).

Residence of Administrator for Purposes of Section. — Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of this section, the term "where plaintiff resided at the time the cause of action arose" has reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N.C. 120, 68 S.E. 1064 (1910); *Whitford v. North State Life Ins. Co.*, 156 N.C. 42, 72 S.E. 85 (1911); *Smith v. Patterson*, 159 N.C. 138, 74 S.E. 923 (1912).

Applied in *John P. Nutt Corp. v. Southern Ry.*, 214 N.C. 19, 197 S.E. 534 (1938); *Poteat v. Southern Ry.*, 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Cited in *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 1-82. Venue in all other cases.

In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute; provided that any person who has resided on or been stationed in a United States army, navy, marine corps, coast guard or air force installation or reservation within this State for a period of one (1) year or more next preceding the institution of an action shall be deemed a resident of the county within which such installation or reservation, or part thereof, is situated and of any county adjacent to such county where such person stationed at such installation or reservation lives in such adjacent county, for the purposes of this section. The term person shall include military personnel and the spouses and dependents of such personnel. (C.C.P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C.S., s. 469; 1957, c. 1082.)

Cross References. — As to venue of domesticated foreign corporations, see case notes to § 1-79.

Legal Periodicals. — For article on

North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Purpose of Section. — The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. *Palmer v. Lowe*, 194 N.C. 703, 140 S.E. 718 (1927).

What Section Requires. — This section requires that venue in civil actions not specifically provided for in §§ 1-76 through 1-81 must be in the county where either the plaintiff or the defendant resides at the commencement of the suit. *Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Effect of Other Venue Provisions — Section 1-76. — This section is general in its terms and is subject to the provisions of § 1-76. *Wofford-Fain & Co. v. Hampton*, 173 N.C. 686, 92 S.E. 612 (1917).

Same — Section 1-77. — Section 1-77 relates to particular cases, while this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, § 1-77, expressing a particular intention, will be

taken as an exception to the general provision. *Godfrey v. Tidewater Power Co.*, 224 N.C. 657, 32 S.E.2d 27 (1944). But see *Hannon v. Southern Power Co.*, 173 N.C. 520, 92 S.E. 353 (1917), wherein it was held that this section should be construed as an exception to § 1-77.

This section relates to venue as opposed to jurisdiction. *Shaw v. Stiles*, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff against a railroad company incorporated in North Carolina. *McGovern & Co. v. Atlantic Coast Line R.R.*, 180 N.C. 219, 104 S.E. 534 (1920).

Venue means a place where the trial of a cause may be held by a court with jurisdiction. *Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Local and Transitory Actions Distinguished. — If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect

the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. *Thompson v. Horrell*, 272 N.C. 503, 158 S.E.2d 633 (1968).

Venue of Transitory Actions. — Where an action is transitory, either the county of residence of the plaintiff or that of the defendant is the proper venue. *First Union Nat'l Bank v. Northwestern Bank*, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

The word "parties" as used in this section means parties to the record. *Rankin v. Allison*, 64 N.C. 673 (1870).

This section governs suits against the State on contracts generally since there is no venue statute specifically applicable to the State. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

Domesticated Foreign Corporations Are Treated like Domestic Corporations. — A foreign corporation which duly domesticates in this State pursuant to § 55-138(a)(5) is to be treated like a domestic corporation for venue purposes. *Moore Golf, Inc. v. Shambley Wrecking Contractors*, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Except for Insurance Corporations. — *Moore Golf, Inc. v. Shambley Wrecking Contractors*, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Residence of Fiduciaries for Venue Purposes. — In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. *Hartford Accident & Indem. Co. v. Hood*, 225 N.C. 361, 34 S.E.2d 204 (1945).

Action by Receiver. — Where a receiver of a corporation resided in a different county from the concern he represented, the venue of the action brought by him for breach of contract would be determined by the place of residence of the receiver and not necessarily that of the insolvent corporation. *Biggs v. Bowen*, 170 N.C. 34, 86 S.E. 692 (1915).

This section governs the venue of actions instituted by an executor or administrator in his official capacity. *Branch Banking & Trust Co. v. Finch*, 232 N.C. 485, 61 S.E.2d 377 (1950).

Under this section an action by an administrator is properly brought in the county where he resides rather than in the county where the decedent lived or in which the administrator qualified. *Klass v. Hayes*, 29 N.C. App. 658, 225 S.E.2d 612 (1976).

An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed. *Whitford v. North State Life Ins. Co.*, 156 N.C. 42, 72 S.E. 85 (1911).

Action for Personal Services Rendered to Administrator. — An action brought to recover for services rendered personally to an administrator is a personal action against the administrator, and can be brought at the election of the plaintiff in the county where either he or the defendant resides. *Craven v. Munger*, 170 N.C. 424, 87 S.E. 216 (1915).

Actions Brought by Nonresidents. — The venue of an action brought by a nonresident of the State in a different county from that where the defendant resides or does business and wherein the defendant has no property is an improper one. *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728 (1923).

In an action for breach of contract brought by a nonresident plaintiff, the county of residence of the defendant is the proper venue. *Southern Cotton Oil Co. v. Grimes*, 183 N.C. 97, 112 S.E. 598 (1922).

Where plaintiff was a nonresident and defendants were residents of North Carolina, the proper venue for trial of an action for false arrest was a county in this State in which the defendants, or any of them, resided at its commencement. *Chow v. Crowell*, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

Action against Foreign Corporation and Resident Defendant. — Where a nonresident plaintiff brought an action to recover damages for negligence against a foreign corporation, with joinder of a resident defendant, and the venue in the action was laid in a different county from that of the resident defendant, the venue was in the county of the resident defendant, and the action was removable thereto upon his motion duly made. Sections 1-76, 1-80 and 1-81 did not apply. *Palmer v. Lowe*, 194 N.C. 703, 140 S.E. 718 (1927); *Brown v. Brevard Auto Serv. Co.*, 195 N.C. 647, 143 S.E. 258 (1928).

Where Principal Office of Corporation Is in County Other than Residence of Defendants. — Where the plaintiff was a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants were citizens of this State, and residents of Sampson County, Durham County was the proper venue for the trial of the action. *North Carolina Joint Stock Land Bank v. Kerr*, 206 N.C. 610, 175 S.E. 102 (1934).

An action on a note by the Commissioner of Banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. *Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc.*, 209 N.C. 36, 182 S.E. 694 (1935).

As to venue of suits against national banks, see *Security Mills Asheville, Inc. v. Wachovia Trust Co.*, 281 N.C. 525, 189 S.E.2d 266 (1972).

An unemancipated illegitimate child sues in the county of his mother's residence, even though he is living in a different county with his grandparents. *Thayer v. Thayer*, 187 N.C. 573, 122 S.E. 307 (1924).

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922).

Effect of Change of Residence. — The defendant by a mere change of residence cannot change the venue as fixed by this section. *Taylor v. Sharp*, 108 N.C. 377, 13 S.E. 138 (1891); *Hannon v. Southern Power Co.*, 173 N.C. 520, 92 S.E. 353 (1917).

Facts Found by Trial Judge in Determining Residency Are Conclusive on Appeal. — Facts found by the trial judge in determining questions of residency raised in a motion to remove a case on grounds of improper venue are conclusive on appeal if supported by competent evidence. *Clarke v. Clarke*, 15 N.C. App. 576, 190 S.E.2d 390 (1972).

Motion for Removal Properly Denied. — Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching

his majority plaintiff instituted an action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action was not against defendant as executrix but against her individually on a liability imposed upon her as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix was properly denied. *Rose v. Patterson*, 218 N.C. 212, 10 S.E.2d 678 (1940).

In an action on a judgment of another state, plaintiff's attachment of lands of defendant situated in a county of this State was rendered immaterial by defendant's general appearance. The court found that both parties were nonresidents. Hence, plaintiff was entitled to maintain the action in any court of this State that she might designate, and the defendant's motion to remove to the county in which the real estate attached was situated and of which he asserted he was a resident was properly denied. *Clement v. Clement*, 216 N.C. 240, 4 S.E.2d 434 (1939).

Applied in *Carolina Mtg. Co. v. Long*, 205 N.C. 533, 172 S.E. 209 (1934); *Atlantic Coast Line R.R. v. Thrower*, 213 N.C. 637, 197 S.E. 197 (1938); *Brendle v. Stafford*, 246 N.C. 218, 97 S.E.2d 843 (1957); *Barker v. Hicks*, 12 N.C. App. 407, 183 S.E.2d 431 (1971); *Poteat v. Southern Ry.*, 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Quoted in *Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

Stated in *Lawson v. Langley*, 211 N.C. 526, 191 S.E. 229 (1937); *Mitchell v. Jones*, 272 N.C. 499, 158 S.E.2d 706 (1968); *Holland v. Gryder*, 54 N.C. App. 490, 283 S.E.2d 792 (1981).

Cited in *McCue v. Times-News Co.*, 199 N.C. 802, 156 S.E. 129 (1930); *Howard v. Queen City Coach Co.*, 212 N.C. 201, 193 S.E. 138 (1937); *Lee v. Poston*, 233 N.C. 546, 64 S.E.2d 835 (1951); *Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 108 S.E.2d 122 (1959); *Aetna Cas. & Sur. Co. v. Petroleum Transit Co.*, 266 N.C. 756, 147 S.E.2d 229 (1966); *Doss v. Nowell*, 268 N.C. 289, 150 S.E.2d 394 (1966); *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968); *Clarke v. Clarke*, 15 N.C. App. 576, 190 S.E.2d 390 (1972); *First Union Nat'l Bank v. Northwestern Bank*, 18 N.C. App. 113, 196 S.E.2d 38 (1973); *Swift & Co. v.*

Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978); *Harrington Mfg. Co. v. Powell Mfg. Co.*,

44 N.C. App. 347, 260 S.E.2d 814 (1979); *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980).

§ 1-83. Change of venue.

If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

- (1) When the county designated for that purpose is not the proper one.
- (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
- (3) When the judge has, at any time, been interested as party or counsel.
- (4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons. (R.C., c. 31, ss. 115, 118; C.C.P., s. 69; 1870-1, c. 20; Code, s. 195; Rev., s. 425; C.S., s. 470; 1945, c. 141.)

Cross References. — As to time and manner of pleading defense of improper venue, see Rule 12 of the Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For case law

survey on venue, see 41 N.C.L. Rev. 525 (1963).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

- I. In General.
- II. Where County Designated Is Not Proper.
- III. Where Convenience of Witnesses and Ends of Justice Would Be Promoted.
- IV. Application for Removal.

I. IN GENERAL.

This Section Is All Inclusive. — This section indiscriminately embraces all the previously enumerated actions of this Subchapter, both those for the recovery of real estate, which under the former system of pleading were called local actions, as well as those which were transitory or personal actions; all are embraced in the sweeping enactment. *Lafoon v. Shearin*, 91 N.C. 370 (1884).

The word "venue," as used in this section, means place of trial, the place or county where the trial of a cause is to be held. The authority thus vested in the superior court judge to remove a cause instituted in a county which is not the proper one, as provided by the statute

fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal, i.e., the superior court. *Lovegrove v. Lovegrove*, 237 N.C. 307, 74 S.E.2d 723 (1953).

Venue is not jurisdictional, but is only ground for removal to the proper county upon a timely objection made in the proper manner. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952); *Casstevens v. Wilkes Tel. Membership Corp.*, 254 N.C. 746, 120 S.E.2d 94 (1961); *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Where an action is brought in the wrong county, defendant is not entitled

to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270 (1920); *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

When an action is instituted in the wrong county, the superior court should, upon apt motion, remove the action, not dismiss it. *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).

And venue may be waived because it is not jurisdictional, and is available to the objecting party by motion in the cause. *Shaffer v. Morris Bank*, 201 N.C. 415, 160 S.E. 481 (1931).

Venue cannot be jurisdiction and it may always be waived. *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 128 S.E. 20 (1925). See also, *Wynne v. Conrad*, 220 N.C. 355, 17 S.E.2d 514 (1941).

Sections 1-76 to 1-83 relate to venue, not jurisdiction, and an objection to the wrong venue is waived if not made in apt time. *Collyer v. Bell*, 12 N.C. App. 653, 184 S.E.2d 414 (1971).

By Any Party, Including the Government. — Venue, not being jurisdictional, may be waived by any party, including the government. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

By Failure to Comply with Requirements of Section. — The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the requirements of this section that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728 (1923).

Venue may be waived unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county. *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975).

A defendant's failure to press his motion to remove has been found to be a waiver. *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Waiver occurs when motion was neither "made in writing" nor "before the time of answering expired." *McMinn v. Hamilton*, 7 N.C. 30 (1819); *Lafoon v.*

Shearin, 91 N.C. 370 (1884) (which was an action of ejectment); *Morgan v. First Nat'l Bank*, 93 N.C. 352 (1885), *aff'd*, 132 U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282 (1889); *Granville County Bd. of Educ. v. State Bd. of Educ.*, 106 N.C. 81, 10 S.E. 1002 (1890); *Baruch v. Long*, 117 N.C. 509, 23 S.E. 447 (1895); *Lucas v. Carolina Cent. Ry.*, 121 N.C. 506, 28 S.E. 265 (1897), modified on rehearing, 122 N.C. 937, 29 S.E. 414 (1898).

Where the county designated for the purpose of summons and complaint is not the proper one, the action may nevertheless be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county and the place of trial is thereupon changed by consent of the parties or by order of the court. *Nelms v. Nelms*, 250 N.C. 237, 108 S.E.2d 529 (1959).

Waiver May Be Express or Implied. — Since venue is not jurisdictional it may be waived by express or implied consent. *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Filing Answer to Merits as Waiver of Venue Defense. — The defendant who files a formal answer to the merits within the time allowed thereby waives his privilege of amendment. *Trustees of Catawba College v. Fetzer*, 162 N.C. 245, 78 S.E. 152 (1913); *Stevens Lumber Co. v. Arnold*, 179 N.C. 269, 102 S.E. 409 (1920); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

Withdrawing Answer. — Where answer has been filed and withdrawn for the purpose of the motion to remove at the proper term, the right to remove will be taken as waived. *Trustees of Catawba College v. Fetzer*, 162 N.C. 245, 78 S.E. 152 (1913).

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. *Garrett v. Bear*, 144 N.C. 23, 56 S.E. 479 (1907); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

Accepting Continuances. — A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. *Oettinger v. Hill Live Stock Co.*, 170 N.C. 152, 86 S.E. 957 (1915).

Demand for change of venue must be made by defendant. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

And Not by Plaintiff. — By adding subdivision (4) to this section, the legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him in an improper county removed to one of proper venue. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

Motion by Plaintiff to Remove Cause Back to Original County. — The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county for the convenience of witnesses and the promotion of the ends of justice. *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

Institution of Action under § 1-78 Does Not Prevent Motion for Change. — Where the plaintiff under § 1-78 is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under this section. *Pushman v. Dameron*, 208 N.C. 336, 180 S.E. 578 (1935).

Power of Court Limited after Proper Motion for Change of Venue. — Where a motion asserting improper venue is made in writing and in apt time, the question of removal becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. *Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

In the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. *Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

But Additional Change Is Not Precluded by Right to Have Case Moved. — The fact that defendant is entitled under § 1-77 to have this case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under this section. *King v. Buck*, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Trial Court Free to Believe or Disbelieve Affidavits. — The trial court, in ruling upon a motion for change of venue, is entirely free to either believe or disbelieve affidavits, without regard to whether they have been controverted by evidence introduced by the opposing party. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

This section allows removal to a nonadjoining county. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated. *Foreman-Blades Lumber Co. v. Tunis Heading & Stave Co.*, 196 N.C. 38, 144 S.E. 297 (1928).

Applied in *Davis v. Singleton*, 256 N.C. 596, 124 S.E.2d 563 (1962); *Slater v. Lovick*, 257 N.C. 619, 127 S.E.2d 273 (1962); *Barker v. Hicks*, 12 N.C. App. 407, 183 S.E.2d 431 (1971); *Shaw v. Stiles*, 13 N.C. App. 173, 185 S.E.2d 268 (1971); *Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

Stated in *Lawson v. Langley*, 211 N.C. 526, 191 S.E. 229 (1937).

Cited in *Riley v. Pelletier*, 134 N.C. 316, 46 S.E. 734 (1904); *Garrett v. Bear*, 144 N.C. 23, 56 S.E. 479 (1907); *Oettinger v. Hill Live Stock Co.*, 170 N.C. 152, 86 S.E. 957 (1915); *Ludwick v. Uwarra Mining Co.*, 171 N.C. 60, 87 S.E. 949 (1916); *Southern Cotton Oil Co. v. Grimes*, 183 N.C. 97, 112 S.E. 598 (1922); *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728 (1923); *Murchison Nat'l Bank v. Broadhurst*, 197 N.C. 365, 148 S.E. 452 (1929); *Miller v. Miller*, 205 N.C. 753, 172 S.E. 493 (1934); *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936); *Cox v. Oakdale Cotton Mills, Inc.*, 211 N.C. 473, 190 S.E. 750 (1937); *Howard v. Queen City Coach Co.*, 212 N.C. 201, 193 S.E. 138 (1937); *Guilford County v. Estates Admin., Inc.*, 212 N.C. 653, 194 S.E. 295 (1937); *Atlantic Coast Line R.R. v. Thrower*, 213 N.C. 637, 197 S.E. 197 (1938); *Boney v. Parker*, 227 N.C. 350, 42 S.E.2d 222 (1947); *Doss v. Nowell*, 268 N.C. 289, 150 S.E.2d 394 (1966); *Thompson v. Horrell*, 272 N.C. 503, 158 S.E.2d 633 (1968); *Owens v. Boling*, 274 N.C. 374, 163 S.E.2d 396 (1968); *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976); *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399 (1978); *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980); *Atkins v.*

Nash, — N.C. App. —, 300 S.E.2d 880 (1983).

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

Construction of "May" in Subdivision (1). — The provision in this section that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "must change." *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

The question of removal, when the action is not brought in the proper county, is not one of discretion; rather, "may, in this connection," means shall or must, as it is construed in every act imposing a duty. *Pelletier v. Saunders*, 67 N.C. 262, (1872); *Jones v. Town of Statesville*, 97 N.C. 86, 2 S.E. 346 (1887); *Falls of Neuse Mfg. Co. v. Brower*, 105 N.C. 440, 11 S.E. 313 (1890). See also, *Lewis v. Sanger*, 216 N.C. 724, 6 S.E.2d 494 (1940).

The trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952); *Mitchell v. Jones*, 272 N.C. 499, 158 S.E.2d 706 (1968); *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975); *Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

And an appeal lies from an order denying a motion for removal of a case to the proper county for trial. *Falls of Neuse Mfg. Co. v. Brower*, 105 N.C. 440, 11 S.E. 313 (1890); *Connor v. Dillard*, 129 N.C. 50, 39 S.E. 641 (1901); *Brown v. Cogdell*, 136 N.C. 32, 48 S.E. 515 (1904); *Perry v. Seaboard Air Line Ry.*, 153 N.C. 117, 68 S.E. 1060 (1910); *Richmond Cedar Works v. J.L. Roper Lumber Co.*, 161 N.C. 603, 77 S.E. 770 (1913); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

Such Appeal Is Not Premature. — An appeal from the refusal of the superior court judge to remove a case to the proper county is not premature. *Dixon v. Haar*, 158 N.C. 341, 74 S.E. 1 (1912); *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).

Costs of Transporting Witnesses of Adverse Party. — While in the exercise of its discretionary power to remove a cause for the convenience of witnesses

and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, a provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of the opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. *Nichols v. Goldston*, 231 N.C. 581, 58 S.E.2d 348 (1950).

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

Motion Is Addressed to Discretion of Court. — A motion to remove when the convenience of witnesses and the ends of justice would be promoted is addressed to the sound discretion of the trial judge. *Belding v. Archer*, 131 N.C. 287, 42 S.E. 800 (1902), petition for rehearing dismissed, 132 N.C. 1151, 45 S.E. 1036 (1903); *Eames v. Armstrong*, 136 N.C. 392, 48 S.E. 769 (1904); *Oettinger v. Hill Live Stock Co.*, 170 N.C. 152, 86 S.E. 957 (1915); *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969). See also, *Garrett v. Baar*, 144 N.C. 23, 56 S.E. 479 (1907); *Craven v. Munger*, 170 N.C. 424, 87 S.E. 216 (1915); *Byrd v. Carolina Spruce Co.*, 170 N.C. 429, 87 S.E. 241 (1915); *Ludwick v. Uwarra Mining Co.*, 171 N.C. 60, 87 S.E. 949 (1916); *Perry v. Perry*, 172 N.C. 62, 89 S.E. 999 (1916); *Causey v. Morris*, 195 N.C. 532, 142 S.E. 783 (1928); *Western Carolina Power Co. v. Klutz*, 196 N.C. 358, 145 S.E. 681 (1928); *Farmers Coop. Exch. v. Trull*, 255 N.C. 202, 120 S.E.2d 438 (1961).

When the trial court finds that the convenience of witnesses and the ends of justice would be promoted by a change of venue, subdivision (2) of this section permits, but does not require, the trial court in its discretion to order such a change of venue. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

And Is Not Reviewable Absent Abuse. — A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown. *Phillips v. Currie Mills, Inc.*, 24

N.C. App. 143, 209 S.E.2d 886 (1974). See also, *Craven v. Munger*, 170 N.C. 424, 87 S.E. 216 (1915); *Ludwick v. Uwarra Mining Co.*, 171 N.C. 60, 87 S.E. 949 (1916); *Grimes v. Fulton*, 197 N.C. 84, 147 S.E. 680 (1929).

Motion for change of venue pursuant to subdivision (2) of this section to promote the convenience of witnesses and the ends of justice presents a question of venue and not jurisdiction. Rulings on such questions are within the sound discretion of the trial court and are not subject to reversal except for manifest abuse of such discretion. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

When Refusal to Remove Will Constitute Abuse of Discretion. — The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of this section unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue or that failure to grant the change of venue will deny the movant a fair trial. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979); *Holland v. Gryder*, 54 N.C. App. 490, 283 S.E.2d 792 (1981).

Motions by Different Defendants. — The trial court is necessarily required to exercise discretion in choosing between two motions to remove by two different defendants in the same case. *Chow v. Crowell*, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

For case dismissing appeal from interlocutory order denying defendant's motion for a change of venue pursuant to subdivision (2) of this section, see *Furches v. Moore*, 48 N.C. App. 430, 269 S.E.2d 635 (1980).

IV. APPLICATION FOR REMOVAL.

Demand to Be Made before Time to Answer Expires. — This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See *Lafoon v. Shearin*, 91 N.C. 370 (1884); *Riley v. Pelletier*, 134 N.C. 316, 46 S.E. 734 (1904); *Garrett v. Bear*, 144 N.C. 23, 56 S.E. 479 (1907); *Calcagno v. Overby*, 217 N.C. 323, 7 S.E.2d 557 (1940); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

And before Answering to Merits. — The objection must be taken not only "before the time of answering expires," as required by this section, but it must also be taken in limine and before answering to the merits. *Granville County Bd. of Educ. v. State Bd. of Educ.*, 106 N.C. 81, 10 S.E. 1002 (1890); *Shaver v. Huntley*, 107 N.C. 623, 12 S.E. 316 (1890). See also, *Farmers' State Alliance v. Murrell*, 119 N.C. 124, 25 S.E. 785 (1896); *Richmond Cedar Works v. J.L. Roper Lumber Co.*, 161 N.C. 603, 77 S.E. 770 (1913).

A motion for removal made before the time for the filing of an answer to the complaint has expired is made in apt time. *Carolina Mtg. Co. v. Long*, 205 N.C. 533, 172 S.E. 209 (1934); *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952); *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 154 S.E.2d 320 (1967).

But the defense of improper venue may be raised in the answer if no pre-answer motions have been made. *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975).

And Discretionary Motions May Be Raised at Any Time. — Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson*, 191 N.C. 366, 131 S.E. 748 (1926); *Causey v. Morris*, 195 N.C. 532, 142 S.E. 783 (1928).

If a motion is based on subdivision (2) of this section, i.e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. *Riley v. Pelletier*, 134 N.C. 316, 46 S.E. 734 (1904).

Subdivision (2) Motion Not Entertained until Answer Is Filed. — The court has no authority to entertain a motion under subdivision (2) of this section until an answer has been filed. *Poteat v. Southern Ry.*, 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Unlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to subdivision (2) of this section are properly made only after an answer has been filed. *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

Where defendant's counterclaim is the only claim left to be adjudicated, defendant is not entitled under this section to a change of venue as a matter of right from the county of plaintiff's residence to the county of defendant's residence, since the county of plaintiff's residence is a proper venue under § 1-82. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 44 N.C. App. 347, 260 S.E.2d 814 (1979).

The demand must be in writing. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E.2d 54 (1952).

But Motion Need Not Be Verified. — Nothing in the Rules of Civil Procedure requires that motion for removal be verified. *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975).

§ 1-84. Removal for fair trial.

In all civil actions in the superior and district courts, when it is suggested on oath or affirmation on behalf of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed for trial to any adjacent county, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by oral evidence or affidavits. (1806, c. 693, s. 12, P.R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C.S., s. 471; 1957, c. 601; 1969, c. 44, s. 1; 1971, c. 268, s. 2; 1977, c. 12.)

Cross References. — As to removal of action under Chapter 50 for alimony or divorce, see § 50-3.

CASE NOTES

Motion Addressed to Discretion of Trial Court. — A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

A motion to remove for prejudice under this section is addressed to the sound discretion of the trial judge. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. *Stroud v. United States*, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103, rehearing denied, 251 U.S. 380, 40 S. Ct. 176, 64 L. Ed. 317 (1919).

Exercise of Discretion on Renewed Motion in Light of Changed Situation. — On a motion for change of venue the court must exercise its discretion in the light of the situation existing when the decision is made. Should some significant change occur thereafter, it may

become necessary, in the interest of assuring a fair trial, that the trial court be called upon again to exercise its discretion. In such case the court's discretion should be exercised in the light of the changed situation, and there is nothing in this section or in the rule which limits the power of one superior court judge to reverse a judgment of another which prevents this being done. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

Inherent Power of Trial-Judge to Order Removal Ex Mero Motu. — In addition to the express statutory authority granted in this section, the judge of the superior court has the inherent discretionary power to order a change of venue ex mero motu when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The fact that plaintiffs filed and later renewed a motion to remove would not compel the court to proceed only under the statutory authority and to forego

exercise of its inherent judicial power. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

Review of Trial Court's Ruling. — Where facts are set forth in the affidavit, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. *Phillips v. Lentz*, 83 N.C. 240 (1880); *Gilliken v. Norcom*, 193 N.C. 352, 137 S.E. 136 (1927); *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969); *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. *Albertson v. Terry*, 109 N.C. 8, 13 S.E. 713 (1891). See also, *Gilliken v. Norcom*, 193 N.C. 352, 137 S.E. 136 (1927).

Removal Must Be to Adjoining County. — Removal of a case for a "fair trial" under the provisions of this section is limited to removal to an adjoining county. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Admission of or Agreement to Facts. — The affidavit is required to make the facts appear to the court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. *Emry v. Hardee*, 94 N.C. 787 (1886).

It is within the power of counsel to consent that the court might hear and consider the facts as if stated in an affidavit. *Emry v. Hardee*, 94 N.C. 787 (1886).

For criminal cases decided under this section prior to the 1977 amendment, which deleted all references to criminal actions, see *State v. Turtty*, 9 N.C. 248 (1822); *State v. Johnson*, 104

N.C. 780, 10 S.E. 257 (1889); *State v. Smarr*, 121 N.C. 669, 28 S.E. 549 (1897); *State v. Turner*, 143 N.C. 641, 57 S.E. 158 (1907); *State v. Davis*, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932); *State v. Godwin*, 216 N.C. 49, 3 S.E.2d 347 (1939); *State v. Bell*, 228 N.C. 659, 46 S.E.2d 834 (1948); *State v. Perry*, 248 N.C. 334, 103 S.E.2d 404 (1958); *State v. Perry*, 250 N.C. 119, 108 S.E.2d 447 (1959); *State v. Moore*, 258 N.C. 300, 128 S.E.2d 563 (1962); *State v. Arnold*, 258 N.C. 563, 129 S.E.2d 229 (1963); *State v. Porth*, 269 N.C. 329, 153 S.E.2d 10 (1967); *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968); *State v. Ledbetter*, 4 N.C. App. 303, 167 S.E.2d 68 (1969); *State v. Penley*, 6 N.C. App. 455, 170 S.E.2d 632 (1969); *State v. Brown*, 13 N.C. App. 261, 185 S.E.2d 471 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 925 (1972); *State v. Mitchell*, 283 N.C. 462, 196 S.E.2d 736 (1973); *State v. Cobb*, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974); *State v. Halton*, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976); *State v. Jackson*, 287 N.C. 470, 215 S.E.2d 123 (1975); *State v. Jackson*, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975); *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976); *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977).

Cited in *Benton v. North Carolina R.R.*, 122 N.C. 1007, 30 S.E. 333 (1898); *McFadden v. Maxwell*, 198 N.C. 223, 151 S.E. 250 (1930); *Codley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

§ 1-85. Affidavits on hearing for removal; when removal ordered.

No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (1879, c. 45; Code, s. 197; 1899, c. 104, s. 2; Rev., s. 427; C.S., s. 472.)

CASE NOTES

This section refers only to § 1-84 (removal for fair trial) and not to § 1-83 (removal where county designated not proper). *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 216 S.E.2d 464 (1975).

When a motion to remove is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969); *State v. Halton*, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974).

The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." *State v. Moore*, 258 N.C. 300, 128 S.E.2d 563 (1962).

Cited in *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

§ 1-86: Repealed by Session Laws 1967, c. 218, s. 4.

Cross References. — For present provisions as to supplemental jurors from other counties, see § 9-12.

§ 1-87. Transcript of removal; subsequent proceedings; depositions.

(a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

(b) After a cause has been directed to be removed, and prior to the time that the transcript is deposited with the court to which the cause is removed, depositions may be taken in the cause, and subpoenas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (1806, c. 694, s. 12, P.R.; 1810, c. 787, P.R.; R.C., c. 31, s. 118; C.C.P., s. 69; Code, ss. 195, 198; Rev., s. 428; C.S., c. 474; 1967, c. 954, s. 3.)

CASE NOTES

Time to Deposit Transcript. — When an action is ordered removed to another county, it is error in the judge presiding in the superior court of the county from which the cause is removed, at the next term thereof, and before the term of the court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party

procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. *Fisher v. Cid. Copper Mining Co.*, 105 N.C. 123, 10 S.E. 1055 (1890).

Where the order of removal is by consent and no time is limited in the order of removal, the parties, or either of them, should have a reasonable time in which to deposit the transcript in the

other court. *Jones v. Brinson*, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to File Transcript within Time Allowed. — In the event that the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control over the cause. *Jones v. Brinson*, 238 N.C. 506, 78 S.E.2d 334 (1953); *Farmers Coop. Exch. v. Trull*, 255 N.C. 202, 120 S.E.2d 438 (1961).

When neither party has taken steps to perfect the removal of the cause, either party has the right to move the lower court for a reactivation of its jurisdiction, and to have it determine, on notice to the other party, whether the order of removal should be rescinded as upon abandonment of the right of removal. *Jones v. Brinson*, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to Transmit Copy of Entire Record. — It is not absolutely essential to the acquisition of jurisdiction by the

court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by certiorari, upon suggestion of a diminution of the record. Meanwhile, the jurisdiction of the court of original venue becomes dormant, and that court is functus officio to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed. *Jones v. Brinson*, 238 N.C. 506, 78 S.E.2d 334 (1953).

As to power to issue subpoenas under former statute similar to subsection (b) of this section, see *Commissioners of Forsyth v. Lemly*, 85 N.C. 341 (1881); *Fisher v. Cid Copper Mining Co.*, 105 N.C. 123, 10 S.E. 1055 (1890).

Quoted in *State ex rel. Clark v. Peebles*, 100 N.C. 349, 6 S.E. 798 (1888).

§ 1-87.1: Repealed by Session Laws 1967, c. 954, s. 4.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§§ 1-88 to 1-91: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to commencement of action, see Rule 3 of the Rules of Civil Procedure (§ 1A-1). As to service of process, see Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-92, 1-93: Repealed by Session Laws 1971, c. 268, s. 34.

§§ 1-94 to 1-98: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of process, see Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-98.1 to 1-98.4: Repealed by Session Laws 1971, c. 1093, s. 19.

Cross References. — For North Carolina's "long arm statute," see publication, see now Rule 4 (j1) of the Rules of Civil Procedure (§ 1A-1).
§ 1-75.1 et seq. As to service of process by

§ 1-99: Repealed by Session Laws 1967, c. 954, s. 4.

§§ 1-99.1 to 1-99.4: Repealed by Session Laws 1971, c. 1093, s. 19.

Cross References. — As to service by publication, see now Rule 4 (j1) of the Rules of Civil Procedure (§ 1A-1).

§§ 1-100 to 1-104: Repealed by Session Laws 1967, c. 954, s. 4.

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

The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner:

- (1) 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. Such service, upon compliance with the other provisions of this section, shall be sufficient service upon the said nonresident.
- (2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the

entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

- (3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as if provided in the case of a nonresident motorist.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491; 1967, c. 954, s. 4; 1971, c. 420, s. 2; 1975, c. 294.)

Editor's Note. — Session Laws 1967, c. 954, s. 4, provided for the repeal of this section, effective Jan. 1, 1970. However, Session Laws 1971, c. 420, s. 1, effective July 1, 1971, amended Session Laws 1967, c. 954, s. 4, by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections.

Legal Periodicals. — For comment on the 1953 amendment, see 31 N.C.L. Rev. 395.

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 530.

For case law survey on process, see 41 N.C.L. Rev. 524.

For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For article, "Modern Statutory Approaches to Service of Process outside the State — Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act," see 49 N.C.L. Rev. 235 (1971).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

- I. In General.
- II. Procedure for Service and Notice.

I. IN GENERAL.

This section is constitutional and valid. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548 (1931); *Wynn v. Robinson*, 216 N.C. 347, 4 S.E.2d 884 (1939); *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its police power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

It Affects a Substantial Right. — This section is not remedial or curative, but affects a substantial right. *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930).

And Is Not Retroactive. — Appointment of the Commissioner under this section is contractual, and the statute is not to be given retroactive effect; hence, service of process under this section in an action accruing before the effective force thereof is void. *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930).

Purpose of Section. — The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina resi-

dents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

A narrow interpretation of this section would defeat its purpose. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

This Section Must Be Strictly Construed. — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed, both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

And Strictly Complied With. — The provisions of this section are in derogation of the common law and must be strictly complied with. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

The provisions of this section are in derogation of the common law and must be strictly complied with, to the extent that actual notice given in any manner other than that prescribed by the statute cannot supply constitutional validity to it or to service under it. *Philpott v. Kerns*, 285 N.C. 225, 203 S.E.2d 778 (1974).

This section does not in any way change or amend the law governing the commencement of actions or the contents of a summons. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

But Provides Artificial Method of Serving Process. — This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Statutes in Pari Materia. — Sections 20-22, 20-37, 20-38 (now repealed) and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a

vehicle on the public highways of the State, deal with the same subject matter and must be considered in *pari materia*. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

This section and former § 1-89, relating to contents and return of summons, were to be construed together and strictly complied with. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967). As to summons, see now Rule 4 of the Rules of Civil Procedure (§ 1A-1).

Section Not in Conflict with § 1-21. — This section and § 1-105.1 are not in conflict with and do not repeal § 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

This section does not warrant service upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. *Lindsay v. Short*, 210 N.C. 287, 186 S.E. 239 (1936).

Section Applies to Action on Judgment Entered in Another State. — This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. *Carolina Coach Co. v. Cox*, 337 F.2d 101 (4th Cir. 1964).

Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of process on defendant by service on the Commissioner under the provisions of this section is valid. *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941), rev'd on other grounds, 220 N.C. 648, 18 S.E.2d 162 (1942).

Section 1-105.1 makes this section applicable to residents of the State who leave and remain without the State subsequent to an accident. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

Before the enactment of § 1-105.1, the method of serving process on a nonresident provided in this section and former § 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or was in the armed services of the United States and stationed in another state or foreign country. *Foster v. Holt*, 237 N.C. 495, 75 S.E.2d 319 (1953).

To sustain service of process upon defendant under this section pursuant to § 1-105.1, the plaintiffs must show either: (1) That defendant had established a residence outside the State subsequent to the accident or collision, or (2) That he had left the State subsequent to the collision complained of and remained absent from the State for 60 days or more continuously. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Residence of defendant at time of accident controlled the application of this section, § 1-105.1 and former § 1-107 under federal Rule 4(d)7. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

Resident of Canada Is "Nonresident". — A resident of Canada who operated an automobile involved in an accident on a public highway in this State was a "nonresident" within the purview of this section. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

Member of Armed Services and Wife Stationed Here under Military Orders. — Where the evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, was sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to ser-

vice of summons under this section. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

Conclusive Effect of Finding of Nonresidence on Appeal. — The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, was conclusive on appeal. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548 (1931).

Before the 1953 amendment, this section made no provision for service on the personal representative of a deceased automobile owner who died after an accident occurring in this State and before service of process, and service under the statute upon such personal representative conferred no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. *Dowling v. Winters*, 208 N.C. 521, 181 S.E. 751 (1935).

Purpose and Scope of 1953 Amendment. — Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and significant effect of the 1953 amendment. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

1953 Amendment Authorizes Service on Personal Representative of Deceased Nonresident. — The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

This section clearly permits nonresident administrators to be sued in

the State, in actions "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle [anywhere within the State]." *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

The overwhelming weight of authority sustains the assertion of jurisdiction over personal representatives of nonresident motorists. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

While North Carolina, by virtue of this section, permits a suit against the nonresident administrator of a motorist who became involved in an auto accident in North Carolina, nonresident administrators are otherwise held to lack the capacity to sue or be sued. However, the argument that the lack of capacity to initiate suit, while having capacity to be sued, renders a statute like this section "grossly unfair" has been specifically rejected. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

The legislature, by the 1955 amendment, intended only to broaden the area of vehicular operation to include private ways and places on land not within the confines of public highways. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

And did not intend to enlarge and extend the meaning of the words "motor vehicle." The 1955 amendment did not undertake to change the type of vehicle, but merely enlarged the sphere of its operation. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

Meaning of "Motor Vehicle". — The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

An airplane is not a "motor vehicle" within the purview of this section. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

Term "Public Highways" Includes Public Streets. — When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the "public highways" of North Carolina, it covered accidents on public streets as well as public roads, for both are public

highways. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

State May Assert Jurisdiction over Owner As Well As Driver. — The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

Ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

But Neither Ownership nor Physical Presence Is Necessary. — By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. *Pressley v. Turner*, 249 N.C. 102, 105 S.E.2d 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence insofar as his amenability to constructive service of process is concerned. *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951).

Car Must Be Operated by, for or under Direction or Control of Nonresident Defendant. — This section provides for constructive service of process upon a nonresident defendant in either of the following situations: (1) Where the nonresident was personally operating the vehicle; or (2) Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. *Davis v.*

Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960).

In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. *Smith v. Haughton*, 206 N.C. 587, 174 S.E. 506 (1934); *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960).

Owner May Be Presumed to Have Right of Control. — An automobile owner may not unreasonably be presumed to have a right to exercise control. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

And Unlikelihood that He Will Exercise It Is Immaterial. — The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

Owner Need Not Be Physically in a Position to Direct Driver. — This section does not require that the owner be physically in a position to direct the driver's every move. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

The words "express or implied" suggest only a minimal connection between the driver and the owner, which is satisfied if the owner has a legal right to control the operation of the automobile. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

Driver Need Not Be Acting for Pecuniary Benefit of Owner. — This section does not require that the driver be acting for the pecuniary benefit of the owner. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

The "family purpose" doctrine is not determinative in interpreting this section where "control or direction" are the standards. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

Family-Purpose Automobile Operated by Son of Owner. — A family-purpose automobile, owned by a resident of Canada, and operated by her

son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

Evidence Held Sufficient to Show Control by Nonresident Defendant.

— An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supported the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section, and in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner was valid. *Wynn v. Robinson*, 216 N.C. 347, 4 S.E.2d 884 (1939). See also, *Queen City Coach Co. v. Chattanooga Medicine Co.*, 220 N.C. 442, 17 S.E.2d 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, was sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner. *Crabtree v. Burroughs-White Chevrolet Sales Co.*, 217 N.C. 587, 9 S.E.2d 23 (1940).

For additional case holding evidence sufficient to show control of motor vehicle by nonresident defendant, see *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951).

Evidence Held Insufficient to Show Control.

— Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner was void. *Blake v.*

Allen, 221 N.C. 445, 20 S.E.2d 552 (1942).

For case holding findings of fact sufficient to support service under this section, see *Winborne v. Stokes*, 238 N.C. 414, 78 S.E.2d 171 (1953).

Applied in *MacClure v. Accident & Cas. Ins. Co.*, 229 N.C. 305, 49 S.E.2d 742 (1948); *Todd v. Thomas*, 202 F. Supp. 45 (E.D.N.C. 1962); *Lamb v. McKibbin*, 15 N.C. App. 229, 189 S.E.2d 547 (1972).

Quoted in *Townsend v. Carolina Coach Co.*, 231 N.C. 81, 56 S.E.2d 39 (1949).

Cited in *Howard v. Queen City Coach Co.*, 212 N.C. 201, 193 S.E. 138 (1937); *Hodges v. Home Ins. Co.*, 232 N.C. 475, 61 S.E.2d 372 (1950); *Ellington v. Milne*, 14 F.R.D. 241 (E.D.N.C. 1953); *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

II. PROCEDURE FOR SERVICE AND NOTICE.

Either service under this section or under Rule 4(j)(9) is available to serve a nonresident operator of a motor vehicle under appropriate circumstances, since validity of this section does not make it exclusive. *House v. House*, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

The issuance of a valid summons is necessary for there to be compliance with the provisions of this section. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

The summons must command the sheriff or other proper officer to summon the defendant or defendants. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Summons Held Defective where Directed to Commissioner rather than Defendants. — A summons was held patently defective when it was directed not to the nonresident defendants as required by § 1A-1, Rule 4(c), but instead was directed to the Commissioner of Motor Vehicles, who was summoned and notified to appear and answer the complaint. *Philpott v. Kerns*, 285 N.C. 225, 203 S.E.2d 778 (1974).

Where the summons commanded the sheriff to summons the Commissioner of Motor Vehicles only and did not command the sheriff to summons the

defendants at all, and the Commissioner duly mailed a copy to the nonresident defendants, the nonresidents were not summoned and the court had no jurisdiction in the absence of a general appearance by them. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Meaning of Subdivision (2). — The provision in subdivision (2) of this section making the defendant's return receipt "sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant" does not mean that all that is required to effect service upon a nonresident motorist is the return of a receipt for registered mail signed by the defendant. This provision did not replace the statutory scheme for substituted service; rather, it merely provided a conclusive means of determining when that service had been accomplished. Service is still to be made "by leaving" the process with the Commissioner of Motor Vehicles. *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966).

Service Held Insufficient Despite Defendant's Receipt of Notice. — Where, apparently through inadvertence, the order for service of process upon a nonresident motorist under this section was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by subdivision (2) of this section. *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966).

What Sheriff's Return Must Show. — When service of process on a nonresident through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. *Propst v. Hughes Trucking Co.*, 223 N.C. 490, 27 S.E.2d 152 (1943).

Default Judgment Not Vacated by Defendants' Refusal to Accept Registered Mail. — A default judgment will not be vacated where nonresident defendants knew plaintiff was injured by a truck owned and operated by them, and

was demanding damages, and they refused to accept registered mail in order to avoid service. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

Requirement in subdivision (3) that refused registered letter be sent by ordinary mail applies only to those letters which were in fact "refused," and does not apply to those which are unclaimed or marked "moved, not forwardable." *Ridge v. Wright*, 35 N.C. App. 643, 242 S.E.2d 389, cert. denied, 295 N.C. 467, 246 S.E.2d 10 (1978).

Effect of Filing Affidavit of Compliance after Hearing on Motion to Dismiss. — Failure of plaintiff to file an affidavit of compliance required under subdivision (3) of this section until after the hearing on the motion to dismiss, which was more than three years after the accident and 114 days after service of the summons on the Commissioner of Motor Vehicles, did not render service on the nonresident defendant invalid, since filing of the affidavit did not affect the completeness of the service but rather merely perfected the record and furnished proof of compliance with this section for the guidance of the courts. *Quattrone v. Rochester*, 46 N.C. App. 799, 266 S.E.2d 40, cert. denied, 301 N.C. 95, 273 S.E.2d 300 (1980).

Affidavit Held Insufficient to Support Service under this Section and § 1-105.1. — Where plaintiffs' affidavits, stripped of incompetent evidence, were left with the statement of deputy sheriff that he went to defendant's last-known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it was insufficient to make out a prima facie case to support service of process under this section and § 1-105.1. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Service under Federal Rule. — If the requirements of this section and § 1-105.1 are met, service under Rule 4 of the federal Rules of Civil Procedure is valid. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

Amendment of Process and Pleading. — When the procedural requirements of this section are strictly complied with, the process and pleading are subject to amendment in accordance

with general rules. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E.2d 559 (1951); *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Procedural Error Corrected when Another Summons Served and Returned. — If the initial service failed to comply with this section, the procedural error is corrected when another summons, dated subsequently, is served and returned as having been served on defendant by leaving a copy with the Commissioner of Motor Vehicles as process agent for defendant. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

Service Held Sufficient. — Where the person sought to be sued personally received notice by registered mail of summons and complaint giving him unmistakable notice that it was he who was intended to be sued, although the process ran against a nonexistent corporation of the same name as the firm operated by him, it was held that the service in strict accord with this section was sufficient to meet the requirements of due process of law. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E.2d 559 (1951).

Where defendant refused to accept a copy of the complaint and summons because the word "Jr." was not included

after his name, the Supreme Court held that the suffix "Jr." is no part of a person's name; it is a mere descriptive personae; names are to designate persons, and where the identity is certain a variance in the name is immaterial. *Sink v. Schafer*, 266 N.C. 347, 145 S.E.2d 860 (1966).

Motion to Quash Service Denied. — Where, in an action against a nonresident bus owner to recover for the negligent operation of a bus in this State, service on the nonresident was had by service on the Commissioner of Motor Vehicles, the nonresident's motion to quash the service would be denied when the nonresident offered no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right. *Israel v. Baltimore & A.R.R.*, 262 N.C. 83, 136 S.E.2d 248 (1964).

Extension of Time to Plead. — The statutes pertaining to service of process upon a nonresident motorist contemplate giving such a defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time. *Mills v. McCuen*, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

OPINIONS OF ATTORNEY GENERAL

Commissioner of Motor Vehicles Does Not Have Authority to Accept Service As Attorney for a Nonresident Motorist; His Function Is Limited to Being the Recipient of Substitute Service of Process upon a Nonresident Motorist. See opinion of Attorney General to Mr. J.M. Penny, Department of Motor Vehicles, 41 N.C.A.G. 567 (1971).

Service on Commissioner Must Be by Sheriff of Wake County or Other Person Duly Authorized by Law to Serve Summons, and Commissioner May Not Accept Service by Mail or Directly. See opinion of Attorney General to Mr. J.M. Penny, Assistant Commissioner of Motor Vehicles, 42 N.C.A.G. 110 (1972).

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

The provisions of G.S. 1-105 of this Chapter shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for 60 days or more, continuously whether such absence is intended to be temporary or permanent. (1955, c. 232; 1967, c. 954, s. 4; 1971, c. 420, s. 2.)

Editor's Note. — Session Laws 1967, c. 954, s. 4, provided for the repeal of this section, effective Jan. 1, 1970. However, Session Laws 1971, c. 420, s. 1, effective

July 1, 1971, amended Session Laws 1967, c. 954, s. 4, by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections.

CASE NOTES

Strict Construction of Section. — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed, both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Section Not in Conflict with § 1-21. — This section and § 1-105, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal § 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

Domicile in State Brings Defendant within Reach of State's Jurisdiction. — Domicile in the State is alone sufficient to bring an absent defendant within the reach of the State's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, provided proper notice and opportunity for hearing were given. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

When Plaintiff Must Show Facts Bringing Defendant within Purview of Section. — This section does not require that plaintiffs must set forth in their complaint or by affidavit the facts giving rise to the conclusion that defendant comes within the purview of the statute; nevertheless, upon attack by special appearance and motion to quash, a showing is required of the facts essential to jurisdiction. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Mere Averment of Due Diligence Is Insufficient. — A mere averment of due diligence such as is sufficient to support service by publication in an in rem action is not sufficient for a case which arises under this section. *Coble v. Brown*, 1

N.C. App. 1, 159 S.E.2d 259 (1968).

Affidavits Held Insufficient to Support Service. — Where plaintiffs' affidavits, stripped of incompetent evidence, were left with the statement of the deputy sheriff that he went to defendant's last known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it was insufficient to make out a prima facie case to support service of process under this section and § 1-105. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Averment and Affidavit Based on Hearsay. — Where one plaintiff simply averred that he was informed and believed that defendant had removed himself from his last known address and had left the State and remained absent for more than 60 days continuously subsequent to the collision complained of and was residing somewhere in Florida, and the deputy sheriff's affidavit averred that he talked with a woman who he was informed and believed was defendant's sister, who told him that it was her information and belief that defendant was living in Florida and that he was informed and believed that the only information he was able to obtain concerning the whereabouts of defendant indicated that the said defendant was residing in the state of Florida, address unknown, this evidence was manifestly inadmissible hearsay evidence and defendant's objection thereto was entirely proper. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Cited in *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E.2d 593 (1965); *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966); *Kennedy v. Starr*, — N.C. App. —, 302 S.E.2d 497 (1983).

OPINIONS OF ATTORNEY GENERAL

Service on Commissioner Must Be by Sheriff of Wake County or Other Person Duly Authorized by Law to Serve Summons, and Commissioner May Not

Accept Service by Mail or Directly. See opinion of Attorney General to Mr. J.M. Penny, Assistant Commissioner of Motor Vehicles, 42 N.C.A.G. 110 (1972).

§§ 1-106 to 1-107.3: Repealed by Session laws 1967, c. 954, s. 4.

§ 1-108. Defense after judgment set aside.

If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (C.C.P., s. 85; Code, s. 220; Rev., s. 449; 1917, c. 68; C.S., s. 492; 1943, cc. 228, 543; 1947, c. 817, s. 2; 1949, c. 256; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.

At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

- (1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.
- (2) Deposit two hundred dollars (\$200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.

- (3) File with him a written authority from a superior or district court judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R.C., c. 31, s. 40; C.C.P., s. 71; Code, s. 209; Rev., s. 450; C.S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989; 1971, c. 268, s. 3.)

Local Modification. — Mecklenburg: 1955, c. 877; Union: 1961, c. 506.

Cross References. — As to costs generally, see § 6-1 et seq. As to bond executed or guaranteed by surety

company, see § 109-17. As to mortgage in lieu of bond, see § 109-29.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs wrongfully paid out. *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182 (1919).

Who Can Take Bond. — The action of the clerk in taking prosecution bonds was always held to be ministerial. Such bonds may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. *Shepherd v. Lane*, 13 N.C. 148 (1828); *Croom v. Morrissey*, 63 N.C. 591 (1869); *Marsh & Co. v. Cohen*, 68 N.C. 283 (1873).

When the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. *Brittain v. Howell*, 19 N.C. 107 (1836); *Russell v. Saunders*, 48 N.C. 432 (1856); *Albertson v. Terry*, 109 N.C. 8, 13 S.E. 713 (1891); *Cooper v. Warlick*, 109 N.C. 672, 14 S.E. 106 (1891).

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. *Costello v. Parker*, 194 N.C. 221, 139 S.E. 224 (1927).

Undertaking under Seal. — Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. *Holly v. Perry*, 94 N.C. 30 (1886).

Undertaking Written on Summons — Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of the plaintiff, the defendant or the surety, it was held to be sufficient. *Holly v. Perry*, 94 N.C. 30 (1886).

The court may increase the penalty on the bond, which is not an unusual procedure in the courts. *Jones v. Cox*, 46 N.C. 373 (1854); *Adams v. Reeves*, 76 N.C. 412 (1877); *Rollins v. Henry*, 77 N.C. 467 (1877); *Vaughan v. Vincent*, 88 N.C. 116 (1883); *Kenney v. Seaboard Air Line R.R.*, 166 N.C. 566, 82 S.E. 849 (1914).

Where the defendant has been successful on his appeal, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. *Kenney v. Seaboard Air Line R.R.*, 166 N.C. 566, 82 S.E. 849 (1914).

Within Its Discretion. — Where a plaintiff has given a bond for costs which has become insufficient, the court has

the power to allow him to proceed with his case without giving additional security. *Holder v. Jones*, 29 N.C. 191 (1847); *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896).

Defendant's Costs on Appeal May Be Covered. — The undertaking provided for by this section may cover the defendant's costs on appeal. *Kenney v. Seaboard Air Line R.R.*, 166 N.C. 566, 82 S.E. 849 (1914).

Surety Not Bound for Plaintiff's Costs. — In contemplation of law, the parties pay the cost of the litigation as the action proceeds, and this bond is given entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. *Hallman v. Dellinger*, 84 N.C. 1 (1881); *Smith v. Arthur*, 116 N.C. 871, 21 S.E. 696 (1895).

No Appeal from Judge's Refusal to Require Bond. — The refusal of the trial judge to require a prosecution bond

is not appealable. *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904); *Carpenter v. Boyles*, 213 N.C. 432, 196 S.E. 850 (1938).

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. *Smith v. Arthur*, 116 N.C. 871, 21 S.E. 696 (1895).

Motion to Dismiss for Failure to File Security as Special Appearance. — A motion to dismiss for failure of plaintiff to file security for costs as required by this section pertains to a procedural question, and an appearance to make this motion and a motion to dismiss for want of jurisdiction is not a general appearance. *Mintz v. Frink*, 217 N.C. 101, 6 S.E.2d 804 (1940).

Stated in In re Will of Winborne, 231 N.C. 463, 57 S.E.2d 795 (1950).

§ 1-110. Suit as a pauper; counsel.

Any superior or district court judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the provisions of G.S. 1-109. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (C.C.P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C.S., s. 494; 1971, c. 268, s. 4.)

Local Modification. — Forsyth, Nash, Northampton: 1937, c. 381.

Cross References. — As to appeals in forma pauperis, see § 1-288. As to costs

in suits in forma pauperis, see § 6-24.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Section as Exception to § 1-109. — This section is in the nature of an exception to the general rule in § 1-109. *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896).

Discretion of Court. — The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the court. *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896).

A guardian can sue in forma pauperis. *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904).

As May Nonresidents. — The words of this section are broad enough to

include any litigant whatever, and hence residents of another state can sue here in forma pauperis. *Porter v. Jones*, 68 N.C. 320 (1873); *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904).

And Personal Representatives. — It has been the unquestioned practice since the adoption of the Code that a personal representative could sue as a pauper upon proper affidavit and certificate. *Allison v. Southern Ry.*, 129 N.C. 336, 40 S.E. 91 (1901), rev'd on other grounds, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903); *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904).

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion, unless it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. *Christian v. Atlantic & N.C.R.R.*, 136 N.C. 321, 48 S.E. 743 (1904). See also, *McKiel v. Cutler*, 45 N.C. 139 (1853).

Refusal to Appoint Counsel in Action under 42 U.S. § 1983. — Absent a showing of abuse of discretion, the trial court's refusal to appoint counsel for plaintiff in an action under 42 U.S.C. § 1983 "to obtain redress for the deprivation, under color of state law, of rights secured by the United States Constitution" was not a violation of this section. *Loren v. Jackson*, 57 N.C. App. 216, 291 S.E.2d 310 (1982).

Who May Authorize Suit in Forma Pauperis. — A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. *Rowark v. Gaston*, 67 N.C. 291 (1872).

Plaintiff's Affidavit Necessary. — Whether the application is to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. *Miazza v. Calloway*, 74 N.C. 31 (1876); *Stell v. Barham*, 85 N.C. 88 (1881), cert. granted, 86 N.C. 727 (1882).

Affidavit Held Insufficient. — A typewritten statement, purporting to have been signed by plaintiff, that plaintiff was unable to comply with § 1-109, which statement was followed by an unsigned, unsealed and unauthenticated jurat was not an affidavit, and would not support an order allowing plaintiff to prosecute the action as a pauper, but the deficiency did not necessarily require

dismissal of the action, since the court could give plaintiff a reasonable time to supply the deficiency. *Ogburn v. Sterchi Bros. Stores*, 218 N.C. 507, 11 S.E.2d 460 (1940).

Proof of Good Cause of Action. — In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. *Miazza v. Calloway*, 74 N.C. 31 (1876).

Security for Costs. — Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896).

Pauper Must Pay Witnesses. — Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs, it does not excuse the pauper from liability for his witnesses. *Morris v. Rippey*, 49 N.C. 533 (1857); *Bailey v. Brown*, 105 N.C. 127, 10 S.E. 1054 (1890).

No Presumption of Contingent Fee. — The bringing of a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. *Allison v. Southern Ry.*, 129 N.C. 336, 40 S.E. 91 (1901), rev'd on other grounds, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903).

Assignment of Interest Pending Action. — Where a plaintiff, pending an action brought in forma pauperis, assigned his interest in the land which was the subject of the action, the court would require the assignee to give security or would withdraw the privilege given to the assignor and dismiss the action. *Davis v. Higgins*, 91 N.C. 382 (1884); *Dale v. Presnell*, 119 N.C. 489, 26 S.E. 27 (1896).

For cases holding this section inapplicable to appeals, see *Martin v. Chasteen*, 75 N.C. 96 (1876); *Bailey v. Brown*, 105 N.C. 127, 10 S.E. 1054 (1890); *Speller v. Speller*, 119 N.C. 356, 26 S.E. 160 (1896).

Cited in *Costello v. Parker*, 194 N.C. 221, 139 S.E. 224 (1927).

OPINIONS OF ATTORNEY GENERAL

An Individual May Institute a Special Proceeding in Forma Pauperis.
— See opinion of Attorney General to

Mrs. Daphene L. Cantrell, Assistant Clerk, Superior Court, Mecklenburg County, 44 N.C.A.G. 147 (1974).

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

In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars (\$200.00), to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (1869-70, c. 193; Code, s. 237; Rev., s. 453; C.S., s. 495.)

Legal Periodicals. — For comment on access of indigents into the civil

courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Purpose of Section. — The purpose of the Legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. *Henning v. Warner*, 109 N.C. 406, 14 S.E. 317 (1891).

The plain purpose of this section is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. *Morris v. Wilkins*, 241 N.C. 507, 85 S.E.2d 892 (1955).

The defense bond required by this section is not an "appeal bond," but is a bond which can be required before defendant is allowed to plead to the complaint. *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

The word "defendant" was not intended to comprehend the State or its agencies. *Kistler v. City of Raleigh*, 261 N.C. 775, 136 S.E.2d 78 (1964).

A municipality is not required to file bond in defending an action for the possession of real property, since this sec-

tion does not apply to the State or its agencies. *Kistler v. City of Raleigh*, 261 N.C. 775, 136 S.E.2d 78 (1964).

The bond required by this section does not apply to a defendant who is not in possession of the land in controversy. Hence, this section does not apply to an action by a plaintiff in possession to remove a cloud from his title. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortgagee in possession. Nor does it apply to a special proceeding under § 38-1 et seq. to establish the location of a boundary line. The decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. *Morris v. Wilkins*, 241 N.C. 507, 85 S.E.2d 892 (1955).

This section and § 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when a motion to strike a cross action on the ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. *Motley v. Thompson*, 259 N.C. 612, 131 S.E.2d 447 (1963).

In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by this section. *Wilson v. Chandler*, 238 N.C. 401, 78 S.E.2d 155 (1953).

In an action to remove a cloud on the title a defense bond is not required. *Tennessee River Land & Timber Co. v. Butler*, 134 N.C. 50, 45 S.E. 956 (1903).

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, was not strictly one in ejectment, and this section, requiring defendant in ejectment actions to file bond, was inapplicable. *Bryant v. Strickland*, 232 N.C. 389, 61 S.E.2d 89 (1950).

An action to establish a parol trust, with prayer that defendant be directed to execute a deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer stricken and judgment by default rendered for failure of defendant to file bond. *Hodges v. Hodges*, 227 N.C. 334, 42 S.E.2d 82 (1947).

Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers, or make affidavit under § 1-112, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. When the tenant fails to give such bond, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant. *Harkey v. Houston*, 65 N.C. 137 (1871).

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. *Battle v. Mercer*, 187 N.C. 437, 122 S.E. 4 (1924).

Vendee in Possession. — Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. *Allen v. Taylor*, 96 N.C. 37, 1 S.E. 462 (1887).

Failure to Give Undertaking. — In cases coming within the purview of this section, when an answer has been filed without any bond and has remained on file without objection, it would be improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving the defendant the opportunity to file a defense bond. *McMillan v. Baker*, 92 N.C. 111 (1885); *Cooper v. Warlick*, 109 N.C. 672, 14 S.E. 106 (1891); *Becton v. Dunn*, 137 N.C. 559, 50 S.E. 289 (1905); *Gates v. McDonald*, 1 N.C. App. 587, 162 S.E.2d 143 (1968); *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970). See also, *Rich v. Norfolk S. Ry.*, 244 N.C. 175, 92 S.E.2d 768 (1956).

Where a defendant in ejectment fails to file the undertaking required by this section or to procure leave to defend without bond under § 1-112, the court may strike out the answer and render judgment by default. *Patrick v. Dunn*, 162 N.C. 19, 77 S.E. 995 (1913).

Failure to File Bond due to Ignorance Held Not Excusable Neglect. — Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he was in possession of and claiming title to lands, the subject of the action, was not excusable neglect on his motion to set the judgment aside, and not allowable when it appeared that the plaintiff was diligent in insisting upon his rights and had done nothing that could be regarded as a waiver thereof. *Battle v. Mercer*, 188 N.C. 437, 122 S.E. 4 (1924).

Waiver of Bond Requirement Generally. — The requirement that the defendant must execute and file a defense bond, or in lieu thereof a certificate and affidavit as provided by § 1-112, may be waived unless seasonably insisted upon by the plaintiff. *Calaway v. Harris*, 229 N.C. 117, 47

S.E.2d 796 (1948); *Motley v. Thompson*, 259 N.C. 612, 131 S.E.2d 447 (1963); *Sisk v. Perkins*, 264 N.C. 43, 140 S.E.2d 753 (1965); *Gates v. McDonald*, 1 N.C. App. 587, 162 S.E.2d 143 (1968); *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

The undertaking required by this section is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. *Gates v. McDonald*, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Bond Requirement Held Waived. — The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants filed a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond was properly set aside when plaintiffs filed a reply to the counterclaim and raised no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they moved for default judgment before the clerk. *Motley v. Thompson*, 259 N.C. 612, 131 S.E.2d 447 (1963).

The failure for three years to move for judgment by default for failure to file a defense bond waived the right thereto. *Tennessee River Land & Timber Co. v. Butler*, 134 N.C. 50, 45 S.E. 956 (1903).

As to time for filing bond, see *Jones v. Jones*, 187 N.C. 589, 122 S.E. 370 (1924).

Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. *Dunn v. Marks*, 141 N.C. 232, 53 S.E. 845 (1906).

Formal Order Fixing Amount of Bond Not Required. — Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. *Privette v. Allen*, 227 N.C. 164, 41 S.E.2d 364 (1947).

Remedy for Insufficient Bond. — Where, in an action in ejectment, defendant, after consultation with the clerk, tendered justified bond in the minimum amount required by this section, and the clerk accepted the bond and made notation thereof on the records, there was a substantial compliance with the statute, and plaintiff's remedy if he deemed the bond insufficient was by motion in the cause. *Privette v. Allen*, 227 N.C. 164, 41 S.E.2d 364 (1947).

Liability of Surety. — The surety on the bond under this section is liable only

for rents and profits pending litigation and subsequent to filing the bond. *Hughes v. Pritchard*, 129 N.C. 42, 39 S.E. 632 (1901).

Summary Judgment against Sureties. — Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. *Rollins v. Henry*, 84 N.C. 570 (1881).

Foreclosure of Mortgage Given for Bond. — A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. *Ryan v. Martin*, 103 N.C. 282, 9 S.E. 197, rehearing denied, 104 N.C. 176, 10 S.E. 169 (1889).

Costs on Appeal. — The defense bond and the sureties thereon, in an action of ejectment under this section, are liable to the amount of the bond for the costs on appeal as well as those incurred in the superior court. *Kenney v. Seaboard Air Line R.R.*, 166 N.C. 566, 82 S.E. 849 (1914); *Grimes v. Andrews*, 171 N.C. 367, 88 S.E. 513 (1916).

Power to Appoint Receiver Not Abridged. — This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N.C. 327 (1884); *Durant v. Crowell*, 97 N.C. 367, 2 S.E. 541 (1887); *Arey v. Williams*, 154 N.C. 610, 70 S.E. 931 (1911).

Appointment of Receiver Unnecessary. — In an action to recover real property or its possession, upon approval of defendant's bond by the clerk of the superior court for continued possession, given under this section, when defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver under § 1-502(1) is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. *Jones v. Jones*, 187 N.C. 589, 122 S.E. 370 (1924).

Applied in *Clegg v. Canady*, 213 N.C. 258, 195 S.E. 770 (1938); *Moody v. Howell*, 229 N.C. 198, 49 S.E.2d 233 (1948); *Turner v. Weber*, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

Cited in *Whitaker v. Raines*, 226 N.C. 526, 39 S.E.2d 266 (1946); *Teel v. Johnson*, 228 N.C. 155, 44 S.E.2d 727

(1947); *Musten v. Musten*, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

§ 1-112. Defense without bond.

The undertaking prescribed in the preceding section [G.S. 1-111] is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever. (1869-70, c. 193; Code, s. 237; Rev., s. 454; C.S., s. 496.)

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Effect of Similar Prior Law. — Under the proviso formerly attached to § 1-111, which was substantially the same as this section, and provided "that no such undertaking shall be required" in the case provided for, the words "no such" were used in the broad sense of not any like that required. There was nothing in the statute that suggested the contrary, or that an undertaking for a less sum than \$200.00 in amount might be required in any case. The purpose was to allow persons thus poor to make defense in such actions without giving any undertaking, nor does § 350 (now § 109-29) authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allowed the party of whom an undertaking might be required in such cases to give such mortgage instead of it, and the former had to be for the same amount as the latter. *Wilson v. Fowler*, 104 N.C. 471, 10 S.E. 566 (1889).

Suit and Appeal in Forma Pauperis Contrasted with Defense without Bond. — When one proposes to sue in forma pauperis, or to appeal, he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. *Taylor v. Apple*, 90 N.C. 343 (1884).

Notice to Adverse Party Unnecessary. — Nothing in this section requires notice to be given to the adverse party on an application for permission to defend a suit without giving the required security. *Deal v. Palmer*, 68 N.C. 215 (1873). See also, *Jones v. Fortune*, 69 N.C. 322 (1873); *Taylor v. Apple*, 90 N.C. 343 (1884); *Dempsey v. Rhodes*, 93 N.C. 120 (1885).

The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for the same or similar relief. *Wilson v. Fowler*, 104 N.C. 471, 10 S.E. 566 (1889).

Certificate of Counsel Held Sufficient. — Where counsel certified that he had examined the case of the defendant, and that in his opinion the plaintiff was not entitled to recover, this was a substantial compliance with the statute. It is not intended that the inquiry of counsel should extend beyond the information derived from the defendant. *Taylor v. Apple*, 90 N.C. 343 (1884).

As to payment and recovery of costs, see *Lambert v. Kinnery*, 74 N.C. 348 (1876); *Justice v. Eddings*, 75 N.C. 581 (1876); *Bailey v. Brown*, 105 N.C. 127, 10 S.E. 1054 (1890); *Speller v. Speller*, 119 N.C. 356, 26 S.E. 160 (1896).

Applied in *Turner v. Weber*, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

Cited in *Whitaker v. Raines*, 226 N.C. 526, 39 S.E.2d 266 (1946); *Morris v. Wilkins*, 241 N.C. 507, 85 S.E.2d 892 (1955); *Sisk v. Perkins*, 264 N.C. 43, 140 S.E.2d 753 (1965); *Gates v. McDonald*, 1

N.C. App. 587, 162 S.E.2d 143 (1968);
 Musten v. Musten, 36 N.C. App. 618, 244
 S.E.2d 699 (1978).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

- (1) If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.
- (2) If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.
- (3) If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action has been against them or any of them alone.
- (4) If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (C.C.P., s. 87; Code, s. 222; Rev., s. 455; C.S., s. 497.)

Legal Periodicals. — For comment on cases decided under this section, see 13 N.C.L. Rev. 83.

For note on acquiring diversity jurisdiction over an unincorporated association, see 60 N.C.L. Rev. 194 (1981).

CASE NOTES

Common Law. — At common law in actions ex contractu, the general rule is that if the contract is joint the plaintiff must sue all the persons who either expressly or by implication of law made the contract. *North State Fin. Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964).

Purpose of Section. — This section was intended to prevent a partner who

was not served with summons from defeating an action against him on the ground that judgment had already been taken against his copartner; and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. *Navassa Guano Co. v. Willard*, 73 N.C. 521 (1875).

Subdivision (1) of this section

applies to obligations that are joint only, not to obligations that are joint and several. *North State Fin. Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964).

Members of a partnership are jointly and severally bound for all its debts. Because of the joint liability, the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. *Hanstein v. Johnson*, 112 N.C. 253, 17 S.E. 155 (1893).

While a creditor and also each partner has a right to demand that partnership (joint) property be applied to the

satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim. *North State Fin. Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964).

Effect of Service on Less than All Partners. — Where, in an action against a partnership, service of summons has been made on some but not all of the partners, upon a verdict in plaintiff's favor a judgment may be properly entered that is binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. *Hancock v. Southgate*, 186 N.C. 278, 119 S.E. 364 (1923).

§ 1-114. Summoned after judgment; defense.

When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section [§ 1-113], those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (C.C.P., ss. 318, 322; Code, ss. 223, 224; Rev., ss. 456, 457; C.S., s. 498.)

CASE NOTES

This section applies to obligations that are joint only, not to obligations that are joint and several. *North State Fin. Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964).

When Motion in Cause Is Proper. — Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. *Davis v. Sanderlin*, 119 N.C. 84, 25 S.E. 815 (1896).

Statute of Limitations Held to Bar Action. — Where an action was begun against certain administrators and the sureties on their bond, and one surety

was not served with summons until more than three years thereafter, the three-year statute of limitations was a bar to the action against such surety. *Koonce v. Pelletier*, 115 N.C. 233, 20 S.E. 391 (1894). See also, *Rufty v. Claywell, Power & Co.*, 93 N.C. 306 (1885).

Where an action was instituted and judgment was obtained against A. B. & Co., upon a bill of exchange, and C, who was a secret partner in the firm, was not joined as defendant, and the plaintiff afterwards, more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him, the action was barred by the statute of limitations. *Navassa Guano Co. v. Willard*, 73 N.C. 521 (1875).

§ 1-115: Repealed by Session Laws 1969, c. 954, s. 4.

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

- (1) Actions affecting title to real property;
 - (2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
 - (3) Actions in which any order of attachment is issued and real property is attached.
- (b) Notice of pending litigation shall contain:
- (1) The name of the court in which the action has been commenced or is pending;
 - (2) The names of the parties to the action;
 - (3) The nature and purpose of the action; and
 - (4) A description of the property to affected thereby.
- (c) Notice of pending litigation may be filed:
- (1) At or any time after the commencement of an action pursuant to Rule 3 of the Rules of Civil Procedure; or
 - (2) At or any time after real property has been attached; or
 - (3) At or any time after the filing of an answer or other pleading in which the pleading party states an affirmative claim for relief falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C.C.P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C.S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1; 1967, c. 954, s. 3.)

Cross References. — As to filing of notice of lis pendens where court is to distribute marital property upon divorce, see § 50-20.

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

As to the similarity of this section to English and New York Statutes, see *Todd, Schenck & Co. v. Outlaw*, 79 N.C. 235 (1878).

The common-law rule of lis pendens has been replaced in North Carolina by this Article. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965); *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849

(1969). See also, *Collingwood v. Brown*, 106 N.C. 362, 10 S.E. 868 (1890).

The common-law rule was that if the real estate to be affected by the judgment or decree was situated in several counties it would all be bound by the lis pendens arising from the pendency of a suit in the county in which only a part of it was situated, since all persons were supposed to be attentive to what occurred

in courts of justice, whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate was situated. *Collingwood v. Brown*, 106 N.C. 362, 10 S.E. 868 (1890).

As to the purpose of the 1959 amendment, see *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974).

Doctrine of Lis Pendens Stated. — The general doctrine of lis pendens is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. *Rollins v. Henry*, 78 N.C. 342 (1878); *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

Operation of Law of Lis Pendens May Be Harsh. — The rule of lis pendens, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts, is nevertheless in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is strictissimi juris. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894); *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

And Strict Compliance Is Required Therewith. — The statutory law as to lis pendens embodied in this Article provides a definite method for giving constructive notice, so that a search of known records will convert it into actual notice. Since the application of this rule may work hardship in many instances, a strict compliance with its provisions is required. *Hughes v. North Carolina State Hwy. Comm'n*, 275 N.C. 121, 165 S.E.2d 321 (1969).

The filing of lis pendens is authorized only in actions affecting the title to real property. *McGurk v. Moore*, 234 N.C. 248, 67 S.E.2d 53 (1951); *Parker v. White*, 235 N.C. 680, 71 S.E.2d 122 (1952); *Wolfe v. Hewes*, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

"Action," as used in this section, embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

And in Actions Enumerated under This Section. — There can be no valid notice of lis pendens in this State except in one of the three types of actions enumerated in subsection (a) of this section. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965); *North Carolina Nat'l Bank v. Evans*, 296 N.C. 374, 250 S.E.2d 231 (1979).

It Is Required when Claim Is in Derogation of the Record. — The rule of lis pendens applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, lis pendens notice is required when the claim is contra or in derogation of the record. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

The nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of subsection (a)(1) of this section, and a valid notice of lis pendens may be filed in connection therewith. *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969).

As Is an Action to Set Aside a Fraudulent Conveyance. — A claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to § 39-15 constitutes an action "affecting title to real property" within the meaning of the lis pendens statute. *North Carolina Nat'l Bank v. Evans*, 296 N.C. 374, 250 S.E.2d 231 (1979).

But an Action for Monetary Damages Is Not. — Where it is clear from a reading of the complaint, and the amendment thereto, that the action is one to recover monetary damages, the action is not one affecting the title to real property within the purview of this section. *Parker v. White*, 235 N.C. 680, 71 S.E.2d 122 (1952).

This section does not apply to an action the purpose of which is to secure a personal judgment for the payment of money, even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965); *Booker v. Porth*, 1 N.C. App. 434, 161 S.E.2d 767 (1968); *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969); *Lord v. Jeffreys*, 22 N.C. App. 13, 205 S.E.2d 563 (1974).

Nor Is Action to Prevent Change in Record. — An action brought for the purpose of preventing a change in the record and not for the purpose of establishing a trust or lien upon the property is not an action of the type in which this section permits the filing of a notice of lis pendens. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

Where mortgagee brings an action to recover on note secured by mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action was not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of lis pendens from the records would be affirmed on appeal. *Threlkeld v. Malcragson Land Co.*, 198 N.C. 186, 151 S.E. 99 (1930).

An action to recover damages for the breach of an option contract was not an action affecting the title to realty within this section, and the filing of notice in such case would not affect a purchaser pending that action. *Horney v. Price*, 189 N.C. 820, 128 S.E. 321 (1925).

Where a complaint merely alleged a diversion of partnership assets without connecting the diversion with the property on which the notice was sought, the complaint failed to state a cause of action affecting title to real property, and the trial court properly cancelled the notices of lis pendens. *Wolfe v. Hewes*, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

This section is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land which are not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

Effects of Lis Pendens and Registration Are the Same. — The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945); *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

And the Law Governing Each Must Be Construed in Pari Materia. — The law of lis pendens and the statute requiring the registration of instruments affecting title to real property must be construed in *pari materia*. Otherwise, the one would be destructive of the other. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

Lis Pendens as Notice to Purchaser. — The principle of lis pendens is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. *Todd, Schenck & Co. v. Outlaw*, 79 N.C. 235 (1878).

Purchaser Is Entitled to Rely on Absence of Record Notice. — This section and §§ 1-118 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974); *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E.2d 129 (1945).

Res Must Be Sufficiently Described. — Comcomitant to the rule that the lis pendens notification is confined to the apparent effect of the pleadings, they must contain a description of the property affected. The res must be sufficiently described in the pleadings. Hence, the lis pendens notification will be confined to the property specified in the papers, and where a partial interest

only in the property is asserted to be in issue the lis pendens notification does not extend to the entire interest. *Hughes v. North Carolina State Hwy. Comm'n*, 275 N.C. 121, 165 S.E.2d 321 (1969).

When Description Is Sufficient. — Although it is necessary in order to constitute lis pendens that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that anyone reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

For cases holding that entry of lis pendens was not required when the action was in the county where the land was, see *Badger v. Daniel*, 77 N.C. 251 (1877); *Rollins v. Henry*, 78 N.C. 342 (1878); *Todd, Schenck & Co. v. Outlaw*, 79 N.C. 235 (1878); *Spencer v. Credle*,

102 N.C. 68, 8 S.E. 901 (1889); *Collingwood v. Brown*, 106 N.C. 362, 10 S.E. 868 (1890); *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894); *Bird v. Gilliam*, 125 N.C. 76, 34 S.E. 196 (1899); *Morgan v. Bostic*, 132 N.C. 743, 44 S.E. 639 (1903); *Jarrett v. Holland*, 213 N.C. 428, 196 S.E. 314 (1938). But see subsection (d) of this section.

In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the cestui que trust, the purchaser at the sale, was properly dissolved, since plaintiff trustor had an adequate remedy at law by filing notice of lis pendens in accordance with this and subsequent sections. *Whitford v. North Carolina Joint Stock Land Bank*, 207 N.C. 229, 176 S.E. 740 (1934).

Applied in *Austin v. Wilder*, 26 N.C. App. 229, 215 S.E.2d 794 (1975); *Whyburn v. Norwood*, 47 N.C. App. 310, 267 S.E.2d 374 (1980).

Cited in *McLeod v. McLeod*, 266 N.C. 144, 146 S.E.2d 65 (1966); *G.L. Wilson Bldg. Co. v. Leatherwood*, 268 F. Supp. 609 (W.D.N.C. 1967); *Hughes v. North Carolina State Hwy. Comm'n*, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

§ 1-116.1. Service of notice.

In all actions as defined in G.S. 1-116 in which notice of pendency of the action is filed, a copy of such notice shall be served on the other party or parties as follows:

- (1) If filed by the plaintiff at or after service of summons but before the filing of the complaint, service shall be in the manner provided in Rule 4 of the Rules of Civil Procedure for service of summons.
- (2) If filed by the plaintiff at or after the filing of the complaint, service shall be in the same manner as the complaint.
- (3) All other such notices shall be served in the manner provided in Rule 5 of the Rules of Civil Procedure. (1949, c. 260; 1967, c. 954, s. 3.)

Editor's Note. — For provisions similar to those of the former last four sentences of this section, see now subsection (b) of § 1-119.

The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Cited in North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

§ 1-117. Cross-index of lis pendens.

Every notice of pending litigation filed under this Article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens," to be kept by him pursuant to G.S. 2-42(6). (1903, c. 472; Rev., s. 464; 1919, c. 31; C.S., s. 501; 1959, c. 1163, s. 2.)

Editor's Note. — Section 2-42, and transferred to § 7A-109 by Session referred to in this section, was revised Laws 1971, c. 363, s. 6.

CASE NOTES

This Section Must Be Construed with § 47-18. — Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 47-18 must be construed in pari materia, while the lis pendens statutes do not affect the registration laws, the converse is not true. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Operation of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Who Are Affected by Lis Pendens. — The doctrine of lis pendens only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the

Record of Lis Pendens. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

This section deals only with constructive notice. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Effect of Purchaser's Actual Notice. — Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Applied in Whyburn v. Norwood, 47 N.C. App. 310, 267 S.E.2d 374 (1980).

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

§ 1-118. Effect on subsequent purchasers.

From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time

of cross-indexing the notice. (C.C.P., s. 90; Code, s. 229; Rev., s. 462; 1919, c. 31; C.S., s. 502.)

CASE NOTES

The purpose of this section is to supplement the registration statute by providing a simple and readily available means of ascertaining the existence of adverse claims to property not otherwise disclosed by the public registry. *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974); *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

This section only purports to deal with constructive notice and its effect on subsequent purchasers. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974).

Purchaser Is Entitled to Rely on Absence of Notice. — This section and §§ 1-116 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981).

Who Are Affected by Lis Pendens. — The doctrine of lis pendens in this State only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Effect of Actual Notice. — The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section, but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. *Morris v.*

Basnight, 179 N.C. 298, 102 S.E. 389 (1920).

Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors. *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Fraudulent Purchase of Lands. — Where the president of a corporation, a substantial owner of its shares of stock, personally bought in the lands which the company was under a binding contract to convey before suit was brought to enforce the contract, and with full knowledge of the plaintiff's right, took a deed for same from his company before the complaint was filed, he and his corporation were precluded from setting up the doctrine of lis pendens as a defense, and his purchase would be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor for specific performance. *Morris v. Basnight*, 179 N.C. 298, 102 S.E. 389 (1920).

Purchase after Suit but before Appeal. — One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of 10 days, takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. *Rollins v. Henry*, 78 N.C. 342 (1878); *Dancy v. Duncan*, 96 N.C. 111, 1 S.E. 455 (1887); *Bird v. Gilliam*, 125 N.C. 76, 34 S.E. 196 (1899).

Prior Law. — Previous to the adoption of § 1-117, regarding a cross-index, the filing of notice as provided in § 1-116 was all that was necessary to affect all purchasers with notice. See *Toms v. Warson*, 66 N.C. 417 (1872).

For cases in which judgment was held to relate back to beginning of suit, see *Briley v. Cherry*, 13 N.C. 2 (1828); *Cates v. Whitfield*, 53 N.C. 266 (1860); *Dancy v. Duncan*, 96 N.C. 111, 1 S.E. 455 (1887).

Applied in *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 114 S.E.2d 882 (1965).

Cited in *Morgan v. Bostic*, 132 N.C. 743, 44 S.E. 639 (1903); *Brinson v. Lacy*, 195 N.C. 394, 142 S.E. 317 (1928); *Pierce*

v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); *Huff v. Trent Academy of Basic Educ., Inc.*, 53 N.C. App. 113, 280 S.E.2d 17 (1981).

§ 1-119. Notice void unless action prosecuted.

(a) The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an affidavit therefor pursuant to Rule 4 (j)(1)c of the Rules of Civil Procedure or by personal service on the defendant within 60 days after the cross-indexing.

(b) When an action is commenced by the issuance of summons and permission is granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure, if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis pendens shall become inoperative and of no effect. The clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (C.C.P., s. 90; Code, s. 229; Rev., s. 461; 1919, c. 31; C.S., s. 503; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974).

Service within 60 Days Required. — Where a party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of lis pendens the requirements of the statute must be strictly followed; among other things, it must be served within 60 days after its filing. *Powell v. Dail*, 172 N.C. 261, 90 S.E. 194 (1916).

Cited in *Pierce v. Mallard*, 197 N.C. 679, 150 S.E. 342 (1929).

§ 1-120. Cancellation of notice.

The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this Article to be cancelled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the

record, which shall refer to the order. (C.C.P., s. 90; Code, s. 229; Rev., s. 463; C.S., s. 504.)

CASE NOTES

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. *Lawing v. Jaynes*, 285 N.C. 418, 206 S.E.2d 162 (1974).

This Section Applies to Cancellation of Valid Notice. — The provisions of this section with reference to cancellation of a notice of lis pendens are applicable to the cancellation of a valid notice. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

When Invalid Notice May Be Cancelled. — If a notice of lis pendens filed in the office of the clerk is not authorized by statute, a court has jurisdiction to cancel it upon the motion of the owner of the record title to the land, without waiting for termination of the action. *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965).

Notice Continues until Cancelled. — Where the suit has been prosecuted with proper diligence, the lis pendens continues until the final judgment, or

until it has been cancelled under the direction of the court. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894).

Loss or Destruction of Notice. — The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894).

Removal of Notice by Act of Party. — If the party, by any act of his own, has, contrary to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of lis pendens, leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351 (1894).

Applied in *Cowart v. Whitley*, 39 N.C. App. 662, 251 S.E.2d 627 (1979).

Cited in *Threlkeld v. Malcragson Land Co.*, 198 N.C. 186, 151 S.E. 99 (1930); *Parker v. White*, 235 N.C. 680, 71 S.E.2d 122 (1952).

§ 1-120.1. Article applicable to suits in federal courts.

The provisions of this Article shall apply to suits affecting the title to real property in the federal courts. (1945, c. 857.)

Legal Periodicals. — As to lis pendens in federal courts, see 23 N.C.L. Rev. 330.

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§§ 1-121 to 1-123: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to commencement of action by issuance of summons on application for permission to delay filing of complaint, see Rule 3 of the Rules of Civil Procedure

(§ 1A-1). For present provisions as to joinder of claims and remedies, see Rule 18 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 13.

Defendant's Pleadings.

§§ 1-124 to 1-126: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to pleadings, see Rule 7 of the Rules of Civil Procedure (§ 1A-1). For present provisions as to when and how defenses and objections may be presented, see Rule 12 of the Rules of Civil Procedure (§ 1A-1). For present

provisions as to striking from pleadings any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter, see section (f) of Rule 12 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 14.

Demurrer.

§§ 1-127 to 1-134: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provision abolishing demurrers, pleas, etc., see Rule 7 of the Rules of Civil Procedure (§ 1A-1). As to raising and waiving defenses and objections, see Rule 12 of

the Rules of Civil Procedure (§ 1A-1). As to procedure upon misjoinder, see Rule 21 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 15.

Answer.

§§ 1-134.1 to 1-138: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to content of pleadings, see now Rule 8 of the Rules of Civil Procedure (§ 1A-1). As to defenses and objections, see now Rule 12 of the

Rules of Civil Procedure (§ 1A-1). As to counterclaims and cross-claims, see Rule 13 of the Rules of Civil Procedure (§ 1A-1).

§ 1-139. Burden of proof of contributory negligence.

A party asserting the defense of contributory negligence has the burden of proof of such defense. (1887, c. 33; Rev., s. 483; C.S., s. 523; 1967, c. 954, s. 3.)

Cross References. — As to pleading affirmative defense of contributory negli-

gence, see Rule 8 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

What Constitutes Contributory Negligence. — A plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge, either actual or constructive, of the danger of injury which his conduct involves. *Harris v. Bridges*, 46 N.C. App. 207, 264 S.E.2d 804, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

Negligence is not presumed from the mere fact that one is killed. *Goodson v. Williams*, 237 N.C. 291, 74 S.E.2d 762 (1953).

Presumption against Contributory Negligence. — Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. *Norton v. North Carolina R.R.*, 122 N.C. 910, 29 S.E. 886 (1898).

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. *Cogdell v. Wilmington & Weldon R.R.*, 132 N.C. 852, 44 S.E. 618 (1903).

A four-year-old child is incapable of negligence, primary or contributory. *Bevan v. Carter*, 210 N.C. 291, 186 S.E. 321 (1936).

Rebuttable Presumption against Contributory Negligence of Minor between Seven and Fourteen. — Minor between ages of seven and 14 is presumed to be incapable of contributory negligence. But this presumption may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances. *Weeks v. Barnard*, 265 N.C. 339, 143 S.E.2d 809 (1965).

Contributory Negligence Must Be Set Up in Answer and Proved. — In all actions to recover damages by reason of the negligence of the defendant, where

contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. *Stith v. Perdue*, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

Defendant must plead contributory negligence in order to be entitled to submission of the issue to the jury. *Bevan v. Carter*, 210 N.C. 291, 186 S.E. 321 (1936).

Sufficiency of Plea. — To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

Contributory Negligence Is a Jury Question. — The question of whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. *Miller v. Scott*, 185 N.C. 93, 116 S.E. 86 (1923).

Burden of Proving Assumption of Risk. — While there is a marked distinction between the doctrines of assumption of risk and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. *Pigford v. Norfolk S.R.R.*, 160 N.C. 93, 75 S.E. 860 (1912).

Applied in *Butner v. Atlantic & Y. Ry.*, 199 N.C. 695, 155 S.E. 601 (1930); *Farrell v. Thomas & Howard Co.*, 204 N.C. 631, 169 S.E. 224 (1933); *Stovall v. Ragland*, 211 N.C. 536, 190 S.E. 899 (1937).

Quoted in *Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973).

Cited in *McAdoo v. Richmond & Danville R.R.*, 105 N.C. 140, 11 S.E. 316

(1890); *Ruffin v. Atlantic & N.C.R.R.*, 142 N.C. 120, 55 S.E. 86 (1906); *United States Leather Co. v. Howell*, 151 F. 444 (4th Cir. 1907); *Ramsey v. Nash Furn. Co.*, 209 N.C. 165, 183 S.E. 536 (1936).

ARTICLE 16.

Reply.

§§ 1-140 to 1-142: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of pleadings, see Rule 5 of the Rules of Civil Procedure (§ 1A-1). As to pleadings

allowed, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 17.

Pleadings, General Provisions.

§§ 1-143 to 1-147: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to signing and verification of pleadings, see Rule 11

of the Rules of Civil Procedure (§ 1A-1).

§ 1-148. Verification before what officer.

Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C.C.P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C.S., s. 532; 1971, c. 268, s. 5.)

Cross References. — As to attorney probating papers to be used in pro-

ceedings in which he appears as attorney, see § 47-8.

CASE NOTES

Verification by Out-of-State Notary. — While formerly the notaries public authorized to take affidavits for the verification of the pleadings were those of this State and not of some other state, this has now been changed by the express terms of this section, which permit verification to be taken by notaries in as well as out of the State. See *Hinton v. Life Ins. Co.*, 116 N.C. 22, 21 S.E. 201 (1895).

Verification made before the clerk

of the Hustings Court of Richmond, Virginia, was valid, as courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public. *Hinton v. Life Ins. Co.*, 116 N.C. 22, 21 S.E. 201 (1895).

For case in which court found an insufficient basis to impeach verification, see *Skinner v. Skinner*, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

§ 1-149. When verification omitted; use in criminal prosecutions.

The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (C.C.P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 493; C.S., s. 533.)

CASE NOTES

Admission in Criminal Prosecutions of Evidence of Civil Pleadings

— **Held Error.** — It was error to permit the solicitor, while cross-examining defendant in a criminal prosecution, to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. *State v. Wilson*, 217 N.C. 123, 7 S.E.2d 11 (1940).

Defendant's motion to set aside verdict on the ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, along with typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, should have been allowed. *State v. Stephenson*, 218 N.C. 258, 10 S.E.2d 819 (1940).

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he was alleged to have embezzled, was

erroneous in view of this section. *State v. Ray*, 206 N.C. 736, 175 S.E. 109 (1934).

Same — Held Proper. — In a prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. *State v. McNair*, 226 N.C. 462, 38 S.E.2d 514 (1946).

Where testimony of a witness as to her bigamous marriage with defendant was competent, the complaint filed by her in an action to annul the marriage was competent for the purpose of corroborating her testimony. *State v. Phillips*, 227 N.C. 277, 41 S.E.2d 766 (1947).

Applied in *State v. Dula*, 204 N.C. 535, 168 S.E. 836 (1933).

§§ 1-150 to 1-160: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to computation, enlargement, etc., of time, see Rule 6 of the Rules of Civil Procedure (§ 1A-1). For general rules of pleading, see Rule 8 of the Rules of Civil Procedure.

As to pleading special matters, see Rule 9 of the Rules of Civil Procedure. As to defenses and objections, see Rule 12 of the Rules of Civil Procedure.

ARTICLE 18.

Amendments.

§§ 1-161 to 1-163: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to amendments, see Rule 15 of the Rules of Civil Procedure (§ 1A-1).

§ 1-164. Amendment changing nature of action or relief; effect.

When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (1901, c. 486; Rev., s. 508; C.S., s. 548.)

CASE NOTES

Cited in *Pierce v. Mallard*, 197 N.C. 679, 150 S.E. 342 (1929); *Perkins v. Langdon*, 233 N.C. 240, 63 S.E.2d 565 (1951).

§ 1-165: Repealed by Session Laws 1967, c. 954, s. 4.

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

When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (C.C.P., s. 134; Code, s. 275; Rev., s. 510; C.S., s. 550.)

CASE NOTES

Purpose of Section. — The obvious purpose of this section is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity existed when a defendant desired to pursue a cross action for contribution against an unknown joint tort-feasor under former § 1-240, since the statute did not begin to run on the claim for contribution until judgment had been recovered against the first tort-feasor. *Wall Funeral Home v. Stafford*, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Effect of Section. — This section pro-

vides that when the plaintiff is ignorant of the name of a defendant, he may designate such defendant by any name and later amend his pleadings to insert the true name when it is discovered. *Wall Funeral Home v. Stafford*, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Discretion of Court as to Correction of Misnomer. — Where a mistake has been made in designating the parties defendant to the action, it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N.C. 236, 86 S.E. 785 (1915).

Middle Name or Initial. — When the identity of a party is established, a variation in name, and especially a difference in the middle initial, such as H. instead of J., is immaterial. *Evans v. Brendle*, 173 N.C. 149, 91 S.E. 723 (1917).

Section Does Not Authorize Defendant to Cross Plead against Unknown Additional Defendant. — This section does not, at least by express

language, apply to authorize a defendant to cross plead against an unknown additional defendant, and former § 1-240 contained no provision permitting a cross action for contribution against an additional defendant designated only by a fictitious name. *Wall Funeral Home v. Stafford*, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

§§ 1-167 to 1-169: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to supplemental pleadings and amendments to conform pleadings to the evidence, see

Rule 15 of the Rules of Civil Procedure (§ 1A-1).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 18A.

Pretrial Hearings.

§§ 1-169.1 to 1-169.6: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to pretrial procedure, see Rule 16 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 19.

Trial.

§§ 1-170 to 1-173: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-174. Issues of fact before the clerk.

All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding session, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C.S., s. 558; 1971, c. 381, s. 12.)

CASE NOTES

Preliminary questions of fact are to be decided by the clerk under this section. If he finds against the petitioner upon them, he will dismiss the proceeding, and if so advised, the petitioner may accept and appeal to the judge, who will hear and decide the appeal. *Kaperonis v. North Carolina State Hwy.*

Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Review of Clerk's Decisions. — The rulings or decisions of the clerks of the court must, as stated in this section, be transferred for trial to the next succeeding term of the superior court, if determinative issues arise on the

pleadings in a procedure where the adversary rights of litigants are presented; and if there are issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken. In passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Mills v. McDaniel*, 161 N.C. 112, 76 S.E. 551 (1912).

Issues of Fact in Partition Proceedings. — Although a partition proceeding is usually within the jurisdiction of the clerk of the superior court, when "issues of fact" are joined before the clerk, the cause must be transferred to the superior court for trial. *Burke v.*

Harrington, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

Denial of Good Faith in Condemnation Proceedings. — In proceedings by a railroad company to condemn lands, where the answer denied the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, did not raise an issue of fact to be transferred to and tried by the superior court in term, under the provisions of this section. *Madison County Ry. v. Gahagan*, 161 N.C. 190, 76 S.E. 696 (1912).

Quoted in *In re Wallace*, 267 N.C. 204, 147 S.E.2d 922 (1966).

Cited in *Boone v. Sparrow*, 235 N.C. 396, 70 S.E.2d 204 (1952); *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967); *Hill v. Smith*, 51 N.C. App. 670, 277 S.E.2d 542 (1981).

§§ 1-175 to 1-179: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to separate trials, see Rule 42 of the Rules of Civil Procedure (§ 1A-1).

§ 1-180: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For statute prohibiting expression of opinion by judge, see § 15A-1222. For statute as to jury instructions, and explanation of law

by judge, prohibiting judge's expression of opinion whether fact has been proved, see § 15A-1232.

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

In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3; 1971, c. 381, s. 12.)

Cross References. — For similar provisions regarding civil actions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

This section and § 15A-1239 prohibit the trial judge from commenting on the verdict in criminal actions. *State v. Neal*, — N.C. App. —, 299 S.E.2d 654 (1983).

This section contains the exclusive remedy for judicial praise, criticism or comment on the verdict. *State v. Neal*, — N.C. App. —, 299 S.E.2d 654 (1983).

Applicability of Section. — The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. *State v. Neal*, — N.C. App. —, 299 S.E.2d 654 (1983).

Commenting on Drug Cases prior to Calling Defendant's Case. — Comments made by a trial judge concerning cases involving drugs and a guilty plea involving hallucinogenic substances, coming immediately before defendant's LSD case was called, entitled defendant to a continuance, and it was

error for the trial judge to overrule defendant's motion. *State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

Comments made by a trial judge concerning cases involving marijuana, coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975).

Discharge of Jury. — A trial judge in his discretion has the power to discharge a jury from service, and this section does not require the trial judge to exercise his prerogative of discharging a jury from further service in the absence of other jurors summoned for the session. *State v. Hiatt*, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

Defendant Must Move for Continuance. — In order to obtain the benefit of this section, a defendant must move for a continuance. *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975).

§ 1-181. Requests for special instructions.

(a) Requests for special instructions to the jury must be —

- (1) In writing,
- (2) Entitled in the cause, and
- (3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same. (C.C.P., s. 239; Code, s. 415; Rev., s. 538; C.S., s. 565; 1951, c. 837, s. 6.)

Cross References. — For similar provisions, see Rule 51 of the Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For article

discussing North Carolina jury instructions practice, see 52 N.C.L. Rev. 719 (1974).

CASE NOTES

Requests for special instructions must be in writing and must be submitted to the trial judge before the judge's charge to the jury is begun. *State v. Long*, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

A request for a special instruction is aptly made if in writing and submitted to

the trial court before the charge to the jury is begun. *State v. Sealey*, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

A party must aptly tender a written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal.

State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. Woods v. Roadway Express, Inc., 223 N.C. 269, 25 S.E.2d 856 (1943).

A party desiring more particular instructions on a subordinate feature must aptly tender request therefor. McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941).

As to "apt time" for tendering written requests, see Merrill v. Whitmire, 110 N.C. 367, 15 S.E. 3 (1892); Ward v. Albemarle & R.R.R., 112 N.C. 168, 16 S.E. 921 (1893).

Request Made after Jury Retired Not Timely. — Where it was only after the jury retired to consider their verdict that defendant's counsel asked the judge if he could have instructions as to any previous record, the request was not timely. State v. Long, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

Judge Has Discretion to Give or Refuse Instruction Not Signed or in Writing. — Where an instruction is not in writing and signed pursuant to this section, it is within the discretion of the trial judge to give or refuse such instruction. State v. Spencer, 225 N.C. 608, 35 S.E.2d 887 (1945); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, remanded on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980). See also, State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The trial judge may disregard oral requests. State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888); Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936).

It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. Avery County Bank v. Smith, 186 N.C. 635, 120 S.E. 215 (1923); State v. Hardee, 6 N.C. App. 147, 169 S.E.2d 533 (1969).

Where Requested Instructions Do Not Relate to Essential Elements of Case. — The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

And failure to grant an instruction not asked for in writing is not ground

for exception. Marshall v. Stine, 112 N.C. 697, 17 S.E. 495 (1893).

The fact that a limiting instruction was not repeated in the charge was not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

But Judge Must Give a Properly Requested Relevant Instruction. — A request for special instructions, aptly made, tendered in writing before argument and signed by counsel, has been held to impose a duty on the court to give the instructions in substance where relevant to the case. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

A request for special instructions, properly made, imposes a duty on the court to give the instructions, at least in substance, where relevant to the case. In the absence of such a request, no duty arises on the part of the trial court. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, remanded on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

It is the rule in this jurisdiction that if a specifically requested jury instruction is proper and supported by evidence, the trial court must give the instruction, at least in substance. State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491, rev'd on other grounds, 301 N.C. 479, 272 S.E.2d 349 (1980).

Requested Instructions Need Not Be Given Verbatim. — A defendant is not entitled to have his requested instructions given verbatim, so long as they are given in substance. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

But Failure to Give a Proper Instruction in Substance Is Reversible Error. — When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. Calhoun v. State Hwy. & Pub. Works Comm'n, 208 N.C. 424, 181 S.E. 271 (1935).

The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instructions in substance, and it is error for the court to change the sense or to so qualify the requested

instruction as to weaken its force. *State v. Puckett*, 54 N.C. App. 576, 284 S.E.2d 326 (1981). See also, *Brink v. Black*, 77 N.C. 59 (1877); *Lloyd v. Bowen*, 170 N.C. 216, 86 S.E. 797 (1915); *Coral Gables, Inc. v. Ayres*, 208 N.C. 426, 181 S.E. 263 (1935).

The trial judge commits reversible error in failing to give substantially a material instruction which is duly requested under this section and embodies a correct principle of law supported by the evidence in the case, even though the evidence may be conflicting. *Parks v. Security Life & Trust Co.*, 195 N.C. 453, 142 S.E. 473 (1928).

It is not error for the court to fail to define and explain words of common usage and meaning to the general public. *State v. Thomas*, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Absent a Request for Special Instructions. — It is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions. *State v. Jones*, 300 N.C. 363, 266 S.E.2d 586 (1980).

An instruction to scrutinize the testimony of a witness on the grounds of interest or bias relates to a subordinate feature of a criminal case, and the trial court is not required to charge as to such matters in the absence of request for special instructions aptly made. *State v. Sealey*, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

Court May Refuse Erroneous or Irrelevant Instructions. — The court may totally refuse instructions based on an erroneous statement of the law, or which concern issues irrelevant to the case. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

This section applies equally to essential elements of the crime charged as well as to other legal terms contained in the charge. *State v. Thomas*, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Party Cannot Complain of Favorable Instructions. — The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but was in their favor. *State v. Freeman*, 122 N.C. 1012, 29 S.E. 94 (1898).

Instruction on Matters Arising Only upon Verdict. — It is not error in the judge to omit to charge the jury upon

matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. *Dupree v. Virginia Home Ins. Co.*, 92 N.C. 417 (1885).

The Supreme Court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. *Kearney v. Thomas*, 225 N.C. 156, 33 S.E.2d 871 (1945).

Judge's Statement of Oral Instructions Binding on Appeal. — A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. *Justice v. Gallert*, 131 N.C. 393, 42 S.E. 850 (1902).

Applied in *Taylor v. Rierison*, 210 N.C. 185, 185 S.E. 627 (1936); *Appliance Buyers Credit Corp. v. Mason*, 271 N.C. 427, 156 S.E.2d 689 (1967); *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969); *State v. Ervin*, 26 N.C. App. 328, 215 S.E.2d 845 (1975); *State v. Scales*, 28 N.C. App. 509, 221 S.E.2d 898 (1976); *State v. Jackson*, 30 N.C. App. 187, 226 S.E.2d 543 (1976); *State v. Rogers*, 32 N.C. App. 274, 231 S.E.2d 919 (1977); *State v. Pharr*, 32 N.C. App. 775, 233 S.E.2d 684 (1977); *State v. Coward*, 296 N.C. 719, 252 S.E.2d 712 (1979); *State v. Lamb*, 39 N.C. App. 334, 249 S.E.2d 887 (1979); *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E.2d 138 (1979); *Thomas v. Deloatch*, 45 N.C. App. 322, 263 S.E.2d 615 (1980); *State v. Jones*, 50 N.C. App. 560, 274 S.E.2d 401 (1981).

Cited in *Pleasants v. Raleigh & A. Airline R.R.*, 95 N.C. 195 (1886); *Taylor v. Plummer*, 105 N.C. 56, 11 S.E. 266 (1890); *Lowe v. Elliott*, 107 N.C. 718, 12 S.E. 383 (1890); *Lee v. Williams*, 111 N.C. 200, 16 S.E. 175 (1892); *Lee v. Williams*, 112 N.C. 510, 17 S.E. 165 (1893); *Marshall v. Stine*, 112 N.C. 697, 17 S.E. 495 (1893); *State v. Macon*, 198 N.C. 483, 152 S.E. 407 (1930); *Penland v. French Broad Hosp.*, 199 N.C. 314, 154 S.E. 406 (1930); *Lane v. Paschall*, 199 N.C. 364, 154 S.E. 626 (1930); *Pyatt v. Southern Ry.*, 199 N.C. 397, 154 S.E. 847 (1930); *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938); *Clarke v. Martin*, 217 N.C. 440, 8 S.E.2d 230 (1940); *Wagner v. Eudy*, 257 N.C. 199, 125 S.E.2d 598 (1962); *Waden v. McGhee*, 274 N.C. 174, 161 S.E.2d 542 (1968); *Jackson v. Jones*, 2 N.C. App. 441, 163 S.E.2d 31 (1968); *State Hwy. Comm'n v. Yarborough*, 6

N.C. App. 294, 170 S.E.2d 159 (1969);
State v. Guy, 54 N.C. App. 208, 282
S.E.2d 560 (1891).

§ 1-181.1. View by jury.

The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain, or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation. (1965, c. 138.)

CASE NOTES

Cited in State Hwy. Comm'n v. Rose,
31 N.C. App. 28, 228 S.E.2d 664 (1976).

§ 1-182: Repealed by Session Laws 1977, c. 776.

§ 1-183: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to dismissal of actions, see Rule 41 of the Rules of Civil Procedure (§ 1A-1). As to motion for directed verdict, see Rule 50 of the Rules of Civil Procedure (§ 1A-1).

§ 1-183.1. Effect on counterclaim of dismissal as to plaintiff's claim.

The granting of a motion by the defendant for judgment of dismissal as to the plaintiff's cause of action shall not amount to the taking of a voluntary dismissal on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. 1A-1, Rule 13. (1959, c. 77; 1971, c. 1093, s. 3.)

CASE NOTES

Applied in Williamson v. Varner, 252
N.C. 446, 114 S.E.2d 92 (1960).

§§ 1-184, 1-185: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions regarding trials by jury and by the court, see Rule 39 of the Rules of Civil Procedure (§ 1A-1). As to findings of fact and conclusions of law by the court, see Rule 52 of the Rules of Civil Procedure (§ 1A-1).

§ 1-186. Exceptions to decision of court.

(a) For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within 10 days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

(b) Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within 10 days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (C.C.P., s. 242; Code, s. 418; Rev., s. 542; C.S., s. 570.)

Cross References. — As to the taking of appeals in civil cases, see Rule 3 of the Rules of Appellate Procedure. As to exceptions and assignments of error in the record on appeal, see Rule 10 of the

Rules of Appellate Procedure.

Legal Periodicals. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

CASE NOTES

Purpose of Section. — The main object of this section is to declare that the trial by the court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. *Green v. Castlebury*, 70 N.C. 20 (1874).

Section Deals with Right of Appeal. — The right of appeal, and not the mere matter of making up the case, is the subject of this section. *Green v. Castlebury*, 70 N.C. 20 (1874).

Necessity for Exceptions. — Where the decision of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court unless exceptions appear to have been aptly taken or error is distinctly pointed out. *Chastain v. Coward*, 79 N.C. 543 (1878).

When a trial by jury is waived, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. Exceptions to such findings must be taken within the time allowed by this section. *City of Goldsboro v. Atlantic Coast Line R.R.*, 246 N.C. 101, 97 S.E.2d 486 (1957).

If an individual wishes to have the Supreme Court review an affirmance by the superior court of findings by a referee

or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge, in the time and manner prescribed by this section. *Clark Equip. Co. v. Johnson*, 261 N.C. 269, 134 S.E.2d 327 (1964).

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal did not meet the requirements of this section. *Nationwide Homes of Raleigh N.C., Inc., v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

Exception to the signing of a judgment presents these questions: (1) Do the facts found support the judgments; and (2) Does any error of law appear upon the face of the record? *City of Goldsboro v. Atlantic Coast Line R.R.*, 246 N.C. 101, 97 S.E.2d 486 (1957).

Broadside Exception. — An exception "to each conclusion of law embodied in the judgment" was a broadside exception and did not comply with this section. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

Presumption where Exceptions Not Taken. — Where no exceptions are taken to the admission of evidence or to the findings of fact, such findings are

presumed to be supported by competent evidence and are binding upon appeal. *City of Goldsboro v. Atlantic Coast Line R.R.*, 246 N.C. 101, 97 S.E.2d 486 (1957).

§ 1-187: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 20.

Reference.

§§ 1-188 to 1-195: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed sections, see section (a) of Rule 53 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 21.

Issues.

§§ 1-196 to 1-200: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to verdicts, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 22.

Verdict and Exceptions.

§ 1-201: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§ 1-202. Special controls general.

Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (C.C.P., s. 234; Code, s. 410; Rev., s. 552; C.S., s. 586.)

Cross References. — For similar provisions, see Rule 49 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-203 to 1-207: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to objections and exceptions, see Rule 46 of the Rules of Civil Procedure (§ 1A-1). For present provisions as to general and special verdicts, see Rule 49 of the Rules of Civil Procedure (§ 1A-1). As to entry of judgment, see Rule 58 of the Rules of Civil Procedure (§ 1A-1). As to new trials, see Rule 59 of the Rules of Civil Procedure (§ 1A-1).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-208: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed section, see Rule 54 of the Rules of Civil Procedure (§ 1A-1).

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

The clerks of the superior courts are authorized to enter the following judgments:

- (1) All judgments of voluntary nonsuit.
- (2) All consent judgments.
- (3) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court.
- (4) All judgments by default final and default and inquiry as are authorized by Rule 55 of the Rules of Civil Procedure, and in this section provided.
- (5) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days' notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of G.S. 105-414 in which there is filed no answer which seeks to prevent entry of judgment of

sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of the said clerk, ratified and confirmed. (1919, c. 156; C.S., s. 593; Ex. Sess., 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1; 1967, c. 954, s. 3.)

Local Modification. — Vance: 1941, c. 139, s. 1.

Cross References. — As to voluntary dismissal, see Rule 41 of the Rules of Civil Procedure (§ 1A-1). As to entry of judgment by default by the clerk, see Rule 55(b)(1) of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — Section 105-414, referred to in this section, was repealed by Session Laws 1971, c. 806, s. 3.

The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

- I. In General.
- II. Consent Judgments.
- III. Default Judgments.

I. IN GENERAL.

Constitutionality. — This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. *Thompson v. Dillingham*, 183 N.C. 566, 112 S.E. 321 (1922).

Purpose of Provision on Tax Foreclosure Proceedings. — To put at rest any question as to the power of the clerk in tax foreclosure proceedings, the 1929 legislature gave clerks of the superior court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. The substance of this statute now appears as the last paragraph of this section. *Travis v. Johnston*, 244 N.C. 713, 95 S.E.2d 94 (1956).

This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments; hence, the jurisdiction of a judge in term to render judgments upon voluntary nonsuits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by this section. The authority of the clerk is concurrent with and additional to that of the judge in term. *Young v. Davis*, 182 N.C. 200, 108 S.E. 630

(1921); *Hill v. Huffines Hotel Co.*, 188 N.C. 586, 125 S.E. 266 (1924); *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329 (1925); *Rich v. Norfolk S. Ry.*, 244 N.C. 175, 92 S.E.2d 768 (1956).

Effect of Judgments Entered by Clerk. — Judgments entered by the clerk, as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329 (1925).

Clerk without Authority to Direct Disbursement of Restitution Funds. — The clerk of the superior court had no jurisdiction to enter an order directing disbursement of restitution funds which the defendant in a criminal proceeding had paid into court as result of a plea bargain. *State v. McIntyre*, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

As to entry of judgments of voluntary nonsuit by the clerk, see *McFetters v. McFetters*, 219 N.C. 731, 14 S.E.2d 833 (1941); *Moore v. Moore*, 224 N.C. 552, 31 S.E.2d 690 (1944); *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962), all decided prior to enactment of the Rules of Civil Procedure.

Appeals from Clerk to Judge. — There is no provision in the statute regulating an appeal from a judgment entered by the clerk upon the authority of the statute upon the ground that such judgment is erroneous. It would seem

that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the appellate court. *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329 (1925).

In the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the superior court of any county in his district rendered pursuant to the provisions of this section, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor. *Ward v. Agrillo*, 194 N.C. 321, 139 S.E. 451 (1927); *Howard v. Queen City Coach Co.*, 211 N.C. 329, 190 S.E. 478 (1937).

Applied in *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E.2d 790 (1961).

Stated in *County of Buncombe v. Penland*, 206 N.C. 299, 173 S.E. 609 (1934); *Ridge Community Investors, Inc. v. Berry*, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Cited in *Ward v. Agrillo*, 194 N.C. 321, 139 S.E. 451 (1927); *Baker v. Corey*, 195 N.C. 299, 141 S.E. 892 (1928); *State ex rel. Standard Supply Co. v. Vance Plumbing & Elec. Co.*, 195 N.C. 629, 143 S.E. 248 (1928); *Beaufort County v. Bishop*, 216 N.C. 211, 4 S.E.2d 525 (1939); *Keen v. Parker*, 217 N.C. 378, 8 S.E.2d 209 (1940); *Johnson v. Sidbury*, 225 N.C. 208, 34 S.E.2d 67 (1945); *Pate v. R.L. Pittman Hosp.*, 234 N.C. 637, 68 S.E.2d 288 (1951); *Boone v. Sparrow*, 235 N.C. 396, 70 S.E.2d 204 (1952); *Morris v. Wilkins*, 241 N.C. 507, 85 S.E.2d 892 (1955); *Keith Tractor & Implement Co. v. McLamb*, 252 N.C. 760, 114 S.E.2d 668 (1960); *Scott v. Scott*, 259 N.C. 642, 131 S.E.2d 478 (1963); *Price v. Horn*, 30 N.C. App. 10, 226 S.E.2d 165 (1976); *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981).

II. CONSENT JUDGMENTS.

A consent judgment is the contract between the parties entered upon records with approval and sanction of the court, and is construed as is any other

contract. *Redevelopment Comm'n v. Hannaford*, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

Entry of Consent Judgment while Action Pending before Referee.

— The clerk of the superior court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. *Weaver v. Hampton*, 204 N.C. 42, 167 S.E. 484 (1933).

Ordinarily Consent Is Required to Set Aside a Consent Judgment.

— A consent judgment cannot be modified or set aside, absent fraud or mutual mistake, without the consent of the parties. *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

When Consent Judgment Will Be Set Aside without Consent of Parties.

— Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed, altered or set aside without the consent of the parties unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake or that consent was not in fact given. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

A consent judgment set aside for cause must be set aside in its entirety. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

Lack of Consent Renders Judgment Void. — The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

And Such Judgment Will Be Vacated without Showing of Meritorious Defense.

— When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

Findings on Consent Supported by Evidence Are Binding.

— The findings of fact made by the trial judge in making a determination as to whether a party gave his consent, where there is some supporting evidence, are final and binding on the appellate court. *Overton*

v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Change in or Misconstruction of Law Not Grounds to Set Aside Consent Judgment. — A consent order is a final and binding decree. Neither a subsequent change in the law, nor counsel's misconstruction of the law at the time the consent order was entered, is a ground for setting aside the order. *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

A consent judgment will not be set aside even where a statute upon which it was predicated was later declared unconstitutional. *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper Procedure to Set Aside Consent Judgment Must Be Followed. — Even with the consent of the parties, a consent judgment may not be later opened, changed or set aside unless the appropriate legal proceeding is instituted. *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper procedure to set aside judgment for want of consent is by a motion in the cause. *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963); *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper procedure to vacate a consent judgment for fraud or mutual mistake is by an independent action. *State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc.*, 52 N.C. App. 344, 278 S.E.2d 564 (1981).

III. DEFAULT JUDGMENTS.

Default judgment by the clerk is provided for by Rule 55(b)(1), is subject to the jurisdictional proof required by § 1-75.11 and is still controlled by subdivision (4) of this section, which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by Rule 55. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Judgment by default may be entered only when defendant has not answered; hence, when an answer has been filed, even though it was filed after time for answering had expired, the clerk

is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis*, 231 N.C. 86, 55 S.E.2d 919 (1949).

Judgment by Default when Plaintiff Fails to Reply to Answer Seeking Affirmative Relief. — Where the parties are properly before the court and the subject matter of the action is also jurisdictional in the superior court, the clerk, having authority under this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. *Finger v. Smith*, 191 N.C. 818, 133 S.E. 186 (1926).

A Default Judgment May Be Entered in an Action for Breach of Contract to Pay a Certain Sum. *Freeman v. Hardee's Food Sys.*, 267 N.C. 56, 147 S.E.2d 590 (1966).

Action to Cancel Deed of Trust and Surrender Secured Notes. — The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. *Cook v. Bradsher*, 219 N.C. 10, 12 S.E.2d 690 (1941).

Judgment Entered without Authority May Be Set Aside on Motion. — A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. *Cook v. Bradsher*, 219 N.C. 10, 12 S.E.2d 690 (1941).

When a clerk of the superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. *Freeman v. Hardee's Food Sys.*, 267 N.C. 56, 147 S.E.2d 590 (1966).

As where Complaint Does Not Allege Sufficient Facts. — Clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. *Freeman v. Hardee's Food Sys.*, 267 N.C. 56, 147 S.E.2d 590 (1966).

The entry of default by the clerk is not a final judgment and it is not appealable; rather, it is an interlocutory act looking toward the subsequent entry of a final judgment by default. However, an exception to such an interlocutory order, properly preserved, may be reviewed on an appeal from the final

judgment. *Looper v. Looper*, 51 N.C. App. 569, 277 S.E.2d 78 (1981).

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

In all condemnation proceedings authorized by G.S. 40-2 or by any other statute, the clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding. (1957, c. 400, s. 1.)

Editor's Note. — Section 40-2, referred to in this section, was repealed by Session Laws 1981, c. 919, s. 1.

CASE NOTES

Authority to Tax Counsel Fees Generally. — With one exception, contained in this section, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court to appeal for and protect the rights of any

party in interest who is unknown or whose residence is unknown. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972).

Cited in North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.

The petitioner in all condemnation proceedings authorized by G.S. 40-2 or by any other statute is authorized and allowed to take a voluntary nonsuit. (1957, c. 400, s. 2.)

Cross References. — As to voluntary dismissal, see Rule 41 of the Rules of Civil Procedure (§ 1A-1).

Editor's Note. — Section 40-2, referred to in this section, was repealed by Session Laws 1981, c. 919, s. 1.

CASE NOTES

Right to Take Nonsuit Recognized Prior to Enactment of Section. — The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit at any time prior to the vesting of title in condemnor was judicially recognized prior to the enactment of this section. *North Carolina State Hwy. Comm'n v. York Indus. Center, Inc.*, 263

N.C. 230, 139 S.E.2d 253 (1964).

This section does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor. *North Carolina Hwy. Comm'n v. York Indus. Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-210. Return of execution; order for disbursement of proceeds.

In all executions issued by the clerk of the superior court upon judgment before the clerk of the superior court, under G.S. 1-209, and execution issued thereon, the sheriff shall make his return to the clerk of the superior court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided, that any interested party may appeal to the superior court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§§ 1-211 to 1-215: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to judgments by default, see Rule 55 of the Rules of Civil Procedure (§ 1A-1).

§ 1-215.1. Judgments or orders not rendered on Mondays validated.

In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

CASE NOTES

Legislature Cannot Validate Void Judgment. — This section was directly intended to validate judgments not rendered on Monday as required by the former statute. However, it is well

understood that the legislature has no power to validate a void judgment. *Ange v. Owens*, 224 N.C. 514, 31 S.E.2d 521 (1944).

§ 1-215.2. Time within which judgments or orders signed on days other than Mondays may be attacked.

From and after the 30th day of September, 1951, no action shall be brought or no motion in the cause shall be made to attack any judgment or order of any clerk of the superior court by reason of such judgment or order having been signed by such clerk of the superior court on any day other than Monday. (1951, c. 895, s. 1.)

§ 1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.

From and after the 30th day of September, 1951, any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the order or confirmation of sale was made on a day other than Monday is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1951, c. 895, s. 2.)

§ 1-216: Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated.

In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the superior court of any county in this State on a day other than Monday, contrary to G.S. 1-215 and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in G.S. 1-220 other than for irregularity as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

Editor's Note. — Sections 1-215 and 1-220, referred to in this section, were repealed by Session Laws 1967, c. 954, s. 4. Section 1-216, also referred to in this section, was repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.

In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, and said judgments or decrees shall not be invalidated by reason of the fact that the summons, although designated an alias or pluries summons, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.

In every case where prior to the tenth day of October, 1969, a judgment by default final has been entered by the clerk of superior court of any county in this State in an action to remove cloud from title to real estate, the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628; 1971, c. 59; 1973, c. 1348, s. 1.)

§§ 1-218 to 1-222: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to relief from judgments or orders, see Rule 60 of the Rules of Civil Procedure (§ 1A-1).

§ 1-223. Against married persons.

In an action brought by or against a married person, judgment may be given against such married person for costs or damages or both, to be levied and collected solely out of such married person's separate estate or property. (Rev., s. 563; C.S., s. 603; 1977, c. 545.)

Cross References. — As to statutes concerning married persons generally, see § 52-1 et seq.

CASE NOTES

Cited in McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898); Craddock v. Brinkley, 177 N.C. 125, 98 S.E. 280 (1919).

§§ 1-224 to 1-227: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to judgment divesting title of one party and vesting it in others, see Rule 70 of the Rules of Civil Procedure (§ 1A-1).

§ 1-228. Regarded as a deed and registered.

Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R.C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev., ss. 567, 568; C.S., s. 608.)

Cross References. — As to distribution by court of marital property upon divorce, see § 50-20.

CASE NOTES

Section Is Partially Superseded by § 47-27. — The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded as to judgments in eminent domain proceedings by the later enactment of c. 148, Public Laws of 1917 (§ 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. *Carolina Power & Light Co. v. Bowman*, 228 N.C. 319, 45 S.E.2d 531 (1947).

Effect of Consent Decree. — A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee as between the parties, and is good as against third persons in the absence of fraud or collusion. *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25 (1920).

Agreement in Divorce Proceedings. — In an action brought by

wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, was binding as a consent judgment, even though a divorce had not been decreed therein; and it was not affected by the fact that an award of the children had therein been made with the sanction of the court. *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25 (1920).

Marginal Cancellation Not Essential but Advisable. — When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but such cancellation is a commendable and convenient practice. *Smith v. King*, 107 N.C. 273, 12 S.E. 57 (1890).

Cited in *Town of Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40 (1929); *Taylor v. Johnston*, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 1-229. Certified registered copy evidence.

In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (1850, c. 107, s. 3; R.C., c. 32, s. 26; 1874-5, c. 17, s. 3; Code, s. 428; Rev., s. 569; C.S., s. 609.)

§ 1-230. In action for recovery of personal property.

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (C.C.P., s. 251; Code, s. 431; Rev., s. 570; C.S., s. 610.)

Cross References. — As to the provisional remedy of claim and delivery for personal property, see § 1-472 et seq.

CASE NOTES

Where defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention. *Boyd v. Walters*, 201 N.C. 378, 160 S.E. 451 (1931).

Judgment in the Alternative. — In claim and delivery, the judgment should be for the delivery of the property or its value. *Oil Co. v. Grocery Co.*, 136 N.C. 354, 48 S.E. 781 (1904); *Hendricks v. Ireland*, 162 N.C. 523, 77 S.E. 1011 (1913). See also, *Grubbs v. Stephenson*, 117 N.C. 66, 23 S.E. 97 (1895).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention. — In a proceeding for claim and delivery of personal property, a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. *Bowen v. King*, 146 N.C. 385, 59 S.E. 1044 (1907); *Mica Indus., Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

Right to Recover Damages in Another Action after Regaining Possession. — While plaintiff could have had his damages assessed in a former action of claim and delivery brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another, by virtue of this section, he was not required to take this course, but, after regaining possession could, in another action, recover damages for the injury done thereby. *Bowen v. King*, 146 N.C. 385, 59 S.E. 1044 (1907).

Where judgment is rendered against defendant and surety on his bond in claim and delivery, and no issue is submitted to the jury on the question of damages for the wrongful detention of the property, plaintiff is not estopped from bringing an independent action to recover such damages. *Woody v. Jordan*, 69 N.C. 189 (1873); *Moore v. Edwards*, 192 N.C. 446, 135 S.E. 302 (1926).

Where the defendant in claim and delivery proceedings had recovered of the plaintiff therein such damages for his wrongful seizure of defendant's property as were allowed by this section, and he had claimed no more, he could by an independent action, sue for such damages to his business as were caused by

the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings. *Ludwick v. Penny*, 158 N.C. 104, 73 S.E. 228 (1911).

Measure of Damages when Property Cannot Be Returned. — The measure of damages for the wrongful taking of a tractor-trailer which cannot be returned was its value at the time of taking by the sheriff, with interest. *Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 111 S.E.2d 606 (1959).

Measure of Damages when Property Is beyond Control of Court. — In an action of claim and delivery, where it appeared that defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities would be adjusted and judgment rendered against defendant for the balance of the purchase money, with interest from the date of purchase. *Hall v. Tillman*, 115 N.C. 500, 20 S.E. 726 (1894).

Additional Cost Allowed by Consent. — Where defendant in claim and delivery of crops had replevied the property, and plaintiff had recovered final judgment, an additional item of expense or cost allowed by consent to plaintiff would be held as binding upon the parties on appeal. *Hendricks v. Ireland*, 162 N.C. 523, 77 S.E. 1011 (1913).

Running of Interest from Date of Judgment. — When the verdict of the jury only established that the plaintiff had wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon would not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court was erroneous in this respect only, it would be ordered to be amended and affirmed. *Penny v. Ludwick*, 152 N.C. 375, 67 S.E. 919 (1910).

Issues and Judgment Should Cover Whole Case. — Where an action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the

sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N.C. 377, 35 S.E. 620 (1900).

Liability of Surety on Replevin Bond. — Where plaintiff is successful in his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by plaintiff; or, if the return cannot be had, the judgment should order that the

surety be discharged upon the payment to plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. *Orange Trust Co. v. Hayes*, 191 N.C. 542, 132 S.E. 466 (1926).

Cited in *Asher v. Reizenstein*, 105 N.C. 213, 10 S.E. 889 (1890); *Penny v. Ludwick*, 152 N.C. 375, 67 S.E. 919 (1910); *Harrell v. Tripp*, 197 N.C. 426, 149 S.E. 548 (1929); *Green v. Carroll*, 205 N.C. 459, 171 S.E. 627 (1933); *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460 (1958); *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960).

§ 1-231. What judge approves judgments.

In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51; Code, s. 432; Rev., s. 571; C.S., s. 611.)

CASE NOTES

Restraining orders must be made returnable before the judge in the district in which the action is pending. *Galbreath v. Everett*, 84 N.C. 546 (1881).

Motions for the appointment of a receiver may be made before the resi-

dent judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. *Corbin v. Berry*, 83 N.C. 27 (1880).

§ 1-232. Judgment roll.

Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

- (1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.
- (2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (C.C.P., s. 253; Code, s. 434; Rev., s. 572; C.S., s. 612.)

CASE NOTES

Section Directory. — The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. *Brown v. Harding*, 171 N.C. 686, 89 S.E. 222 (1916). But see, *Dewey v. Sugg*, 109 N.C. 328, 13 S.E. 923 (1891), to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."

Where a party is seeking to establish his chain of title and introduces into evidence a deed executed by a commissioner, but fails to offer in evidence the judgment roll to establish that the person named was in fact a commissioner, and had authority to convey, there is a break in the chain of title. *Keller v. Hennessee*, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

Cited in *Williams v. Trammell*, 230 N.C. 575, 55 S.E.2d 81 (1949).

§ 1-233. Docketed and indexed; held as of first day of session.

Every judgment of the superior or district court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, the address, if known, of each party against whom judgment is rendered, and the relief granted, date of judgment, and the date, hour and minute of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof; however, error or omission in the entry of the address or addresses shall in no way affect the validity, finality or priority of the judgment docketed. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within 10 days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments. (Sup. Ct. Rule VIII; C.C.P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C.S., s. 613; 1929, c. 183; 1943, c. 301, s. 4½; 1971, c. 268, s. 6; 1981, c. 745, s. 1.)

Local Modification. — Durham: 1929, c. 88.

change of names by legal process, see 16 N.C.L. Rev. 187.

Legal Periodicals. — For article on

CASE NOTES

Necessity of Strict Compliance. — The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every

respect is required. *Jones v. Currie*, 190 N.C. 260, 129 S.E. 605 (1925).

Liability of Clerk for Failure to Index Judgment. — An action of tort will lie against the clerk upon his failure to index a judgment where such neglect

results in damage to the plaintiff. *Shackelford v. Staton*, 117 N.C. 73, 23 S.E. 101 (1895).

Duty of Judgment Creditor to See Judgment Properly Docketed. — It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of failure to docket the judgment. *Holman v. Miller*, 103 N.C. 118, 9 S.E. 429 (1889).

Docketing of Judgment in Another County. — Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed, but must also be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. *Dewey v. Sugg*, 109 N.C. 328, 13 S.E. 923 (1891); *Jones v. Currie*, 190 N.C. 260, 129 S.E. 605 (1925).

When there are several judgment debtors in the docketed judgment the index must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is so that the index shall point to a judgment against the particular person inquired about if there is a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. *Dewey v. Sugg*, 109 N.C. 328, 13 S.E. 923 (1891); *Jones v. Currie*, 190 N.C. 260, 129 S.E. 605 (1925).

Initials in Index. — "J. Mizell" or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." *Valentine v. Britton*, 127 N.C. 57, 37 S.E. 74 (1900).

One Cross-Indexing Not Sufficient for Two Judgments. — One

cross-indexing is insufficient for two judgments, even though they appear on the same page and include the same parties, and only the first judgment on the page will constitute a lien. *Valentine v. Britton*, 127 N.C. 57, 37 S.E. 74 (1900).

Judgment Signed Out of Session. — The provisions of this section that judgments relate to the first day of the term (now session) apply when the judgment was rendered and docketed during the term (session) or within 10 days after adjournment thereof, and not to a judgment signed out of term (session) by the consent of the parties, except where third persons are prejudiced; hence, the position could not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term (session), when by consent the order was signed after the term (session) of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. *Conestee Chem. Co. v. Long*, 184 N.C. 398, 114 S.E. 465 (1922).

Consent Judgments. — For case holding that the provision that judgments rendered during a term (now session) should relate back to the first day thereof does not apply to judgments by consent, see *Hood v. Wilson*, 208 N.C. 120, 179 S.E. 425 (1935).

Judgment against Corporations. — A judgment against a corporation does not relate back, by implication of law, to the beginning of the term (session), so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meantime been appointed. *Odell Hdwe. Co. v. Holt-Morgan Mills*, 173 N.C. 308, 92 S.E. 8 (1917).

Cited in *Pentuff v. Park*, 195 N.C. 609, 143 S.E. 139 (1928); *Henry v. Sanders*, 212 N.C. 239, 193 S.E. 15 (1937).

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

Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the court of the county where the judgment roll was filed, and may be docketed on the judgment of the court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such

real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (C.C.P., s. 254; Code, s. 435; Rev., s. 574; C.S., s. 614; 1971, c. 268, s. 7.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

- I. In General.
- II. Creation of Lien.
- III. Priorities.
- IV. Enforcement and Loss of Lien.

I. IN GENERAL.

Liens on Real Estate and Personalty Distinguished. — A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. *Community Credit Co. v. Norwood*, 257 N.C. 87, 125 S.E.2d 369 (1962).

As to liens upon personal property, see also, *Selby v. Dixon*, 11 N.C. 424 (1826); *Merchants Nat'l Bank v. Newton Cotton Mills*, 115 N.C. 507, 20 S.E. 765 (1894); *Summers Hdwe. Co. v. Jones*, 222 N.C. 530, 23 S.E.2d 883 (1943); *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

Applicability of Section to Legal and Equitable Estates. — This section is sufficiently comprehensive to include equitable as well as legal estates. *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905).

Judgment Constitutes Lien on All Defendant's Interest in Realty. — A judgment, from the time it is docketed, constitutes a lien on all the interest of whatever kind the defendant had in real estate, whether it is such as may be seized under execution or not. *Hoppock, Glenn & Co. v. Shober*, 69 N.C. 154 (1873).

But property converted from its original nature, such as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute

gives a lien, under the judgment, on all the real property of the debtor in the county. *Dixon v. Dixon*, 81 N.C. 323 (1879); *Clifton v. Owens*, 170 N.C. 607, 87 S.E. 502 (1916).

Homestead Right Not Subject to Judgment Lien. — The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. *Kirkwood v. Peden*, 173 N.C. 460, 92 S.E. 264 (1917).

But Reversionary Interest May Be Subjected. — The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. *Kirkwood v. Peden*, 173 N.C. 460, 92 S.E. 264 (1917).

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. *Vanstory v. Thornton*, 112 N.C. 196, 17 S.E. 566 (1893).

A judgment upon individual debt against the holder of a mere legal title held in trust for another constitutes

no lien upon the land so held. *Jackson v. Thompson*, 214 N.C. 539, 200 S.E. 16 (1938).

An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. *Fowle v. McLean*, 168 N.C. 537, 84 S.E. 852 (1915).

Where title is taken in the name of some third person, a docketed judgment constitutes no lien on real property purchased by the debtor. In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. *Dixon v. Dixon*, 81 N.C. 323 (1879).

Judgments against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. *Stern Bros. v. Lee*, 115 N.C. 426, 20 S.E. 736 (1894).

Where a debtor executes a deed in trust to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. *McKeithan v. Walker*, 66 N.C. 95 (1872).

Only Land Situated in County of Docketing Is Affected. — A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. *King v. Portis*, 77 N.C. 26 (1877); *Helsabeck v. Vass*, 196 N.C. 603, 146 S.E. 576 (1929); *Jackson v. Thompson*, 214 N.C. 539, 200 S.E. 16 (1938); *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946).

A docketed judgment gives no peculiar lien upon any particular parcel of land. *Bryan v. Dunn*, 120 N.C. 36, 27 S.E. 37 (1897).

Nor Vest Any Estate in Land. — The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches. *Bruce v. Nicholson*, 109 N.C. 202, 13 S.E. 790 (1891).

Liability of Trustee. — A trustee who has a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose, the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. *Barrett v. Barnes*, 186 N.C. 154, 119 S.E. 194 (1923).

A judge cannot validly issue an order to the clerk not to docket a judgment pending the fulfillment of a conditional order directed to the parties. *Hopkins v. Bowers*, 111 N.C. 175, 16 S.E. 1 (1892).

Comprehensive Bankruptcy Relief. — An action by debtors to quiet whatever liability might arise from creditors' judgments under this section which might survive their discharge and eventually impair any exemptable interests in real property they acquire in the future is not necessary, as the comprehensive relief afforded by a Chapter 7 discharge protects the debtors' interests in property they acquire after bankruptcy and assures them a "fresh start" in their financial affairs. *Clowney v. North Carolina Nat'l Bank*, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Applied in *Dillard v. Walker*, 204 N.C. 67, 167 S.E. 632 (1933); *Equitable Life Assurance Soc'y v. Russos*, 210 N.C. 121, 185 S.E. 632 (1936); *McCollum v. Smith*, 233 N.C. 10, 62 S.E.2d 483 (1950).

Stated in *Dula v. Parsons*, 243 N.C. 32, 89 S.E. 797 (1955).

Cited in *McKeithan v. Walker*, 66 N.C. 95 (1872); *Rhyne v. McKee*, 73 N.C. 259 (1875); *Mannix v. Ihrie*, 76 N.C. 299 (1877); *Pasour v. Rhyne*, 82 N.C. 149 (1880); *Lyon v. Russ*, 84 N.C. 588 (1881); *Morton v. Rippey*, 84 N.C. 611 (1881); *Brown v. Harding*, 170 N.C. 253, 86 S.E. 1010 (1915); *Boyd v. Bristol Typewriter*

Co., 190 N.C. 794, 130 S.E. 858 (1925); Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Jones v. Rhea, 198 N.C. 190, 151 S.E. 255 (1930); Osborne v. Board of Educ., 207 N.C. 503, 177 S.E. 642 (1935); Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936); Scales v. Scales, 218 N.C. 553, 11 S.E.2d 569 (1940); Edmonds v. Wood, 222 N.C. 118, 22 S.E.2d 237 (1942); Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

II. CREATION OF LIEN.

The mere rendition of a judgment will not constitute a lien. Alsop v. Mosely, 104 N.C. 60, 10 S.E. 124 (1889).

Nor does the execution fix the lien. Pasour v. Rhyne, 82 N.C. 149 (1880).

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter, the purchaser takes subject to the statutory lien given by this section. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895); Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946). See also, Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

And Fixes the Rights of Judgment Creditors. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

Judgment by Confession. — Even though a judgment by confession is given out of the ordinary course of procedure, when docketed it at once becomes a lien upon the judgment debtor's real property. Sharp v. Danville, M. & S.R.R., 106 N.C. 308, 11 S.E. 530 (1890); Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

No Charge against Property Is Created until It Is Acquired. — The language of this section which provides for a lien on real property acquired by judgment debtors within 10 years of the entry of the judgment does not create a charge against or interest in real property until the real property is acquired by the judgment debtor. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Judgment creditors have no charge against or interest in the real property the debtors might acquire in the future, as such judgments cannot create a "judicial lien" until the creditors attach the

liability arising from the judgments upon some property of the debtors. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

When Lien Attaches to After-Acquired Lands. — Under this section the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895).

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939). See also, Durham v. Pollard, 219 N.C. 750, 14 S.E.2d 818 (1941).

The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchie Bros., 169 N.C. 21, 85 S.E. 40 (1915).

Docketing Requirements Must Be Strictly Complied with. — To constitute a lien on real estate, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is situated. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir.), cert. denied, 302 U.S. 761, 58 S. Ct. 368, 82 L. Ed. 590 (1937); Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir.), cert. denied, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

But docketing is not a condition precedent to the enforcement of the judgment by final process. Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898). See also, Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

Docketing First in County of Rendition. — A judgment rendered in one county cannot be docketed in another without having been first docketed in the county where it was rendered. McAden v. Banister, 63 N.C. 479 (1869); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Sufficiency of Transcript Sent to Foreign County. — The transcript of a

judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. *Wilson v. Patton*, 87 N.C. 318 (1882); *Lee v. Bishop*, 89 N.C. 256 (1883).

Interlocutory Judgment. — An interlocutory judgment containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, where the land was not sold, did not affect the rights of the parties. *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905).

III. PRIORITIES.

Record as Notice. — A plaintiff will be charged with notice of judgment entered at a regular term of court as of the time of the entry. *Sluder v. Graham*, 118 N.C. 835, 23 S.E. 924 (1896).

Liens Ranked in Order of Docketing. — Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Including Liens of Justice's Judgments. — If a number of justice's judgments are docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time; and even though an execution is issued on the latter and the sheriff levies it on the land and advertises it for sale, yet if before the sale executions are issued on a part of the justice's docketed judgments and placed in the hands of the sheriff, the proceeds of the sale of the land must first be applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N.C. 221 (1871).

And Those of Consent Judgments. — Consent judgments, under this section, have priority in accordance with the priority of docketing, since the provisions of § 1-233 are not applicable to consent judgments. *Hood v. Wilson*, 208 N.C. 120, 179 S.E. 425 (1935).

Judgment Prevails over Later Attachment. — Where a judgment has become a lien on property of defendant before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor. *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N.C. 573, 111 S.E.2d 904 (1960).

Docketed Judgment Superior to Unrecorded Deed. — The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925).

Where there was a lien by judgment under this section against the holder of an equitable title to lands, who also held a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed, registered after the lien of the judgment had taken effect, could not render the lien under the mortgage superior to the judgment lien, and equity would remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905); *Mills v. Tabor*, 182 N.C. 722, 109 S.E. 850 (1921).

A judgment is not a lien upon lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. *Helsabeck v. Vass*, 196 N.C. 603, 146 S.E. 576 (1929).

Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title; in such case, the law will take notice of fractions of a day in favor of such a purchaser. Receivers of the debtor should be classed as purchasers. *Odell Hdwe. Co. v. Holt-Morgan Mills*, 173 N.C. 308, 92 S.E. 8 (1917).

A docketed judgment has priority over a subsequently recorded mortgage. *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946).

Where, after the recordation of a judgment, the judgment debtor executed a mortgage on certain of his land, and the land was foreclosed under prior mortgages antedating the judgment, and the judgment debtor made no claim to his homestead, the judgment creditor had a preference in the proceeds of the sale over the subsequent mortgage. *Duplin County v. Harrell*, 195 N.C. 445, 142 S.E. 481 (1928).

The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtor's allotted homestead, and therefore, the proceeds of the sale of such land should first be applied to the payment of the judgment debt. *Gulley v. Thurston*, 112 N.C. 192, 17 S.E. 13 (1893).

Subsequent Purchaser Takes Subject to Lien. — Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of 10 years from the time of its docketing, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. *Moses v. Major*, 201 N.C. 613, 160 S.E. 890 (1931).

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. *Byrd v. Pilot Fire Ins. Co.*, 201 N.C. 407, 160 S.E. 458 (1931).

An adverse holder of land under § 1-40, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. *Johnson v. Fry*, 195 N.C. 832, 143 S.E. 857 (1928).

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. *In re Wallace*, 212 N.C. 490, 193 S.E. 819 (1937).

Judgment Lien Is Subject to Homestead. — A lien on the lands of the judgment debtor is subject to the homestead interest provided by the Constitution. *Farris v. Hendricks*, 196 N.C. 439, 146 S.E. 77 (1929).

When an heir acquires land or property to be treated as realty subsequent to the docketing of several judgments against him, the judgment

creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. *Linker v. Linker*, 213 N.C. 351, 196 S.E. 329 (1938).

Effect of Execution Sale under Prior Judgment. — A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. *Helsabeck v. Vass*, 196 N.C. 603, 146 S.E. 576 (1929).

Where judgment creditor and mortgagee under a prior registered mortgage claim land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. *Mills v. Tabor*, 182 N.C. 722, 109 S.E. 850 (1921).

The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment; and the effect of a sale under both is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. *Cannon v. Parker*, 81 N.C. 320 (1879).

Merger. — Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. *Springs v. Pharr*, 131 N.C. 191, 42 S.E. 590 (1902).

Satisfaction of Judgment after Successive Transfers of Different Tracts.

— Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and this rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. *Brown v. Harding*, 170 N.C. 253, 86 S.E. 1010 (1915), rehearing denied, 171 N.C. 686, 89 S.E. 222 (1916).

Where there was a conflict as to the priorities of the secured creditors, plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution, but had to resort to an action in the

nature of an equitable execution where an account could be taken. *Trimble v. Hunter*, 104 N.C. 129, 10 S.E. 291 (1889).

IV. ENFORCEMENT AND LOSS OF LIEN.

The life of the lien of a judgment is 10 years from the date of its rendition in the superior court. *Lupton v. Edmundson*, 220 N.C. 188, 16 S.E.2d 840 (1941).

The lien of a judgment created upon real estate by the provisions of this section is for a period of 10 years from the date of rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. *Cheshire v. Drake*, 223 N.C. 577, 27 S.E.2d 627 (1943).

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of 10 years from the date of rendition of the judgment and not the date of docketing. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Lien Is Lost if Sale Not Made in Ten Years. — This section and § 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of 10 years from the date of the docketing, and notwithstanding execution was begun, but not completed, before the expiration of the 10 years. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

An action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the 10-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and proceeding on the judgment. *Lupton v. Edmundson*, 220 N.C. 188, 16 S.E.2d 840 (1941).

The execution adds nothing by way of prolongation to the life of the lien. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. *Pasour v.*

Rhyne, 82 N.C. 149 (1880); *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

When Mandate to Sell Expires. — A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than 40 days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. *Jeffreys v. Hocutt*, 193 N.C. 332, 137 S.E. 177 (1927).

Time for Issuing Execution. — Leave to issue execution upon a docketed judgment may be granted at any time within 10 years from the docketing. *Adams v. Guy*, 106 N.C. 275, 11 S.E. 535 (1890).

Motion to Issue Execution Held Timely. — Motion for leave to issue execution was made in apt time, even though the 10 years expired pending appeal no undertaking was given, because the time during which judgment creditor was restrained by the operation of the appeal was not to be counted, as the appeal had the effect of preventing issuance of execution within the time prescribed. *Adams v. Guy*, 106 N.C. 275, 11 S.E. 535 (1890).

Where a judgment creditor delayed issuing execution until within a short time before the expiration of the lien of his judgment, and then gave notice of a motion to revive and for leave to issue execution, and the motion was heard and execution was issued after 10 years from the date of the judgment, a purchaser at the execution sale of land got no title as against one who bona fide bought the land during the 10 years. *Lilly v. West*, 97 N.C. 276, 1 S.E. 834 (1887); *Pipkin v. Adams*, 114 N.C. 201, 19 S.E. 105 (1894).

The same principle applied where the execution was levied before the expiration of the lien but the sale did not take place until after the expiration of the lien. *Spicer v. Gambill*, 93 N.C. 378 (1885).

Execution sale held less than 10 days before the expiration of 10 years after rendition of the judgment was held ineffective, since under former § 45-28, the sale under execution could "not be deemed to be closed under 10 days," in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the 10-year period. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

Appeal which Was Never Heard Held Not to Stop Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, which motion was denied, and appeal was taken to the judge, and the clerk ordered that execution should not issue until adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the 10-year statute of limitations. *Exum v. Carolina R.R.*, 222 N.C. 222, 22 S.E.2d 424 (1942).

The period during which a judgment debtor is in the bankrupt court and his property in custodia legis should be deducted from the 10-year period, as

provided in this section. *First-Citizens Bank & Trust Co. v. Parker*, 232 N.C. 512, 61 S.E.2d 441 (1950).

Life of Lien not Prolonged by Order of Resale. — Where the bid for real estate, offered at a sale held under authority of an execution within the period of 10 years next after the date of rendition of the judgment upon which the execution issued, was raised, and resales were ordered successively under former § 45-28, and the final sale so ordered took place on a date after the expiration of the 10-year period, such orders did not have the effect of prolonging the statutory life of the lien of the judgment within the meaning of this section. *Cheshire v. Drake*, 223 N.C. 577, 27 S.E.2d 627 (1943), commented on in 22 N.C.L. Rev. 146.

§ 1-235. Of appellate division docketed in superior court; lien.

It is the duty of the appropriate clerk of the appellate division, on application of the party obtaining judgment in one of the courts of that division, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the appellate court otherwise directs. (1881, c. 75, ss. 1, 4; Code, s. 436; Rev., s. 575; C.S., s. 615; 1969, c. 44, s. 2.)

CASE NOTES

Simple rendition of a judgment will not constitute a lien upon the judgment debtor's land until the judgment is docketed in the county where the land lies, as required by statute. *Alsop v. Moseley*, 104 N.C. 60, 10 S.E. 124 (1889).

Application of Amount of Decree of Appellate Court to Docketed Lower

Court Judgment. — Where defendant, by a decree in the appellate court, had recovered from plaintiffs a sum of money, and while the execution was in the hands of the sheriff plaintiffs recovered from defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the

appellate court, and these latter judgments were docketed and executions were taken out upon them and returned nulla bona, plaintiffs were entitled at their request to an order to have the

amount of the decree in favor of defendant applied to their judgments. *Hogan v. Kirkland*, 64 N.C. 250 (1870).

Cited in *Southern Dairies, Inc. v. Banks*, 92 F.2d 282 (4th Cir. 1937).

§ 1-236: Repealed by Session Laws 1971, c. 268, s. 34.

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

Each transcript of judgment from the original docket of the superior or district court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11; 1971, c. 268, s. 8.)

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.

Judgments and decrees rendered in the district courts of the United States within this State may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, recorded, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this State, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the State law to the requirements of the act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the act of August first, one thousand eight hundred and eighty-eight, Chapter seven hundred and twenty-nine. (1889, c. 439; Rev., s. 576; C.S., s. 616; 1943, c. 543.)

CASE NOTES

Date of Docketing Fixes the Lien. — Under the act of Congress as to docketing judgments of federal courts and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this State for the purpose of creating liens,

such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. *Riley v. Carter*, 165 N.C. 334, 81 S.E. 414 (1914).

A condemnation judgment in favor of the United States need not be recorded in the county where the land

lies and cross-indexed in order to protect the federal government's ownership in land that it has acquired. *United States v. Norman Lumber Co.*, 127 F. Supp. 518 (M.D.N.C.), *aff'd*, 223 F.2d 868, *cert. denied*, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

Whether docketing and cross-indexing of federal judgments of condemnation with State court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far Congress has not seen fit to take action with regard to the matter. *Norman Lumber Co. v. United States*, 223 F.2d 868 (4th Cir.), *cert. denied*, 350

U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

Enforcement by United States of Federal Judgment Barred by Statute.

— Judgment rendered by federal district and circuit courts, in order to be liens, must be docketed as required by the State laws, and since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the 10-year limitation contained in this statute. *United States v. Minor*, 235 F. 101 (4th Cir. 1916).

Cited in *Southern Dairies, Inc. v. Banks*, 92 F.2d 282 (4th Cir. 1937).

§ 1-238: Repealed by Session Laws 1943, c. 543.

§ 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) 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, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. 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, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied."

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided, further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided further, that the attorney of record may waive said notice, and said

moneys shall be paid by the clerk of superior court, by signing the judgment docket.

(c) Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered, and the clerk shall thereafter promptly enter the payment on the judgment docket of the court, and the clerk shall immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of the judgment has been sent, and the clerk of each superior court shall thereafter promptly enter the same on the judgment docket of the court and file the original with the judgment roll in the action. If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars (\$100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure. (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.)

CASE NOTES

Clerk Is Statutory Agent of Owner of Judgment. — The effect of this section is to make the clerk the statutory agent of the owner of the judgment, and not of the party making the payment. *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 155 S.E.2d 238 (1967).

The effect of this section is to make the clerk the statutory agent of the owner of a judgment, and it is the clerk's duty to pay money received thereunder to the party entitled thereto. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1968).

There is no duty on the party making payment to require the clerk to make an entry on the judgment docket. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1968).

Credit for Payments Not Entered by Clerk. — A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the superior court in whose office the judgment is docketed, even though the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. *Dalton v. Strickland*, 208 N.C. 27, 179 S.E. 20 (1935).

Misappropriation of Payment by Clerk. — Where a judgment debtor has paid the judgment entered against him

in the office of the clerk of the superior court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. *Gilmore v. Walker*, 195 N.C. 460, 142 S.E. 579 (1928).

Liability for Loss Resulting from Clerk's Failure to Perform Duty. — The clerk of the superior court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. *Dalton v. Strickland*, 208 N.C. 27, 179 S.E. 20 (1935).

The clerk and his surety would be liable to the owner of the judgment for any loss which he might suffer because of the clerk's failure to perform his statutory duty. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E.2d 33 (1968).

A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment. *Sugg v. Bernard*, 122 N.C. 155, 29 S.E. 221 (1898).

Payment when Execution Is in Sheriff's Hands. — A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. *Bynum v. Barefoot*, 75 N.C. 576 (1876).

Receipt of Depreciated Currency. — Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly

authorized by the plaintiff or that the plaintiff had done acts from which such an authority might fairly be implied. *Purvis v. Jackson*, 69 N.C. 474 (1873).

Applied in *United States v. Atlantic Coast Line R.R.*, 237 F.2d 137 (4th Cir. 1956).

Stated in *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in *Pittman v. Snedeker*, 264 N.C. 55, 149 S.E.2d 740 (1965).

§ 1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.

In all cases where the governing authority of any county has caused the instruments or documents filed for record in the office of the clerk of the superior court of such county to be recorded by any system involving the use of microfilm or by the use of any microphotographic system or by any system of photographic recording, it shall be lawful for the clerk of the superior court to keep a record or docket book for the purpose of entering on same payment or payments, credit or satisfaction, assignments or releases in whole or in part of any judgment which has heretofore been recorded by any photographic process above mentioned. For this purpose, the form of such docket or record book shall be substantially as follows:

"..... Superior Court Cancellation, Assignment, Transfer or Release of Judgments, etc.

I (We) do hereby certify that that certain judgment docketed in Judgment Docket, at page, filed day of, 19....., Case No., wherein is (are) Plaintiff(s) and is (are) Defendant(s) has been fully satisfied, released and discharged together with all costs, and interest,

.....
Signed in the presence of

.....
Assistant-Deputy Clerk of
the Superior Court of
..... County

Any entries of payment, credits or satisfaction made on such record or docket book, in substantially the form above mentioned, shall be good and valid payments, credits or satisfactions in all respects as if the same had been duly entered on the original judgment docket before the recording of same by the photographic process or system above mentioned. The clerk of the superior court shall have the authority to forward certificates to the clerk of the superior court of each county to whom a transcript of said judgment has been sent to the same extent and for all the purposes provided in G.S. 1-239, and all payments, credits or satisfactions entered in said docket book or record shall be valid to the same extent as if the same had been entered in the regular judgment docket in accordance with the provisions of G.S. 1-239. (1951, c. 774.)

§ 1-240: Repealed by Session Laws 1967, c. 847, s. 2.

Cross References. — For present provisions as to contribution, see Chapter 1B. As to third-party practice, see Rule 14 of the Rules of Civil Procedure (§ 1A-1).

§ 1-241. Clerk to pay money to party entitled.

The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (1823, c. 1212, s. 2, P.R.; R.C., c. 31, s. 128; Code, s. 439; Rev., s. 578; C.S., s. 619.)

CASE NOTES

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).
Applied in *United States v. Atlantic Coast Line R.R.*, 135 F. Supp. 600 (4th Cir. 1955).

§ 1-242. Credits upon judgments.

Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, a transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of. (1903, c. 558; Rev., s. 579; C.S., s. 620.)

CASE NOTES

Parol Agreement to Convey Land Not within Section. — Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose; such is not in the purview of the statute, and is not enforceable under the statute of frauds. *Brown v. Hobbs*, 154 N.C. 544, 70 S.E. 906 (1911).

Credit for Amount Paid on Covenant Not to Sue. — Where some of defendants, sued as joint tort-feasors, paid plaintiff a sum in consideration of a covenant not to sue, and thereafter the action was prosecuted against the other defendants and judgment was recovered against them, the defendants against whom judgment was entered were enti-

tled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to execution, the motion coming within the spirit if not the letter of this section. *Brown v. Norfolk S.R.R.*, 208 N.C. 423, 181 S.E. 279 (1935); *Ramsey v. Camp*, 254 N.C. 443, 119 S.E.2d 209 (1961).

§ 1-243. For money due on judicial sale.

The Supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (R.C., c. 31, s. 129; Code, s. 941; Rev., s. 1524; C.S., s. 621.)

CASE NOTES

Constitutionality. — This section is constitutional and does not contravene the right of trial by jury. *Ex parte Cotten*, 62 N.C. 79 (1867).

Waiver of Right to Jury Trial. — Although the defendant under this section is entitled to have the issue tried by a jury where the debt sued on was contracted for the purchase of land, if after being duly summoned he fails to appear and answer, he waives that right. *Durham v. Wilson*, 104 N.C. 595, 10 S.E. 683 (1889).

Applicability of Section to Sale by Administrator. — A sale of land for assets, made by an administrator pursuant to a judgment in a probate court in a proceeding instituted for that purpose, is a judicial sale, and the provisions of this section are applicable thereto. *Mauney v. Pemberton*, 75 N.C. 219 (1876); *Chambers v. Penland*, 78 N.C. 53 (1878).

Remedies where Purchaser Fails to Comply with Bid. — If a purchaser at a judicial sale fails to comply with his bid, the court may decree: (1) That he specially perform his contract; (2) That the land be resold and the purchaser released; or (3) That without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. *Hudson v. Coble*, 97 N.C. 260, 1 S.E. 688 (1887).

Motion Is Proper Method to Enforce Purchase Contract. — An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection is timely made; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed. *Lackey v. Pearson*, 101 N.C. 651, 8 S.E. 121 (1888).

But Absent Timely Objection an Independent Action May Be Allowed. — If objection is not made at the proper time the court may proceed with an independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale. Such objection will not be entertained when made for the first time in the appellate court. *Lackey v. Pearson*, 101 N.C. 651, 8 S.E. 121 (1888).

In proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time. *Davis v. Pierce*, 167 N.C. 135, 83 S.E. 182 (1914).

Notice Required. — Any court which orders a judicial sale has the power to make a decree for the money after 10 days' notice thereof. *Ex parte Cotten*, 62 N.C. 79 (1867).

Reopening of Case where Actual Purchase Price was Withheld from Court. — Where commissioner for the private sale of lands for division withheld from the knowledge of the court the actual price the purchaser had agreed to pay, and reported a lesser sum,

which the court confirmed by final judgment, this is an imposition on the court, and would not conclude it from reopening the case on the petition of the commis-

sioner in the cause, after notice, and affording the proper relief. *Lyman v. Southern Coal Co.*, 183 N.C. 581, 112 S.E. 242 (1922).

§ 1-244: Repealed by Session Laws 1971, c. 268, s. 34.

§ 1-245. Cancellation of judgments discharged through bankruptcy proceedings.

When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind. (1937, c. 234, ss. 1-4; 1971, c. 268, s. 8.1.)

Legal Periodicals. — For article on discharge in bankruptcy, see 58 N.C.L. Rev. 723 (1980).

CASE NOTES

Effect of Section. — This statute outlines a procedure which effectively gives notice that judgments which have been discharged in bankruptcy no longer

have the power to create a lien upon property of the discharged debtor. *Clowney v. North Carolina Nat'l Bank*, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.

No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 462.

CASE NOTES

This section refers solely to what an assignee is required to do in order to protect his rights as against a subsequent assignee or other subsequent creditors of or purchasers from the owner of

the judgment. *Houck v. Overcash*, 282 N.C. 623, 193 S.E.2d 905 (1973).

Stated in *Walker Mfg. Co. v. Dickerson, Inc.*, 510 F. Supp. 329 (W.D.N.C. 1980).

ARTICLE 24.

Confession of Judgment.

§§ 1-247 to 1-249: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to confession of judgment, see now Rule 68.1 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 25.

Submission of Controversy without Action.

§§ 1-250 to 1-252: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 26.

Declaratory Judgments.

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

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Cross References. — As to declaratory judgments, see also Rule 57 of the Rules of Civil Procedure (§ 1A-1).

Legal Periodicals. — For explanation and comments regarding this section, see 9 N.C.L. Rev. 20; 9 N.C.L. Rev. 352.

For note on this section, see 12 N.C.L. Rev. 57.

For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

CASE NOTES

- I. In General.
- II. Scope of Article.
- III. Actual Controversy Requirement.
- IV. What May Be Determined by Declaratory Judgment.
 - A. In General.
 - B. Actions in Which Declaratory Judgment Held Available.
 - C. Actions in Which Declaratory Judgment Held Unavailable.
- V. Procedure.

I. IN GENERAL.

Common Law. — It would appear that declaratory relief was unknown at common law, inasmuch as the common-law conception of courts was that they were a branch of the government created to redress private wrongs and punish the commission of crimes and misdemeanors. The courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

This Article Preserves the Inherent Function of Judicial Tribunals. — While the Uniform Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Hicks v. Hicks*, — N.C. App. —, 299 S.E.2d 275 (1983).

An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order to preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249

S.E.2d 402 (1978); *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Purpose of Article. — The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The Declaratory Judgment Act may be utilized to alleviate uncertainty and clarify litigation. *Travelers Ins. Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

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, nor a substitute or alternate method of contesting the validity of wills. *Farthing v. Farthing*, 235 N.C. 634, 70 S.E.2d 664 (1952); *Bennett v. Attorney Gen.*, 245 N.C. 312, 96 S.E.2d 46 (1957).

The Declaratory Judgment Act affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation. *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, — N.C. App. —, 300 S.E.2d 877 (1983).

The Declaratory Judgment Act is to be liberally construed and administered. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there

must be no uncertainty that the loss will occur or that the asserted right will be invaded. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

Applied in *Edgerton v. Hood*, 205 N.C. 816, 172 S.E. 481 (1934); *Farnell v. Dongan*, 207 N.C. 611, 178 S.E. 77 (1935); *Carr v. Jimmerson*, 210 N.C. 570, 187 S.E. 800 (1936); *E.B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 199 S.E. 405 (1938); *Branch Banking & Trust Co. v. Toney*, 215 N.C. 206, 1 S.E.2d 538 (1939); *Hilton Lumber Co. v. Estate Corp.*, 215 N.C. 649, 2 S.E.2d 869 (1939); *Burcham v. Burcham*, 219 N.C. 357, 13 S.E.2d 615 (1941); *Moore v. Sampson County*, 220 N.C. 232, 17 S.E.2d 22 (1941); *Oxford Orphanage v. Kittrell*, 223 N.C. 427, 27 S.E.2d 133 (1943); *Williams v. Rand*, 223 N.C. 734, 28 S.E.2d 247 (1943); *Patterson v. Brandon*, 226 N.C. 89, 36 S.E.2d 717, 163 A.L.R. 1150 (1946); *Buffaloe v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946); *First Sec. Trust Co. v. Henderson*, 226 N.C. 649, 39 S.E.2d 804 (1946); *In re Battle*, 227 N.C. 672, 44 S.E.2d 212 (1947); *Williams v. Johnson*, 228 N.C. 732, 47 S.E.2d 24 (1948); *Ward v. Black*, 229 N.C. 221, 49 S.E.2d 413 (1948); *First Nat'l Bank v. Brawley*, 231 N.C. 687, 58 S.E.2d 706 (1950); *Elmore v. Austin*, 232 N.C. 13, 59 S.E.2d 205 (1950); *Williamson v. Williamson*, 232 N.C. 54, 59 S.E.2d 214 (1950); *Blue Ridge Mem. Park v. Union Nat'l Bank, Inc.*, 237 N.C. 547, 75 S.E.2d 617 (1953); *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953); *City of Greensboro v. Smith*, 239 N.C. 138, 79 S.E.2d 486 (1954); *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954); *Hubbard v. Wiggins*, 240 N.C. 197, 81 S.E.2d 630 (1954); *Julian v. Lawton*, 240 N.C. 436, 82 S.E.2d 210 (1954); *Mesimore v. Palmer*, 245 N.C. 488, 96 S.E.2d 356 (1957); *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957); *Wachovia Bank & Trust Co. v. Taliaferro*, 246 N.C. 121, 97 S.E.2d 776 (1957); *Carter v. Davis*, 246 N.C. 191, 97 S.E.2d 838 (1957); *Walker v. Moss*, 246 N.C. 196, 97 S.E.2d 836 (1957); *Reed v. Elmore*, 246 N.C. 221, 98 S.E.2d 360 (1957); *Competitor Liaison Bureau of Nascar, Inc. v. Midkiff*, 246 N.C. 409, 98 S.E.2d 468 (1957); *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E.2d 869 (1957); *Bullock v. Bullock*, 251 N.C. 559, 111 S.E.2d 837 (1960); *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960);

Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); *Eastern Carolina Taste-Freez, Inc. v. City of Raleigh*, 256 N.C. 208, 123 S.E.2d 632 (1962); *Cline v. Olson*, 257 N.C. 110, 125 S.E.2d 320 (1962); *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963); *Thomas v. Thomas*, 258 N.C. 590, 129 S.E.2d 239 (1963); *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963); *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963); *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963); *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964); *Adams v. Adams*, 261 N.C. 342, 134 S.E.2d 633 (1964); *Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*, 262 N.C. 691, 138 S.E.2d 512 (1964); *Walker v. City of Charlotte*, 262 N.C. 697, 138 S.E.2d 501 (1964); *First Union Nat'l Bank v. Broyhill*, 263 N.C. 189, 139 S.E.2d 214 (1964); *Central Carolina Bank & Trust Co. v. Bass*, 265 N.C. 218, 143 S.E.2d 689 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967); *Grant v. Banks*, 270 N.C. 473, 155 S.E.2d 87 (1967); *Breece v. Breece*, 270 N.C. 605, 155 S.E.2d 65 (1967); *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967); *Ray v. Ray*, 270 N.C. 715, 155 S.E.2d 185 (1967); *Harrelson v. City of Fayetteville*, 271 N.C. 87, 155 S.E.2d 749 (1967); *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967); *Sigmund Sternberger Found. v. Tannenbaum*, 273 N.C. 658, 161 S.E.2d 116 (1968); *City of Raleigh v. Norfolk S. Ry.*, 4 N.C. App. 1, 165 S.E.2d 745 (1969); *Dillon v. North Carolina Nat'l Bank*, 6 N.C. App. 584, 170 S.E.2d 571 (1969); *Godfrey v. Patrick*, 8 N.C. App. 510, 174 S.E.2d 674 (1970); *Kale v. Forrest*, 9 N.C. App. 82, 175 S.E.2d 752 (1970); *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 9 N.C. App. 193, 175 S.E.2d 741 (1970); *Price v. Price*, 11 N.C. App. 657, 182 S.E.2d 217 (1971); *North Carolina Nat'l Bank v. Carpenter*, 12 N.C. App. 19, 182 S.E.2d 3 (1971); *Stephens v. North Carolina Nat'l Bank*, 12 N.C. App. 323, 183 S.E.2d 287 (1971); *Duplin County Bd. of Educ. v. Carr*, 15 N.C. App. 690, 190 S.E.2d 653 (1972); *Reeves Bros. v. Town of Rutherfordton*, 282 N.C. 559, 194 S.E.2d 129 (1973); *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974); *Sterling Cotton Mills, Inc. v. Vaughan*, 24 N.C. App. 696, 212 S.E.2d 199 (1975); *Gaddy v. North Carolina Nat'l Bank*, 25 N.C. App. 169, 212 S.E.2d 561 (1975); *White v. Alexander*, 290 N.C. 75, 224

S.E.2d 617 (1976); Cedar Creek Enter., Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Suitt Constr. Co. v. Seaman's Bank for Sav., 30 N.C. App. 155, 226 S.E.2d 408 (1976); Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

Quoted in Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

Stated in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Cited in In re Reynolds, 206 N.C. 276, 173 S.E.2d 789 (1934); Corl v. Corl, 209 N.C. 7, 182 S.E. 725 (1935); Peyton v. Smith, 213 N.C. 155, 195 S.E. 379 (1938); Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Efird v. Efird, 234 N.C. 607, 68 S.E.2d 279 (1951); Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955); North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Taylor v. Taylor, 243 N.C. 726, 92 S.E.2d 136 (1956); Blanchard v. Ward, 244 N.C. 142, 92 S.E.2d 776 (1956); Price v. Davis, 244 N.C. 229, 93 S.E.2d 93 (1956); Town of Farmville v. A.C. Monk & Co., 250 N.C. 171, 108 S.E.2d 479 (1959); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Brown v. Byrd, 252 N.C. 454, 113 S.E.2d 804 (1960); Andrews v. Andrews, 253 N.C. 139, 116 S.E.2d 436 (1960); Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 117 S.E.2d 733 (1961); Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966); Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Howell v. Gentry, 8 N.C. App. 145, 174 S.E.2d 61 (1970); Latham v. Taylor, 10 N.C. App. 268, 178 S.E.2d 122 (1970); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); Reading

v. Dixon, 10 N.C. App. 319, 178 S.E.2d 322 (1971); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973); Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Revco S.E. Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974); Myers v. Southern Nat'l Bank, 21 N.C. App. 202, 204 S.E.2d 30 (1974); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Houck v. Stephens, 26 N.C. App. 608, 216 S.E.2d 490 (1975); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); In re Grady, 33 N.C. App. 477, 235 S.E.2d 425 (1977); Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979); Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980); Beveridge v. Howland, 301 N.C. 498, 271 S.E.2d 910 (1980); State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980), rev'd on other grounds, 302 N.C. 274, 275 S.E.2d 399 (1981); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331 (1981); Nationwide Mut. Ins. Co. v. Taylor, 55 N.C. App. 76, 284 S.E.2d 532 (1981); Bowlin v. Bowlin, 55 N.C. App. 100, 285 S.E.2d 273 (1981); Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982); Pittman v. Thomas, — N.C. —, 299 S.E.2d 207 (1983); Chem-Security Systems v. Morrow, — N.C. App. —, 300 S.E.2d 393 (1983).

II. SCOPE OF ARTICLE.

Scope of Article, Generally. — For a discussion of principles concerning the scope of the Declaratory Judgment Act, see Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

While proceedings under this Article have been given a wide latitude, they are not without limitations, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947); Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979). See also, Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

This Article does not license litigants to fish in judicial ponds for

legal advice. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974).

The courts of this State do not issue anticipatory judgments resolving controversies that have not arisen. *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

This Article does not authorize the adjudication of mere abstract or theoretical questions. *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

This Article does not extend to the submission of the theoretical problem or a mere abstraction, and it is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931); *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1933); *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27 (1936); *Branch Banking & Trust Co. v. Whitfield*, 238 N.C. 69, 76 S.E.2d 334 (1953); *Competitor Liaison Bureau of Nascar, Inc. v. Blevins*, 242 N.C. 282, 87 S.E.2d 490 (1955).

The sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions is fully applicable to the Declaratory Judgment Act. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

Nor the Giving of Advisory Opinions. — The Uniform Declaratory Judgment Act does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d

404 (1949); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Hicks v. Hicks*, — N.C. App. —, 299 S.E.2d 275 (1983).

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise or give abstract opinions. *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960).

This Article was not intended to require the court to give advisory opinions when no genuine controversy presently exists between the parties. *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

The Declaratory Judgment Act does not require the court to give a purely advisory opinion which the parties might put on ice to be used if and when occasion might arise. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

No Justiciable Controversy where Action Is Barred. — Where the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgment Act. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

A moot question is not within the scope of the Declaratory Judgment Act. *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

It is not required for purposes of jurisdiction under the Uniform Declaratory Judgment Act that the plaintiff allege that his rights have been invaded by the defendant prior to commencement of the action. Nevertheless, the courts have construed the law in such a manner that the jurisdiction may be protected against mere academic inquiry when the questions presented are altogether moot,

arising out of no necessity for the protection of any rights or avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. *Hicks v. Hicks*, — N.C. App. —, 299 S.E.2d 275 (1983).

Unavailability of Adequate Remedy at Law Not Necessary. — For a court to have jurisdiction under the Declaratory Judgment Act, it is not necessary for a plaintiff to show that an adequate remedy at law is unavailable. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

III. ACTUAL CONTROVERSY REQUIREMENT.

The touchstone of the Declaratory Judgment Act is the presence of a justiciable controversy, where the pleadings demonstrate a real controversy and the need for a declaration of rights. *State ex rel. Hunt v. North Carolina Reinsurance Facility*, 49 N.C. App. 206, 271 S.E.2d 302 (1980), rev'd on other grounds, 302 N.C. 274, 275 S.E.2d 399 (1981).

And the existence of a genuine controversy is a jurisdictional necessity. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969); *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978); *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

Parties cannot confer jurisdiction upon a court by consent, stipulation or agreement in declaratory judgment proceedings. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

Action for a declaratory judgment will lie only where there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949); *Branch Banking & Trust Co. v. Whitfield*, 238 N.C. 69, 76 S.E.2d 334 (1953); *City of Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958); *Haley v. Pickelsimer*, 261 N.C. 293, 134 S.E.2d 697 (1964); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249

S.E.2d 402 (1978); *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979); *Hicks v. Hicks*, — N.C. App. —, 299 S.E.2d 275 (1983).

Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. *Wright v. McGee*, 206 N.C. 52, 173 S.E. 31 (1934); *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

The broad terms of this Article do not confer upon the court an unlimited jurisdiction; and the court will not entertain an ex parte proceeding of a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942).

Arising Out of Conflicting Contentions as to Rights and Liabilities.

— The superior court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance or franchise. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968); *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

For a court to have jurisdiction under the Declaratory Judgment Act it is required only that plaintiff allege in his complaint and show at trial that a real controversy arising out of the parties' opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

To constitute an actual controversy there need not exist an actual right of action in one party against the other in which consequential relief might be granted. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

It need not be shown by plaintiff that the question is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942).

But Mere Apprehension of a Future Action Is Not Sufficient. — A mere fear or apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment; before granting such relief, the court must be convinced that litigation sooner or later appears to be unavoidable. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969); *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

The mere threat of an action to rescind a sale of personal property or to sue for damages is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act. *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

Litigation Must Appear Unavoidable. — It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the courts be convinced that the litigation appears to be unavoidable. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974).

Jurisdiction lies where the court is convinced that litigation, sooner or later, appears to be unavoidable. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

A Mere Difference of Opinion Is Not Enough. — A mere difference of opinion between the parties as to whether one has the right to purchase or condemn the property of another, without any practical bearing on any contemplated action, does not constitute a genuine controversy. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978). See also, *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942).

But where there is no doubt that litigation is forthcoming, plaintiff

should not be required to await suit, perhaps indefinitely, thereby running the risk that evidence relating to the facts will be lost. This is especially true where in the meantime plaintiff would have to maintain sufficient reserves to cover the claim. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

"Bootstrapping" Not Allowed. — Where plaintiffs sought by their complaint a ruling creating a new interpretation of Internal Revenue Code sections, and then sought to use such ruling to create a controversy between the parties justifying the grant of relief, such "bootstrapping" would not suffice for the jurisdictional prerequisites of a declaratory judgment action. *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966); *Walker v. City of Charlotte*, 268 N.C. 345, 150 S.E.2d 493 (1966).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

A. In General.

Editor's Note. — As to what matters may be determined by declaratory judgment, see also § 1-254 and the case notes thereunder.

A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Under which Only Civil Matters May Be Determined. — Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938).

An action is maintainable under the Declaratory Judgment Act only insofar as it affects the civil rights, status and other relations in the present actual

controversy between parties. *Chadwick v. Salter*, 254 N.C. 389, 119 S.E.2d 158 (1961).

And Declaratory Judgment Will Not Be Granted to Determine Criminal Issues. — A declaratory judgment will not be granted when its only effect is to determine questions which properly should be decided in a criminal action. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

But the courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971); *Commodities Int'l, Inc. v. Eure*, 22 N.C. App. 723, 207 S.E.2d 777 (1974).

In General Only Questions of Law May Be Determined. — Absent waiver of jury trial, the trial court under this Article may only determine questions of law. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E.2d 170, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978).

The purpose of this Article is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. *Prudential Ins. Co. of Am. v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940).

Declaratory Judgment May Be Used to Determine Construction and Validity of a Statute. — This section furnishes a proper method for determining all controversies relative to the construction and validity of a statute. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

And to Determine a Statute's Constitutionality. — It is the rule in this jurisdiction that a statute will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees. This may be done in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

But Declaratory Judgment Will Not Lie Prior to Statute's Enactment. — It is unnecessary for an assailed statute to have taken effect in order to entitle

one whose rights it affects to contest it by declaratory action. However, the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

And Statute Must Be Challenged by One Who Is Directly Affected. — The validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under this Article, but only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby. *City of Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966); *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

This Article does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961).

Adjudication of Sales Tax Liability Not Available. — The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act for adjudication of his tax liability under the sales tax statute, and hence the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act. *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

As State Cannot Be Delayed in Collection of Revenue. — As broad and comprehensive as it is, this Article does not supersede the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its existence depends. *Bragg Dev. Co. v. Braxton*, 239 N.C. 427, 79 S.E.2d 918 (1954).

An action to obtain a judicial declaration of plaintiff's right to an easement is authorized by the Declaratory Judgment Act. *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this Article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. *Carver v.*

Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949).

A controversy as to the extent of an easement granted by the State may be the basis of a suit against the State in the superior court under this section, since such suit involves title to realty within the purview of § 41-10.1. *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963); *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

But State May Not Be Enjoined from Interfering with Easement. — In an action under this section to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with an easement as defined by the court, since no action, except as provided in § 143-291, may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963).

Article Does Not Vest in Superior Court Power to Supervise Officials of Inferior Courts. — While the Declaratory Judgment Act is comprehensive in scope and purpose, the legislature, in enacting it, did not intend to vest in the superior courts of the State the general power to oversee, supervise, direct or instruct officials of inferior courts in the discharge of their official duties. *Town of Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E.2d 774 (1954); *City of Henderson v. County of Vance*, 260 N.C. 529, 133 S.E.2d 201 (1963).

This Article does not confer upon one judge authority to advise a litigant upon a matter of procedure in another trial before another judge. *Redmond v. Farthing*, 217 N.C. 678, 9 S.E.2d 405 (1940).

No Jurisdiction over Workers' Compensation Cases. — In an action instituted in the superior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose that an employee-employer relationship exists so that the parties are subject to the provisions of the Workers' Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. *Cox v. Pitt County Transp. Co.*, 259 N.C. 38, 129 S.E.2d 589 (1963).

The Declaratory Judgment Act may not be used to determine whether or not an employer's insurance carrier is entitled to the right of subrogation against funds received from third party

tort-feasor under the provisions of § 97-10.2, since the Industrial Commission has exclusive original jurisdiction to determine such question. *Cox v. Pitt County Transp. Co.*, 259 N.C. 38, 129 S.E.2d 589 (1963).

Action to Quiet Title. — A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Marketability of Land. — The Declaratory Judgment Act does not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949).

Construction and Coverage of Insurance Contracts. — The Declaratory Judgment Act, while not applicable to claims under the Workers' Compensation Act, is applicable to the construction of insurance contracts and in determining the extent of coverage when there is a controversy as to whether workers' compensation or insurance covers. *Travelers Ins. Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

Generally questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief. *Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*, 258 N.C. 69, 128 S.E.2d 19 (1962); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

A declaratory judgment action which served the dual purpose of determining with finality an insurance company's obligation to defend insured in a pending tort action and the company's ultimate liability for any judgment rendered against the insured was a perfect case for declaratory judgment. *Stout v. Grain Dealers Mut. Ins. Co.*, 307 F.2d 521 (4th Cir. 1962).

The Declaratory Judgment Act is applicable to construction of insurance contracts and in determining the extent of coverage under a policy. *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, — N.C. App. —, 300 S.E.2d 877 (1983).

B. Actions in Which Declaratory Judgment Held Available.

Action to Determine Applicability of Administrative Procedure Act to Governor's Action. — A declaratory

judgment action was appropriate to obtain a determination as to whether the Governor had to follow the procedure set out in the Administrative Procedure Act in removing for cause a member of the North Carolina Cemetery Commission and whether the Governor had authority to suspend a member of the commission pending final determination on the merits. *James v. Hunt*, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Challenge by Governor to Reinsurance Facility's Collection of Recoupment Surcharges. — The Governor's constitutional powers, duties and obligations to the people of North Carolina generally, including that significant class of citizens who are compelled to obtain automobile liability insurance in order to use the public roads and highways of the State, constituted significant interest in controversy generated by the action of the Board of Governors of the North Carolina Reinsurance Facility in charging and collecting recoupment surcharges from motor vehicle insurance policyholders without filing the surcharge and supplemental information with the Commissioner of Insurance, which interest was sufficient to give the Governor standing to seek a declaration as to the legality of their action. *State ex rel. Hunt v. North Carolina Reinsurance Facility*, 49 N.C. App. 206, 271 S.E.2d 302 (1980), rev'd on other grounds, 302 N.C. 274, 275 S.E.2d 399 (1981).

Question of Insurer's Liability. — An insurer who issued a liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of the Uniform Declaratory Judgment Act to determine whether the truck was being used at the time of an accident within the exception clause of the policy. *Lumber Mut. Cas. Ins. Co. v. Wells*, 225 N.C. 547, 35 S.E.2d 631 (1945).

Interpretation of Testamentary Trust. — A bona fide controversy justiciable under the Declaratory Judgment Act was presented by the pleadings and stipulations in a trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of land constituting the trust corpus to testator's widow and daughter upon termination of the trust. *First-Citizens Bank & Trust Co. v. Carr*, 279 N.C. 539, 184 S.E.2d 268 (1971).

An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who were beneficiaries of the trust were made parties, was justiciable under this Article. *Johnson v. Wagner*, 219 N.C. 235, 13 S.E.2d 419 (1941).

Question as to Right of Adopted Children to Share in Corpus of Trust.

— Where, in an action to construe a will, the parties sought an adjudication as to whether three adopted children of testator's nephew would be entitled to share in the corpus of a trust after the death of the life beneficiaries, it was held that since the question was one of law and was presently determinable, and since it would not be moot unless all three adopted children were to die prior to the death of the survivor of the life beneficiaries, the parties were entitled to a determination of the question. *Wachovia Bank & Trust Co. v. Green*, 238 N.C. 339, 78 S.E.2d 174 (1953).

Challenge to Order of Board of Paroles. — The Declaratory Judgment Act is an appropriate means whereby a prisoner who is currently serving a valid sentence for a crime committed during his parole may challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked would be served upon completion of the sentence for the crime committed during the parole. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Challenge to Firemen's Pension Fund Act. — Under the broad terms of the Declaratory Judgment Act there was held to be a right to challenge the Firemen's Pension Fund Act, § 118-18 et seq., in the superior court. It did not appear that the case was an action against the State and the allegations were sufficient to show the court had jurisdiction of the cause. *American Equitable Assurance Co. v. Gold*, 248 N.C. 288, 103 S.E.2d 344 (1958).

Right to Close Alleyway. — Where an alleyway ending in a cul-de-sac was referred to in the respective deeds to contiguous lots, the right to close a part of the alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954); *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy as to whether deeds created a fee upon special limitation

and as to whether title would revert to grantors upon threatened happening of contingency could be maintained under the Declaratory Judgment Act. *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114, cert. denied, 350 U.S. 983, 76 S. Ct. 469, 100 L. Ed. 851 (1955); *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

C. Actions in Which Declaratory Judgment Held Unavailable.

Challenge to Statutes Authorizing Land Acquisition for Park Purposes.

— Where none of the plaintiffs seeking a declaratory judgment that Article 2 of Chapter 113 and Article 3 of Chapter 113A were unconstitutional and praying that defendants be permanently enjoined from adopting a "Master Plan" for the Eno River State Park had as yet been directly and adversely affected by the statutes they sought to challenge, and where no condemnation proceeding affecting any lands of the plaintiffs had as yet been instituted, and all that had occurred was that employees of the Division of Parks and Recreation had made initial alternative planning proposals for a State park which contemplated ultimate acquisition of certain lands of the plaintiffs for park purposes, the plaintiffs failed to show the existence of a genuine controversy cognizable under the Declaratory Judgment Act. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

Challenge to Insurance Regulation without Exhausting Administrative Remedies. — Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where plaintiff failed to exhaust available administrative remedies. *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

A proceeding for a declaration as to how the estate of deceased passed by purported will would be dismissed where the record of probate of the instrument disclosed on its face that the paper-writing had not been proven as required by statute, since in such instance the question of title to property under the paper-writing was moot.

Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

Action to determine whether salaries paid certain employees should be included in computing contributions to be paid by an employer under the Employment Security Law involved solely an issue of fact and did not involve any right, status or legal relation, and the employer could not maintain proceedings under this Article to determine the question. *Prudential Ins. Co. of Am. v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940).

Failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court could not be made the subject of an action instituted under the Declaratory Judgment Act. *Town of Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E.2d 774 (1954).

V. PROCEDURE.

Plaintiff must show the existence of the conditions upon which the court's jurisdiction may be invoked. *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

But Specific Reference to this Article Is Not Required. — It is not error if an action instituted under this section fails to make specific reference to the statute in the complaint. It is the facts alleged that determine the nature of the relief to be granted. *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960); *Langdon v. Hurdle*, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

When Motion to Dismiss under Rule 12(b)(6) Is Proper. — When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a motion to dismiss under § 1A-1, Rule 12(b)(6). *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

When Summary Judgment Is Appropriate. — Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law. *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E.2d 521 (1982), cert. granted, — N.C. —, 299 S.E.2d 650 (1983).

Summary judgment may be entered, when otherwise proper, upon the motion of either plaintiff or defendant in an action for a declaratory judgment. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

As to the use of demurrers in declaratory judgment actions, see *Walker v. City of Charlotte*, 268 N.C. 345, 150 S.E.2d 493 (1966); *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

A declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing, in the absence of a stipulation. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d

654 (1964); *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

Effect of Failure to Appear and Answer. — The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions. *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

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

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

CASE NOTES

Editor's Note. — As to what matters may be determined by declaratory judgment, see also the case notes to § 1-253.

Construction of Contract before or after Breach. — When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).

The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their

rights under the statute. *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967).

A statute can be declared unconstitutional and its enforcement enjoined in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. *Webster v. Perry*, 367 F. Supp. 666 (M.D.N.C. 1973), judgment vacated, 417 U.S. 963, 94 S. Ct. 3166, 41 L. Ed. 2d 1136 (1974).

A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interests involved therein. *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967).

A suit to determine the validity of a city zoning ordinance is a proper

case for a declaratory judgment. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Taylor v. City of Raleigh*, 22 N.C. App. 259, 206 S.E.2d 401 (1974), *aff'd*, 290 N.C. 608, 227 S.E.2d 576 (1976).

A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under this section for a declaratory judgment. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976); *Stutts v. Swain*, 30 N.C. App. 611, 228 S.E.2d 750, *cert. denied*, 291 N.C. 178, 229 S.E.2d 692 (1976).

Owners of property in the adjoining area affected by a city zoning ordinance are parties in interest entitled to maintain an action under this section. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

Persons Entitled to Bring Action for Construction of Will. — Any interested party may obtain a declaration of rights, status or any other legal relation under a will by bringing an action for declaratory judgment. *Taylor v. Taylor*, 301 N.C. 357, 271 S.E.2d 506 (1980).

Determination of the status of adopted children under the provisions of a will is clearly within the purpose of the Uniform Declaratory Judgment Act. *Stoney v. MacDougall*, 31 N.C. App. 678, 230 S.E.2d 592 (1976), *cert. denied*, 291 N.C. 716, 232 S.E.2d 208 (1977).

Release of Prospective Testamentary Benefit. — Where the heart of a case was the determination of the effect, meaning and validity of a release of a testamentary benefit from a prospective testator and the rights of the parties thereunder, there was a real controversy which plaintiffs were entitled to have determined. *Stewart v. McDade*, 256 N.C. 630, 124 S.E.2d 822 (1962).

In an action by an executor under the Declaratory Judgment Act for construction of a will and to determine the validity of an assignment of interest

in a legacy, a motion to dismiss for want of jurisdiction would be denied where the controversy over the validity of assignment was originally brought into court by the executor, as the executor is entitled to have the matter determined. *First Sec. Trust Co. v. Henderson*, 226 N.C. 649, 39 S.E.2d 804 (1946).

An action to modify or reform a judgment may not be maintained under the Declaratory Judgment Act. *Howland v. Stitzer*, 231 N.C. 528, 58 S.E.2d 104 (1950).

Applied in *North Carolina State Art Soc'y v. Bridges*, 235 N.C. 125, 69 S.E.2d 1 (1952); *Walters v. Baptist Children's Home of N.C., Inc.*, 251 N.C. 369, 111 S.E.2d 707 (1959); *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961); *Gregory v. Godfrey*, 254 N.C. 215, 118 S.E.2d 538 (1961); *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970); *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971); *North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co.*, 48 N.C. App. 508, 269 S.E.2d 688 (1980).

Quoted in *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954); *Bennette v. Attorney Gen.*, 245 N.C. 312, 96 S.E.2d 46 (1957); *American Equitable Assurance Co. v. Gold*, 248 N.C. 288, 103 S.E.2d 344 (1958); *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960).

Stated in *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968); *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Cited in *Rountree v. Rountree*, 213 N.C. 252, 195 S.E. 784 (1938); *First Sec. Trust Co. v. Henderson*, 225 N.C. 567, 35 S.E.2d 694 (1945); *Citizens Nat'l Bank v. Phillips*, 235 N.C. 494, 70 S.E.2d 509 (1952); *Langdon v. Hurdle*, 15 N.C. App. 158, 189 S.E.2d 517 (1972); *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

§ 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:

- (1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

- (2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
- (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 102, s. 3.)

CASE NOTES

Advice as to Inheritance Taxes. — An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. *Wachovia Bank & Trust Co. v. Lambeth*, 213 N.C. 576, 197 S.E. 179, 117 A.L.R. 117 (1938).

Invocation of General Equitable Powers. — A proceeding may not be maintained under this Article by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for the benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do

or refrain from doing any act in their fiduciary capacity. *Brandis v. Trustees of Davidson College*, 227 N.C. 329, 41 S.E.2d 833 (1947), commented on in 26 N.C.L. Rev. 69.

Applied in *Rierson v. Hanson*, 211 N.C. 203, 189 S.E. 502 (1937); *Citizens Nat'l Bank v. Corl*, 225 N.C. 96, 33 S.E.2d 613 (1945); *Cunningham v. Brigman*, 263 N.C. 208, 139 S.E.2d 353 (1964); *Kale v. Forrest*, 9 N.C. App. 82, 175 S.E.2d 752 (1970); *Palmer v. Ketner*, 29 N.C. App. 187, 223 S.E.2d 913 (1976); *Wing v. Wachovia Bank & Trust Co.*, 44 N.C. App. 402, 261 S.E.2d 279 (1980).

Quoted in *Dickey v. Herbin*, 250 N.C. 321, 108 S.E.2d 632 (1959); *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 113 S.E.2d 689 (1960).

Cited in *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

§ 1-256. Enumeration of declarations not exclusive.

The enumeration in G.S. 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in G.S. 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

Legal Periodicals. — For comment on taxpayers' actions, see 13 *Wake Forest L. Rev.* 397 (1977).

CASE NOTES

Purpose of Section. — The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. *Brandis v. Trustees of Davidson College*, 227 N.C. 329, 41 S.E.2d 833 (1947); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

This section enlarges the specific categories mentioned elsewhere in the statute. *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942).

Applied in *James v. Hunt*, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Quoted in *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954).

Cited in *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44 (1979); *Wing v. Wachovia Bank & Trust Co.*, 44 N.C. App. 402, 261 S.E.2d 279 (1980).

§ 1-257. Discretion of court.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (1931, c. 102, s. 5.)

Legal Periodicals. — For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

CASE NOTES

Applied in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

§ 1-258. Review.

All orders, judgment and decrees under this Article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

CASE NOTES

This section does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the Declaratory Judgment Act. Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959).

Conclusive Effect of Findings of Fact. — The trial court's findings of fact in a declaratory judgment action are con-

clusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed even though there is evidence which might sustain findings to the contrary and even though incompetent evidence may have been admitted. Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

§ 1-259. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

CASE NOTES

Waiver of Petition and Notice Requirement. — In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, where defendant stipulated as to the exact amount of the "tapping privilege fees" collected by it and to the pre-

cise total amount of accumulated interest on the payments made under protest and did not object to the procedure of entering a judgment for money in the declaratory judgment proceeding, defendant waived the requirement of this section as to service of petition and

notice. *Raintree Corp. v. City of Charlotte*, 49 N.C. App. 391, 271 S.E.2d 524 (1980).

Applied in *Northwestern Bank v. Robertson*, 39 N.C. App. 403, 250 S.E.2d 727 (1979).

§ 1-260. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

Cross References. — As to necessary joinder of parties, see Rule 19 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

The language of this section is clear and specific. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).

Who Is a "Necessary Party". — A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action which completely and finally determines the controversy without his presence as a party. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Who Are "Proper Parties". — Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting

them, and whether they shall be brought in or not is within the discretion of the court. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Section Not Intended to Authorize Proceedings in Absence of Necessary Party. — The latter portion of the first sentence of this section ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E.2d 679 (1958).

And Judgment Should Not Be Entered Where Rights of Nonparties Would Be Prejudiced. — While persons who are not parties to a proceeding for a declaratory judgment would not be bound by the judgment, judgment should not be entered in their absence if they have such an interest in the controversy that their rights would be prejudicially affected by the judgment. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Refusal to Proceed with Construction of Will in Absence of Necessary Party. — Where it appears in a case involving the construction of a will that the absence of a necessary party would prevent the entry of a judgment finally settling and determining the

question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E.2d 869 (1957); *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Person Contracting with City Must Be Made Party to Suit on Contract's Validity. — The court cannot pass upon the validity of a city's contract where the person contracting with the city had not been made a party. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

Where the purpose of an action was to obtain a declaration that a contract between defendant and another party was invalid, the other party, not being a party to the action, would not be legally bound by a judgment rendered therein, but its rights, if any, under the contract with the defendant would be adversely affected by a declaration of rights, and if the plaintiff were to prevail in the action, the defendant, though forbidden by the judgment of the court to perform its contract, might well be sued for nonperformance by the absent party; therefore, that party was a necessary party in a proceeding to declare its contract with the defendant invalid, and the court below could not properly determine the validity of that contract without making the absent party a party to the proceeding. *North*

Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Parties to Action to Determine Right to Close Alleyway. — The owners of the fee in an alleyway in which owners of contiguous lots had an easement were necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the cul-de-sac end might be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open. But neither a lot owner who had leased her entire interest, nor a party who had agreed to lease the alleyway only in the event that a part of it could be closed were necessary parties to the proceeding. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954).

Applied in *Marsden v. Southern Flight Serv., Inc.*, 192 F. Supp. 418 (M.D.N.C. 1961); *Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co.*, 261 N.C. 716, 136 S.E.2d 124 (1964); *North Carolina Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

Stated in *Elliott v. Ballentine*, 7 N.C. App. 682, 172 S.E.2d 552 (1970).

Cited in *Dickey v. Herbin*, 250 N.C. 321, 108 S.E.2d 632 (1959); *Chadwick v. Salter*, 254 N.C. 389, 119 S.E.2d 158 (1961); *Griffin v. Fraser*, 39 N.C. App. 582, 251 S.E.2d 650 (1979); *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44 (1979).

§ 1-261. Jury trial.

When a proceeding under this Article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Legal Periodicals. — For article, "Advisory Rulings by Administrative

Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Absent waiver of jury trial, trial court may only determine questions of law under this Article. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E.2d 170, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978).

Exclusion under Insurance Policy. — Where insurer alleged exclusion from

liability on policy and insured alleged coverage, and coverage was conceded unless use of vehicle was within exception clause in policy, the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. *Lumber Mut. Cas. Ins. Co. v.*

Wells, 225 N.C. 547, 35 S.E.2d 631 (1945).

Applied in Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962).

Stated in Zopfi v. City of Wilmington,

273 N.C. 430, 160 S.E.2d 325 (1968); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C. 1962).

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

Proceedings under this Article shall be tried at a session of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the trial division in which the proceeding is pending. If the parties do not agree upon a judge for the hearing and the proceeding is in the Superior Court Division, then upon motion of the plaintiff, the proceeding may be heard by a resident superior court judge of the district, or a superior court judge holding the courts of the district, or by any judge holding a session of superior court within the district. If the parties do not agree upon a judge and the proceeding is in the District Court Division, then upon motion of the plaintiff, the proceeding may be heard by the chief district judge or by a district judge authorized by the chief judge to hear motions and enter interlocutory orders. Such motion shall be in writing, with 10 days' notice to the defendant, and the judge designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the clerk of the court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearings in other civil actions before a judge without a jury. References to judges of the superior court in this section include emergency and special judges. (1931, c. 102, s. 10; 1971, c. 268, s. 9.)

CASE NOTES

In an action under the Declaratory Judgment Act where the pleadings do not raise issues of fact, the court is without authority to consider evidence and find additional facts. Thus, where the facts were established by defendant's unequivocal admission of all of plaintiffs' factual allegations, the court should not have considered affidavits offered by plaintiffs, and the findings of fact incorporated in the judgment, to the extent that they differed from or went beyond the facts established by the

pleadings, would not be considered on appeal. *City of Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958).

Applied in *Breece v. Breece*, 270 N.C. 605, 155 S.E.2d 65 (1967).

Cited in *North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955); *Stout v. Grain Dealers Mut. Ins. Co.*, 201 F. Supp. 647 (M.D.N.C. 1962); *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

§ 1-263. Costs.

In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

CASE NOTES

This section was not repealed by the enactment of § 1A-1, Rule 57. *Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972).

Applied in *Board of Managers v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953); *Dillon v. North Carolina Nat'l Bank*, 6 N.C. App. 584, 170 S.E.2d 571 (1969).

§ 1-264. Liberal construction and administration.

This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

CASE NOTES

Applied in *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E.2d 809 (1967); *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *American Mfrs. Mut. Ins. Co. v. Ingram*, 43 N.C. App. 621, 260 S.E.2d 120 (1979); *Raintree Corp. v. City of Charlotte*, 49 N.C. App. 391, 271 S.E.2d 524 (1980).

Quoted in *American Equitable Assur-*

ance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971); *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971); *Wing v. Wachovia Bank & Trust Co.*, 44 N.C. App. 402, 261 S.E.2d 279 (1980).

§ 1-265. Word "person" construed.

The word "person" wherever used in this Article, shall be construed to mean any person, partnership, joint-stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13.)

CASE NOTES

Cited in *American Equitable Assurance Co. v. Gold*, 248 N.C. 288, 103 S.E.2d 344 (1958).

§ 1-266. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ 1-267. Short title.

This Article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

CASE NOTES

Cited in Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Wing v. Wachovia Bank &

Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978); Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331 (1981); Pittman v. Thomas, — N.C. —, 299 S.E.2d 207 (1983).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-268. Writs of error abolished.

Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this Chapter. (C.C.P., s. 296; Code, s. 544; Rev., s. 583; C.S., s. 629.)

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I(2A).

CASE NOTES

For case holding that the Supreme Court had no power to issue a writ of error, see Smith v. Cheek, 50 N.C. 213 (1857).

As to abolition of writs of error and substitution of appeals therefor, see Lynn v. Lowe, 88 N.C. 478 (1883); White v. Morris, 107 N.C. 92, 12 S.E. 80 (1890).

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and not a mere

erroneous interpretation of the law, the injured party should proceed by motion in the original cause. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgment, the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Cited in King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893).

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

Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is

filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (1874-5, c. 109; Code, s. 545; Rev., s. 584; C.S., s. 630.)

Cross References. — As to supersedeas bond, see § 1-289 et seq. As to stay of proceedings to enforce a judgment, see Rule 62 of the Rules of Civil Procedure (§ 1A-1). As to cash deposit in lieu of bond, see § 109-32. For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A). As to recordari, supersedeas and certiorari in the superior courts, see Rule 19 of the General Rules of Practice for the Superior and District Courts, in Volume 4A,

Appendix I(5).

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

CASE NOTES

- I. In General.
- II. Certiorari.
 - A. In General.
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- III. Recordari.
 - A. In General.
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I. IN GENERAL.

History. — The original Code of Civil Procedure of 1868 abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari. *Marsh v. Williams*, 63 N.C. 371 (1869).

When Supreme Court or Superior Courts May Issue Writs. — Whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court, as to all courts of the State, and the superior courts, as to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. *State v. Tripp*, 168 N.C. 150, 83 S.E. 630 (1914).

Time for Applying for Recordari or Certiorari. — The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application, must be satisfactorily accounted for. *Todd v.*

Mackie, 160 N.C. 352, 76 S.E. 245 (1912). See also, *Koonce v. Pelletier*, 83 N.C. 237 (1880).

Issuance at Term following Trial. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. *Boing v. Raleigh & G.R.R.*, 88 N.C. 62 (1883); *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981 (1916).

Affidavit Showing Merits Required. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981 (1916).

Applied in *Hamilton v. Southern Ry.*, 203 N.C. 468, 166 S.E. 392 (1932); *Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954).

Stated in *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

Cited in *Skinner v. Badham*, 80 N.C. 14 (1879); *Holmes v. Holmes*, 84 N.C. 833 (1881); *Cox v. Pruett*, 109 N.C. 487, 13 S.E. 917 (1891); *Sanders v. Thompson*, 114 N.C. 282, 19 S.E. 225 (1894); *Haynes v. Coward*, 116 N.C. 840, 21 S.E. 690

(1895); *Zell Guano Co. v. Hicks*, 120 N.C. 29, 26 S.E. 650 (1897); *Walsh v. Burleson*, 154 N.C. 174, 69 S.E. 680 (1910); *McNeil v. Virginia-Carolina R.R.*, 173 N.C. 729, 92 S.E. 484 (1917); *Tripp v. Somerset*, 182 N.C. 767, 108 S.E. 633 (1921); *In re Guerin*, 206 N.C. 824, 175 S.E. 181 (1934); *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954); *Menzel v. Menzel*, 250 N.C. 649, 110 S.E.2d 333 (1959); *In re McCoy*, 233 F. Supp. 409 (E.D.N.C. 1964); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

II. CERTIORARI.

A. In General.

Certiorari may issue from the superior courts as well as the appellate court. *Rhyne v. Lipscombe*, 122 N.C. 650, 29 S.E. 57 (1898).

Function of Certiorari. — The writ of certiorari is an extraordinary remedial writ and lies for two purposes: (1) As a writ of false judgment to correct errors of law, and (2) As a substitute for an appeal. In either case, it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. *Williams v. Williams*, 71 N.C. 427 (1874), *aff'd* upon rehearing, 74 N.C. 1 (1878).

A writ of certiorari to bring up the record is the proper substitute for an appeal. *State v. McGimsey*, 80 N.C. 377 (1879).

If an appeal is unavoidably lost, certiorari may be granted as a substitute. *Anonymous*, 2 N.C. 302 (1796); *Norwood v. Pratt*, 124 N.C. 745, 32 S.E. 979 (1899).

But where no appeal lay, a certiorari as a substitute therefor could not be granted. *State v. Georgia Co.*, 109 N.C. 310, 13 S.E. 861 (1891); *State v. Todd*, 224 N.C. 776, 32 S.E.2d 313 (1944).

Proceedings of Inferior Courts and Quasi-Judicial Bodies. — Certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. *Russ v. Board of Educ.*, 232 N.C. 128, 59 S.E.2d 589 (1950); *In re Burris*, 261 N.C. 450, 135 S.E.2d 27 (1964).

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. *Board of Comm'rs v. Smith*, 110 N.C. 417, 14 S.E. 972 (1892).

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. *McPherson Drug Co. v. Norfolk S. Ry.*, 173 N.C. 87, 91 S.E. 606 (1917).

Habeas Corpus Proceedings. — Certiorari is the only method by which the appellate court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. *In re Holley*, 154 N.C. 163, 69 S.E. 872 (1910).

Issuance of Writ from One Superior Court to Another. — Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed, but upon the principle that all courts have the right to issue any writ necessary to the exercise of their powers. *State v. Reid*, 18 N.C. 377 (1835).

Certiorari is not a proper remedy where another adequate remedy is available. *Petty v. Jones*, 23 N.C. 408 (1841); *Watson v. Shields*, 67 N.C. 235 (1872).

Interlocutory Judgments. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. *Smith v. Miller*, 155 N.C. 247, 71 S.E. 355 (1911).

Who Is Entitled to Certiorari. — To entitle a person to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. *Petty v. Jones*, 23 N.C. 408 (1841). See *Otey v. Rogers*, 26 N.C. 534 (1844); *Shober v. Wheeler*, 119 N.C. 471, 26 S.E. 26 (1896).

Applicant Must Negative Laches. — He who seeks a certiorari must negative laches. *Mitchell v. Baker*, 129 N.C. 63, 39 S.E. 633 (1901); *Cox v. Kinston Carolina R.R.*, 177 N.C. 227, 98 S.E. 704 (1919); *Peoples Bank & Trust Co. v. Parks*, 191 N.C. 263, 131 S.E. 637 (1926).

Effect of Negligent Delay in Bringing Appeal. — One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. *Suiter v. Brittle*, 92 N.C. 53

(1885); *In re Brittain*, 93 N.C. 587 (1885).

Necessity of Filing Record. — The appellant must aptly file a record proper in the case appealed from as a prerequisite for the appellate court to grant his motion for a certiorari to bring up the case for review. *Lindsey v. Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916); *Brock v. Ellis*, 193 N.C. 540, 137 S.E. 585 (1927).

As to docketing of transcript as a condition precedent for certiorari, see *Pittman v. Kimberly*, 92 N.C. 562 (1885); *Slocumb v. Construction Co.*, 142 N.C. 349, 55 S.E. 196 (1906); *Walsh v. Burleson*, 154 N.C. 174, 69 S.E. 680 (1910); *Murphy v. Carolina Elec. Co.*, 174 N.C. 782, 93 S.E. 456 (1917).

As to procedure when transcript cannot be docketed, see *Slocumb v. Construction Co.*, 142 N.C. 349, 55 S.E. 196 (1906). See *Burrell v. Hughes*, 120 N.C. 277, 26 S.E. 782 (1897); *Parker v. Southern Ry.*, 121 N.C. 501, 28 S.E. 347 (1897); *McMillan v. McMillan*, 122 N.C. 410, 29 S.E. 361 (1898).

Necessity of Security. — Since certiorari is but a substitute for an appeal, it can only be allowed on the same security and justification thereof as in cases of appeal. *Chastain v. Chastain*, 87 N.C. 283 (1882).

Issuance of Writ Without Security. — The appellate court has the power, in a proper case, to allow the writ to issue without security. *Brittain v. Mull*, 93 N.C. 490 (1885).

Certiorari Denied when Appeal Waived. — A writ of certiorari will not issue where the right of appeal has been waived. *King v. Taylor*, 188 N.C. 450, 124 S.E. 751 (1924).

For cases in which certiorari would not issue for petitioner's failure to give the notice required by former Supreme Court Rule 34, see *Keerans v. Keerans*, 109 N.C. 101, 13 S.E. 895 (1891); *Sanders v. Thompson*, 114 N.C. 282, 19 S.E. 225 (1894).

Certiorari Cannot Be Dispensed with by Agreement. — Certiorari is a discretionary writ, and counsel may not dispense with it by agreement. *In re McCade*, 183 N.C. 242, 111 S.E. 3 (1922); *State v. Hooker*, 183 N.C. 763, 111 S.E. 351 (1922).

Discretion of Supreme Court. — The granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. *King v. Taylor*, 188 N.C. 450, 124 S.E. 751 (1924); *Peoples Bank & Trust Co. v.*

Parks, 191 N.C. 263, 131 S.E. 637 (1926); *Waller v. Dudley*, 193 N.C. 354, 137 S.E. 149 (1927).

Imposition of Terms on Applicant. — When certiorari is granted, the applicant may be laid under terms not to avail himself of a technical advantage. *Collins v. Nall*, 14 N.C. 224 (1831).

Only Errors on the Face of the Record May Be Considered. — Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. *Hartsfield v. Jones*, 49 N.C. 309 (1857); *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

When a criminal action has been brought from an inferior court to the superior court by means of a writ of certiorari, the superior court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record, and can only revise the proceedings as to regularity or on questions of law or legal inference. *State v. King*, 222 N.C. 137, 22 S.E.2d 241 (1942).

As to issuance of successive writs where the transcript is defective, see *State v. Munroe*, 30 N.C. 258 (1848).

Treatment of Appeal as Certiorari. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. *Huffman v. Douglass Aircraft Co.*, 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

Effect of Certiorari as Stay. — Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense be bailable, he is entitled to bail. *State v. Walters*, 97 N.C. 489, 2 S.E. 539 (1887). See also, *Pender v. Mallett*, 122 N.C. 163, 30 S.E. 324 (1898).

When issued, the writ of certiorari suspends the authority of the lower court in a case, pending the action of the reviewing court. *Wheeler v. Thabit*, 261 N.C. 479, 135 S.E.2d 10 (1964).

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held

that the power of review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. *Belk's Dep't Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943).

B. Grounds for Certiorari.

Deprivation of Appeal by Conduct of Opponent. — Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. *State v. Bill*, 35 N.C. 373 (1852); *Walton v. Pearson*, 83 N.C. 309 (1880); *Wiley v. Lineberry*, 88 N.C. 68 (1883); *State v. Bennett*, 93 N.C. 503 (1885).

Where appellant has lost right to appeal by neglect of an officer of the law, contrivance of opponent or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. *McConnell v. Caldwell*, 51 N.C. 469 (1859).

After a party has prayed an appeal and offered his sureties, if he is defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. *Chambers v. Smith*, 2 N.C. 366 (1796); *Graves v. Hines*, 106 N.C. 323, 11 S.E. 362 (1890). But see, *Pittman v. Kimberly*, 92 N.C. 562 (1885), as to clerk's failure to send up a transcript.

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." *Bledsoe v. Snow*, 48 N.C. 100 (1855).

Fraud of Opponent Depriving Party of Defense. — Where a party was deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which defense could be made in the superior court as well as in the county court, his proper remedy was by a writ of certiorari. *Lunceford v. McPherson*, 48 N.C. 174 (1855).

A mere suggestion of fraud is insufficient. *McLaughlin v. McLaughlin*, 47 N.C. 319 (1855). See also, *Haddock v. Stocks*, 167 N.C. 70, 83 S.E. 9 (1914).

Delay of Judge. — Where delay in prosecuting appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari may be granted in lieu of an appeal. *Sparks v. Sparks*, 92 N.C. 359 (1885); *Haynes v. Coward*, 116 N.C. 840, 21 S.E. 690 (1895).

Retirement of Judge before Preparing Case. — Where the trial judge goes out of office before preparing a case on appeal, certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. *Shelton v. Shelton*, 89 N.C. 185 (1883).

Where the trial judge has died, certiorari will not lie. *Taylor v. Simmons*, 116 N.C. 70, 20 S.E. 961 (1895).

Sickness of Obligor. — Where the principal obligor in a bond was called, and after he failed to appear judgment was rendered against his surety, it was held that the fact that the principal was sick and unable to attend at the term for which he was bound did not entitle the surety to a certiorari to have the case removed into the superior court. *Buis v. Arnold*, 53 N.C. 233 (1860).

Sickness of Appellant. — Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. *Howerton v. Henderson*, 86 N.C. 718 (1882).

Sickness of Attorney. — The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal, and certiorari will lie. *Mott v. Ramsay*, 90 N.C. 372 (1884).

The sickness of one of two attorneys is not sufficient excuse for lack of diligence in preparing an appeal, even though the other attorney is absent from the county. *Boyer v. Garner*, 116 N.C. 125, 21 S.E. 180 (1895).

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. *Barber v. Justice*, 138 N.C. 20, 50 S.E. 445 (1905); *Smith v. Miller*, 155 N.C. 247, 71 S.E. 355 (1911).

Where appellant's counsel told him that he would do everything necessary toward perfecting his appeal, but counsel failed to file a proper appeal bond, there was no ground for certiorari. *Winborne v. Byrd*, 92 N.C. 7 (1885).

Failure to File Proper Appeal Bond. — Failure to perfect appeal because of failure of counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. *Winborne v. Byrd*, 92 N.C. 7 (1885); *Churchill v. Brooklyn Life Ins. Co.*, 92 N.C. 485 (1885). See also, *Turner v. Powell*, 93 N.C. 341 (1885); *Bowen v. Fox*, 99 N.C. 127, 5 S.E. 437 (1888). But see, *Manning v. Sawyer*, 8 N.C. 37 (1820), where appellant failed to bring up the appeal bond

along with the transcript through ignorance as to requirements.

Inability to Give Bond. — A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it is shown that the judge below refused to make an order allowing the appeal in forma pauperis. *Lindsay v. Moore*, 83 N.C. 444 (1880).

Failure to Pay Clerk's Fees. — Certiorari will not be granted where it appears that petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. *Smith v. Lynn*, 84 N.C. 837 (1881); *Sanders v. Thompson*, 114 N.C. 282, 19 S.E. 225 (1894); *Brown v. House*, 119 N.C. 622, 26 S.E. 160 (1896).

Omission of Assignments of Error. — As to certiorari to have assignments of error which were omitted from the record on appeal without appellant's negligence sent up, see *McDowell v. J.S. Kent Co.*, 153 N.C. 555, 69 S.E. 626 (1910). See also, *Cameron v. Thornton Light & Power Co.*, 137 N.C. 99, 49 S.E. 76 (1904), as to incorporation of exceptions.

Stenographer's Notes. — The mistake of appellant's counsel in sending up stenographer's notes on appeal instead of a properly settled case did not entitle appellant to a certiorari. *Cressler v. Asheville*, 138 N.C. 482, 51 S.E. 53 (1905).

Executive action in personnel matters was not appealable on a writ of certiorari to the courts where departmental hearing conducted by fire department was not a judicial or quasi-judicial function which would permit review by certiorari. *Foust v. City of Greensboro*, 47 N.C. App. 159, 266 S.E.2d 835, cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

Removal of Public Officer or Employee. — If the act of removal of a public officer is executive it is not reviewable on certiorari, but if it is on hearing and formal findings, it is reviewable, as the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E.2d 375 (1967).

A hearing, pursuant to the act creating the civil service board of a city, with respect to the discharge of a classified employee of the city by the civil service board, was a quasi-judicial function and reviewable upon a writ of certiorari issued from the superior court. In re

Burris, 261 N.C. 450, 135 S.E.2d 27 (1964); *Bratcher v. Winters*, 269 N.C. 636, 153 S.E.2d 375 (1967).

An order entered by the civil service board of a city, dismissing a policeman from the police department, was properly brought up for the superior court's review by writ of certiorari. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E.2d 375 (1967).

The action of a county board of education in removing a school committeeman from his office may be reviewed in the superior court by certiorari. *Russ v. Board of Educ.*, 232 N.C. 128, 59 S.E.2d 589 (1950).

Demotion of Policeman. — Order entered by a chief of police, demoting a policeman from captain of detectives to patrolman, was the administrative act of the chief of police and neither judicial nor quasi-judicial in its nature; hence, the order was not reviewable by the superior court on certiorari. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E.2d 375 (1967).

As to the use of certiorari in order that trial judge may make corrections in case on appeal, see *Currie v. Clark*, 90 N.C. 17 (1884); *Cheek v. Watson*, 90 N.C. 302 (1884); *Ware v. Nisbet*, 92 N.C. 202 (1885); *State v. Gay*, 94 N.C. 821 (1886); *Porter v. Western N.C.R.R.*, 97 N.C. 63, 2 S.E. 580 (1887); *Allen v. McLendon*, 113 N.C. 319, 18 S.E. 205 (1893); *City Nat'l Bank v. Bridgers*, 114 N.C. 107, 19 S.E. 276 (1894); *Slocumb v. Construction Co.*, 142 N.C. 349, 53 S.E. 196 (1906); *Clark v. Saco-Pettee Mach. Works*, 150 N.C. 88, 63 S.E. 153 (1908).

Failure to Plead and Appeal. — Where a defendant failed to enter a plea and to take an appeal, he was not entitled to a certiorari to bring the case into the superior court. *Rule & Hall v. Council*, 48 N.C. 33 (1855).

Failure to Timely Perfect Appeal pursuant to Agreement to Waive Time. — To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: (1) Where the record shows a written agreement of counsel waiving the lapse of time; and (2) Where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. *Walton v. Pearson*, 82 N.C. 464 (1880).

Where there is an undenied tacit agreement to waive delay, certiorari will issue. *Holmes v. Holmes*, 84 N.C. 833 (1881); *Willis v. Atlantic & D.R.R.*, 119 N.C. 718, 25 S.E. 790 (1896).

A certiorari will not be granted where an alleged oral agreement between counsel to await the decision of a certain other case is denied. *Hutchinson v. Rumfelt*, 83 N.C. 441 (1880); *Short v. Sparrow*, 96 N.C. 348, 2 S.E. 233 (1887); *Graves v. Hines*, 106 N.C. 323, 11 S.E. 362 (1890).

When judgment has been entered in the recorder's court upon defendant's plea of guilty, certiorari will not lie from the superior court to the recorder's court. *State v. Barber*, 232 N.C. 577, 61 S.E.2d 714 (1950).

Review of Hearing on Lunacy Writ. — Where a writ of lunacy was issued by a county court, and the party was found non compos, and a guardian was appointed, in the absence of the said party and without notice, it was held that the petitioner was entitled to a certiorari to have the case taken into a superior court. *Dowell v. Jacks*, 53 N.C. 387 (1861).

C. Application for Certiorari.

Merits Must Be Shown. — An application for a writ of certiorari must show a prima facie case of merits. *March v. Thomas*, 63 N.C. 249 (1869); *Short v. Sparrow*, 96 N.C. 348, 2 S.E. 233 (1887).

Mere Allegation of Fraud Is Insufficient. — Conceding complaint to be a petition for writ of certiorari to review the ruling of the municipal board of control in respect to the sufficiency of the signatures to a petition to change the name of a town, it failed to make a proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient. *Hunsucker v. Winborne*, 223 N.C. 650, 27 S.E.2d 817 (1943).

When Certiorari Granted without Reference to Merits. — Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. *Collins v. Nall*, 14 N.C. 224 (1831); *McConnell v. Caldwell*, 51 N.C. 469 (1859).

Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact,

where the case discloses that there were questions of law which he had a right to have decided by the superior court. *Britt v. Patterson*, 31 N.C. 197 (1848).

Failure to Pray that Writ Be Issued. — Where a verified petition of a district school committeeman alleged that the county board of education made an order purporting to remove the petitioner from his office without notice and an opportunity to be heard, and contained a general prayer for relief in addition to specific prayers, it would not be held inadequate as a petition for certiorari because of its failure to specifically pray that the writ be issued. *Russ v. Board of Educ.*, 232 N.C. 128, 59 S.E.2d 589 (1950).

For case in which affidavit was held sufficient, see *Bayer v. Raleigh & A. Air Line R.R.*, 125 N.C. 17, 34 S.E. 100 (1899).

Application Must Be Timely. — An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. *Todd v. Mackie*, 160 N.C. 352, 76 S.E. 245 (1912).

Time for Applying for Writ. — Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of was entered in the superior court. If the writ is applied for after that term, sufficient cause for the delay must be shown. *State v. Johnson*, 93 N.C. 559 (1885); *State v. Sloan*, 97 N.C. 499, 2 S.E. 666 (1887).

An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. *State v. Harris*, 114 N.C. 830, 19 S.E. 154 (1894); *State v. Marsh*, 134 N.C. 184, 47 S.E. 6 (1903).

As to when certiorari is allowed after argument, see *Boyer v. Teague*, 106 N.C. 571, 11 S.E. 330 (1890).

III. RECORDARI.

A. In General.

The writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. *State v. Griffis*, 117 N.C. 709, 23 S.E. 164 (1895).

Recordari lies to an inferior tribunal whose proceedings are not recorded. *Hartsfield v. Jones*, 49 N.C. 309 (1857).

Function of Recordari. — The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. *Caldwell v. Beatty*, 69 N.C. 365 (1873); *Morton v. Rippy*, 84 N.C. 611 (1881); *King v. Wilmington & W.R.R.*, 112 N.C. 318, 16 S.E. 929 (1893); *Marler - Dalton - Gilmer Co. v. Wadesboro Clothing & Shoe Co.*, 150 N.C. 519, 64 S.E. 366 (1909).

If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. *Ledbetter v. Osborne*, 66 N.C. 379 (1872).

The writ of recordari may be used as a writ of false judgment. *Parker v. Gilreath*, 28 N.C. 221 (1845); *Kearney v. Jeffreys*, 30 N.C. 96 (1847); *Bailey v. Bryan*, 48 N.C. 357 (1856).

The writ of recordari is in the nature of an extension of the power of appeal. *Webb v. Durham*, 29 N.C. 130 (1846).

Jurisdiction of Superior Courts. — The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the Constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the State. *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981 (1916).

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by § 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. *Peltz v. Bailey*, 157 N.C. 166, 72 S.E. 978 (1911); *Abell v. Thornton Light & Power Co.*, 159 N.C. 348, 74 S.E. 881 (1912); *L.D. Powell & Co. v. Rogers*, 180 N.C. 657, 104 S.E. 70 (1920).

Right to Object to Petition for Recordari Not Waived. — An appellee who does not docket an appeal from a justice's court that is not docketed in time by appellant and move for affirmance does not waive the right to object to appellant's petition to bring up the appeal by recordari. *Pickens v. Whitten*, 182 N.C. 779, 109 S.E. 836 (1921).

Dismissal for Failure to Docket. — A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at

a subsequent term docket the case, and have it dismissed. *Johnson v. Reformers*, 135 N.C. 385, 47 S.E. 463 (1904).

Review of Judge's Decision upon Petition for Recordari. — The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise or excusable negligence. *Barnes v. Easton*, 98 N.C. 116, 3 S.E. 744 (1887). See also, *Stewart v. Craven*, 205 N.C. 439, 171 S.E. 609 (1933).

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the appellate court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. *Tedder v. Deaton*, 167 N.C. 479, 83 S.E. 616 (1914).

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. *Perry v. Whitaker*, 77 N.C. 102 (1877).

What Must Be Shown in Application. — Recordari will not be issued unless party applying shows (1) excuse for laches, and (2) meritorious grounds. *Pritchard v. Sanderson*, 92 N.C. 41 (1885).

Application Must Negative Laches. — An applicant for recordari must show that he has not been guilty of laches. *Marler - Dalton - Gilmer Co. v. Wadesboro Clothing & Shoe Co.*, 150 N.C. 519, 64 S.E. 366 (1909). See *March v. Thomas*, 63 N.C. 249 (1869); *Pritchard v. Sanderson*, 92 N.C. 41 (1885); *In re Brittain*, 93 N.C. 587 (1885).

Sufficient Grounds for Recordari Must Be Shown. — It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. *Baltimore Bargain House v. Jefferson*, 180 N.C. 32, 103 S.E. 922 (1920).

Applicant Must Show Merit. — An applicant for a writ of recordari must show merit. *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co.*, 150 N.C. 519, 64 S.E. 366 (1909).

It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant and loss of right to appeal, where there is no showing of a meritorious defense. *Hunter v. Atlantic Coast Line R.R.*, 161 N.C. 503, 77 S.E. 678 (1913).

Averment as to Payment of Costs. — Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. *Steadman v. Jones*, 65 N.C. 388 (1871).

Recordari Granted without Notice and Affidavit or Petition Subject to Dismissal. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing. *Wilcox v. Stephenson*, 71 N.C. 409 (1874).

Procedure where No Error Is Assigned or Appears. — Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. *Leatherwood v. Moody*, 25 N.C. 129 (1842); *Sossamer v. Hinson*, 72 N.C. 578 (1875).

Order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. *Steadman v. Jones*, 65 N.C. 388 (1871).

Duty to File Motion. — On appeal from a justice of the peace to the superior court, where the justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where the superior court judge was absent from such next term, to file a motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. *Barnes v. Saleeby*, 177 N.C. 256, 98 S.E. 708 (1919).

B. Grounds for Recordari.

Loss of Appeal by Misfortune. — As a rule the writ of recordari is not resorted to except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. *State v. Griffis*, 117 N.C. 709, 23 S.E. 164 (1895). See also, *Boing v. Raleigh & G.R.R.*, 88 N.C. 62 (1883); *Davenport v. Grissom*, 113 N.C. 38, 18 S.E. 78 (1893).

Loss of Appeal without Fault of Applicant. — A recordari is a substitute

for an appeal where the party has lost his right to appeal otherwise than by his own default. *Marsh v. Cohen*, 68 N.C. 283 (1873); *Pickens v. Whitton*, 182 N.C. 779, 109 S.E. 836 (1921).

Party Denied Right of Appeal. — If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. *Ledbetter v. Osborne*, 66 N.C. 379 (1872); *Birdsey v. Harris*, 68 N.C. 92 (1873).

Refusal of Appeal on Frivolous Grounds. — If an appeal is refused by a magistrate on frivolous grounds, the remedy is by a writ of recordari. *Bailey v. Bryan*, 48 N.C. 357, 67 Am. Dec. 246 (1956).

Appeal Lost by Excusable Neglect. — Where a party has lost his appeal by excusable neglect, he may have relief by a writ of recordari as a substitute for an appeal. *Navassa Guano Co. v. Bridgers*, 93 N.C. 439 (1885).

Loss of Appeal by Technical Default. — Where a party has lost his appeal by a technical default, the superior court judge can have it brought up by recordari. *Suttle v. Green*, 78 N.C. 76 (1878).

Erroneous Supposition as to Agreement. — A writ of recordari is properly granted where the defendant had merits and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. *Carmer v. Evers*, 80 N.C. 56 (1879).

Where a party is not deprived of his appeal by any fraud, accident, surprise or denial by the court, he is not entitled to the aid of a writ of recordari. *Satchwell v. Rispass*, 32 N.C. 365 (1849); *Hare v. Parham*, 49 N.C. 412 (1857).

Failure to Perfect Appeal. — Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. *State v. Griffis*, 117 N.C. 709, 23 S.E. 164 (1895); *Peltz v. Bailey*, 157 N.C. 166, 72 S.E. 978 (1911).

A motion for recordari made in the superior court several terms after the judgment was entered in the justice's court for failure to send up the transcript would be denied where the appellant had not paid the required fees or taken proper steps to perfect the appeal. *Helsabec v. Grubbs*, 171 N.C. 337, 88 S.E. 473 (1916).

Illness of One Member of Law Firm. — As every member of a law firm

is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court and thus caused defendant to suffer a default judgment and lose right of appeal was not a showing of excusable neglect which would warrant the issuance of a writ of recordari. *Hunter v. Atlantic Coast Line R.R.*, 163 N.C. 281, 79 S.E. 610 (1913).

Appeal Lost through Negligence of Applicant's Attorney. — A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. *Boing v. Raleigh & G.R.R.*, 88 N.C. 62 (1883).

As to party's duty to see that appeal is filed in time, see *Baltimore Bargain House v. Jefferson*, 180 N.C. 32, 103 S.E. 922 (1920).

IV. SUPERSEDEAS.

"Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review. It is granted only by the court ordering removal of the cause, and is regulated by statute. *Seaboard Air Line Ry. v. Horton*, 176 N.C. 115, 96 S.E. 954 (1918); *City of New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961).

Writ of supersedeas may issue to vacate the order of the lower court. *Arey v. Williams*, 154 N.C. 610, 70 S.E. 931 (1911); *McArthur v. Commonwealth Land & Timber Co.*, 164 N.C. 383, 80 S.E. 403 (1913); *Page v. Page*, 166 N.C. 90, 81 S.E. 1060 (1914); *In re Blake*, 184 N.C. 278, 114 S.E. 294 (1922); *Clegg v. Clegg*, 186 N.C. 28, 118 S.E. 824 (1923).

Supersedeas Must Be Auxiliary to Appellate Jurisdiction. — The superior court cannot supersede the process of an inferior court unless the writ of supersedeas is auxiliary to the appellate jurisdiction of the former. *President & Dirs. v. Stanley*, 13 N.C. 476 (1830).

A supersedeas is ancillary to a writ of error and the former may be granted by the same judge who has granted the latter. *Seaboard Air Line Ry. v. Horton*, 176 N.C. 115, 96 S.E. 954 (1918).

The Supreme Court of North Carolina has no power to grant a supersedeas pending a petition to the United States Supreme Court for certiorari. *Seaboard Air Line Ry. v. Horton*, 176 N.C. 115, 96 S.E. 954 (1918).

A writ of supersedeas is only granted in case of necessity. *McArthur v. Commonwealth Land & Timber Co.*, 164 N.C. 383, 80 S.E. 403 (1913).

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. *McArthur v. Commonwealth Land & Timber Co.*, 164 N.C. 383, 80 S.E. 403 (1913).

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. *Sykes v. Everett*, 167 N.C. 600, 83 S.E. 585 (1914).

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay the proceedings, but may disregard the attempted appeal. *Dunn v. Marks*, 141 N.C. 232, 53 S.E. 845 (1906).

Review of Clerk's Decision. — A supersedeas is the proper remedy to stay proceedings in a cause pending review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. *Saulsbury v. Cohen*, 68 N.C. 289 (1873).

Grant of Injunction. — An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. *Green v. Griffin*, 95 N.C. 50 (1886); *Fleming v. Patterson*, 99 N.C. 404, 6 S.E. 396 (1888).

Dissolution of Injunction. — It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. *James v. Markham*, 125 N.C. 145, 34 S.E. 241 (1899).

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunctions. *Reyburn v. Sawyer*, 128 N.C. 8, 37 S.E. 954 (1901).

An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. *Bank of Newbern v. Jones*, 17 N.C. 284 (1832).

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to mother and husband appeals, and mother sued out habeas corpus for custody of the child pending appeal, the Supreme Court could supersede the order as to custody pending the appeal, by virtue of constitutional authorization to issue

remedial writs. Page v. Page, 166 N.C. 90, 81 S.E. 1060 (1914).

§ 1-270. Appeal to appellate division; security on appeal; stay.

Cases shall be taken to the appellate division by appeal, as provided by law. All provisions in this Article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the appellate division. (C.C.P., s. 312; Code, ss. 561, 946; Rev., ss. 595, 1540; C.S., s. 631; 1969, c. 444, s. 3.)

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); **Richardson v. Cooke**, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-271. Who may appeal.

Any party aggrieved may appeal in the cases prescribed in this Chapter. A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved. (C.C.P., s. 298; Code, s. 547; Rev., s. 585; C.S., s. 632; 1969, c. 895, s. 15.)

Cross References. — For cases in which an appeal lies, see note under § 1-277. For the Rules of Civil Procedure, see § 1A-1. For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

CASE NOTES

- I. In General.
- II. Parties Held Entitled to Appeal.
- III. Parties Held Not Entitled to Appeal.

I. IN GENERAL.

Common-Law Rule Codified. — At common law the right to appeal was limited to parties in the action who were aggrieved by the ruling of the court. This common-law rule has been codified in North Carolina under this section. **Duke Power Co. v. Salisbury Zoning Bd. of Adjustment**, 20 N.C. App. 730, 202 S.E.2d 607, cert. denied, 285 N.C. 235, 204 S.E.2d 22 (1974).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. **Harrell v. Harrell**, 253 N.C. 758, 117 S.E.2d 728 (1961).

The scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and it is

well established that if the appealing party has no right to appeal the appellate court should dismiss the appeal ex mero motu. **Harris v. Harris**, — N.C. —, 300 S.E.2d 369 (1983).

Therefore, when a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. **Harris v. Harris**, — N.C. —, 300 S.E.2d 369 (1983).

No appeal lies from a judgment until someone is hurt or "aggrieved" by it. **Yadkin County v. City of High Point**, 219 N.C. 94, 13 S.E.2d 71 (1941).

Only the party aggrieved may appeal from the superior court to the appellate court. **Watkins v. Grier**, 224 N.C. 334, 30 S.E.2d 219 (1944); **Langley v. Gore**, 242 N.C. 302, 87 S.E.2d 519 (1955); **Dickey v. Herbin**, 250 N.C. 321,

108 S.E.2d 632 (1959); Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975); Harris v. Harris, — N.C. —, 300 S.E.2d 369 (1983).

Appeal can be taken only by the aggrieved real party in interest. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Where a party is not aggrieved, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963); Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

Where no error was found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void would be dismissed, since only the party aggrieved may appeal. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

Where both plaintiffs and defendants appealed from judgment in favor of defendants, defendants' appeals would not be considered when no error was found on plaintiffs' appeal, since in such instance defendants were not the parties aggrieved by the judgment. Teague v. Duke Power Co., 258 N.C. 759, 129 S.E.2d 507 (1963).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Meaning of "Party Aggrieved". — The "party aggrieved" is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959).

A party is aggrieved if his rights are substantially affected by judicial order. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967); State Farm Mut.

Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

A party is not aggrieved unless the order complained of affects a substantial right or in effect determines the action. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

For other definitions of the term "party aggrieved," see In re Applications for Reassignment, 247 N.C. 413, 101 S.E.2d 359 (1958).

Representative May be "Aggrieved". — One may be "aggrieved" within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative agency. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

One who challenges neither the proceeding nor the judgment below and appeals only for delay is not a "party aggrieved" within the meaning of this section. Stephenson v. Watson, 226 N.C. 742, 40 S.E.2d 351 (1946).

One not a party or privy to the record cannot appeal. Siler v. Blake, 20 N.C. 90 (1838); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981); In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981), rev'd in part on other grounds, 305 N.C. 565, 290 S.E.2d 688 (1982).

A legal proceeding must be prosecuted by a legal person, whether it be a natural person, sui juris, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association or governmental body or agency. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

Where no natural or other legal person appears as a party defendant, whether aggrieved or not aggrieved, the appeal must be dismissed for failure to comply with this section. State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236, cert. denied, 284 N.C. 121, 199 S.E.2d 663 (1973).

Class Members Must Prosecute or Defend Class Actions. — Even a class action must be prosecuted or defended by

one or more named members of the class. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A party has no right to appeal from a judgment entered on his own motion. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

One whose claim to intervene in a suit has been rejected by the court cannot appeal from the judgment rendered in the suit. Phelps v. Long, 31 N.C. 226 (1848); Evans v. Governor's Creek Transp. & Mining Co., 50 N.C. 332 (1858); Rollins v. Rollins, 76 N.C. 264 (1877).

Applicability of Requirement that Appellant Be Aggrieved to Administrative Proceedings. — The rule that an appeal to the appellate division may be prosecuted only at the instance of a party or parties aggrieved by the judgment of the court or tribunal from which the appeal is taken applies with as much force to proceedings governed by the statute relating to judicial review of decisions of administrative agencies as to ordinary civil cases. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

As to joinder of parties on appeal from joint verdict and judgment, see Hicks v. Gilliam, 15 N.C. 217 (1833); Smith v. Cunningham, 30 N.C. 460 (1848); Mastin v. Porter, 32 N.C. 1 (1848); Kelly v. Muse, 33 N.C. 182 (1850).

As to appeal of judgment against one of two defendants, see Sharpe v. Jones, 7 N.C. 306 (1819); Stephens v. Batchelor, 23 N.C. 60 (1840).

Applied in Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949); Queen City Coach Co. v. Carolina Coach Co., 237 N.C. 697, 76 S.E.2d 47 (1953); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961); Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964); Martin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964); Days Inn of Am., Inc. v. Board of Transp., 24 N.C. App. 636, 211 S.E.2d 864 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Greene v. Town of Valdese, 306 N.C. 79, 291 S.E.2d 630 (1982).

Quoted in In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

Stated in Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950).

Cited in Simmons v. Andrews, 106 N.C. 201, 10 S.E. 1052 (1890); In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934); In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940); Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 221 N.C. 185, 19 S.E.2d 489 (1942); State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951); In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982).

II. PARTIES HELD ENTITLED TO APPEAL.

Where, in proceedings by administrator to sell lands of the estate to pay debts, the judge ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assumed the character of a creditor's bill, in which a creditor whose claim has been disallowed may appeal as a party aggrieved. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

Where defendants were not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affected their interest, they had the right to appeal under this section. Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934).

Where judgment for costs was rendered in a claim and delivery proceeding against a person who was not a party thereto, and who did not appear on the record as a party, such person could appeal on a special appearance made for that purpose. Loven v. Parson, 127 N.C. 301, 37 S.E. 271 (1900).

Appeal by Justices of County. — Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment was rendered against them, they could appeal, even though a minority of the justices refused to join in the appeal. State ex rel. Kelly v. Justices of Moore County, 24 N.C. 430 (1842).

When an application to be made a party defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal under this section. *Rollins v. Rollins*, 76 N.C. 264 (1877).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

In a caveat proceeding where the jury found against propounders and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, the propounders were not the "parties aggrieved" by the order setting aside the verdict and they could not appeal. *In re Will of Hargrove*, 207 N.C. 280, 176 S.E. 752 (1934).

Where order was issued that certain funds be turned over to plaintiffs, and defendants appealed on the ground that plaintiffs were not entitled to the funds, but defendants had no interest in or claim to the funds, defendants were not the parties aggrieved within the meaning of this section. *Langley v. Gore*, 242 N.C. 302, 87 S.E.2d 519 (1955).

A commissioner appointed to make a deed was not a "party to the action," and having no personal interest in the subject of it could not appeal from an order of the court requiring him to correct his deed. *Summerlin v. Morrissey*, 168 N.C. 409, 84 S.E. 689 (1915).

Parties whose Only Interest Was Payment of Moneys Secured by Trust Deed. — In an action to restrain a trustee from selling lands under a trust deed until the determination of plaintiff's interest in the premises, parties whose only interest in the suit was the payment of the moneys secured to them by the trust deed could not appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. *Faison v. Hardy*, 118 N.C. 142, 23 S.E. 959 (1896).

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under § 45-37 (5) the right to possession and the right to foreclose were barred. *Gregg v. Williamson*, 246 N.C. 356, 98 S.E.2d 481 (1957).

Where a trustor's equity was divested by foreclosure of a junior deed of trust on the property, he had no rights in the property, and he was not a

party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 132 S.E.2d 345 (1963).

Where plaintiffs were estopped to assert title to land, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. *Coburn v. Roanoke Land & Timber Corp.*, 260 N.C. 173, 132 S.E.2d 340 (1963).

Where an action was entitled in the name of certain individuals "t/a" a named corporation, the corporation could not be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. *Williams v. Denning*, 260 N.C. 540, 133 S.E.2d 148 (1963).

Receivers of a corporation could not appeal from a judgment of instructions on the grounds that the instructions were, as between classes of stockholders, prejudicial to one of such classes. *Strauss v. Carolina Interstate Bldg. & Loan Ass'n*, 117 N.C. 308, 23 S.E. 450 (1895), reaff'd, 118 N.C. 556, 24 S.E. 116 (1896).

Where a proceeding to garnishee funds belonging to delinquent taxpayer was dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer was the "party aggrieved," within the meaning of this section and neither could prosecute an appeal. *Gill v. McLean*, 227 N.C. 201, 41 S.E.2d 514 (1947).

Party Not Served with Process. — One who is not a party cannot appeal, and the entry of a special appearance for one who is not served with process, though named as a defendant, did not authorize counsel so appearing to appeal from a default judgment against his client. *Houston v. Lumber Co.*, 136 N.C. 328, 48 S.E. 738 (1904).

A defendant who asked for no affirmative relief was not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and could not appeal. *Guy v. Aetna Life Ins. Co.*, 206 N.C. 118, 172 S.E. 885 (1934).

Where defendant was granted a new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defen-

dant was not the "party aggrieved" within the meaning of this section. *Starnes v. Tyson*, 226 N.C. 395, 38 S.E.2d 211 (1946).

Submission of Controversy. — Parties to an equity suit, who agreed that the judge should find the facts, were precluded from asking the appellate court, on appeal, to review the finding. *Runnion v. Ramsay*, 93 N.C. 410 (1885).

Where trial court entered judgment that plaintiff recover nothing of certain defendants, such defendants could not, upon plaintiff's appeal from refusal of the court to enter judgment on the verdict, appeal from the court's refusal to

set aside the verdict for errors committed during the trial, since, until a judgment was entered against them, they were not parties aggrieved. *Bethea v. Town of Kenly*, 261 N.C. 730, 136 S.E.2d 38 (1964).

Instruction on Negligence of Codefendant. — In an action against each of two defendants as joint tort-feasors, one defendant could not by the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant where they were not adversaries inter se. *Childers v. Seay*, 270 N.C. 721, 155 S.E.2d 259 (1967).

§ 1-272. Appeal from clerk to judge.

Appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within 10 days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C.C.P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C.S., s. 633; 1927, c. 15; 1971, c. 381, s. 12.)

CASE NOTES

Effect of Section. — By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without an undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

Applicability. — This section and §§ 1-274 and 1-275, regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to enactment of Public Laws 1921, Extraordinary Session, Chapter 92 (which act has now been repealed except for § 1-281). These sec-

tions do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329 (1925).

This section applies in special proceedings as well as in civil actions generally. *Welfare v. Welfare*, 108 N.C. 272, 12 S.E. 1025 (1891).

Section Inapplicable where Judge and Clerk Have Concurrent Jurisdiction. — This section and §§ 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, have no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. *Moody v. Howell*, 229 N.C. 198, 49 S.E.2d 233 (1948).

Proceedings to which Section Applies — Order to Sell Land for Debt. — This section applies to an appeal from an order of the clerk to sell lands of decedent to pay debts. *Perry v. Perry*, 179 N.C. 445, 102 S.E. 772 (1920).

Same — Refusal to Issue Execution. — Where a clerk of the superior court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district. *Huntley v. Hasty*, 132 N.C. 279, 43 S.E. 844 (1903).

Same — Execution Sale. — An action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely cancelled judgments against the property owner constituted an impermissible collateral attack upon the order of confirmation of the execution sale by the clerk of court, plaintiffs' remedy being to proceed directly either by motion in the cause or appeal. *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Same — Proceedings Supplemental to Execution. — Where, in proceedings supplemental to execution, the clerk held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

Same — Setting Aside Commissioner's Report. — An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. *McMillan v. McMillan*, 123 N.C. 577, 31 S.E. 729 (1898).

Same — Sufficiency of Bonds. — The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk. *S. Marsh & Co. v. Cohen*, 68 N.C. 283 (1873).

Same — Order Concerning Judgment Debtor. — An appeal lies from an order of the clerk requiring a judgment

debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

Same — Removal of Executors. — An appeal will lie to the judge in proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N.C. 4 (1886).

Section Construed in Pari Materia with § 1-276. — As this section and § 1-276 deal with the same subject matter, they must be construed in pari materia and harmonized to give effect to each. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967).

Section 1-276, giving power to the superior court judge to determine all matters in controversy when a special proceeding is transferred for any ground from the clerk, must be construed in pari materia with this section. *Journeys Int'l, Inc. v. Corbett*, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Compliance with Section Required. — In order to entitle the judge of the superior court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by this section must be followed. *Muse v. Edwards*, 223 N.C. 153, 25 S.E.2d 460 (1943).

There must be an appeal from the clerk's judgment to give the superior court jurisdiction. *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967); *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Appeal of Probate Matters. — Jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In *re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).

Under a strict construction of this section and § 1-273 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the

hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In *re Estate of Adamee*, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

The appeal must be taken within 10 days after the clerk's judgment to entitle the judge of the superior court to review the ruling. *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Dismissal on Ground of Laches. — An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. *Hicks v. Wooten*, 175 N.C. 597, 96 S.E. 107 (1918).

Jurisdiction of Superior Court when Proceeding before Clerk Is Brought before Judge — In General. — The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivate; rather, the court has jurisdiction to hear and determine all matters in controversy as if the case was originally before him. However, the judge of the superior court may in his discretion remand the cause to the clerk for further proceedings. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

Same — Erroneous Transfer to Superior Court. — Even when a proceeding is erroneously transferred to the superior court, and the judge takes jurisdiction pursuant to § 1-276, he may in his discretion make new parties, allow them to answer and hold the case for jury determination before further proceedings are held. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

Although a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk had acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

Where an equitable proceeding brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the appellate court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. *Smith v. Gudger*, 133 N.C. 627, 45 S.E. 955 (1903).

Clerk Acts for Court. — The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. *Brittain v. Mull*, 91 N.C. 498 (1884).

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless all his power is delegated by virtue of his office as clerk of the superior court. *Windsor v. McVay*, 206 N.C. 730, 175 S.E. 83 (1934).

And Clerk's Action Is Not Conclusive. — The action of the clerk is not final and conclusive. In a proper case, on appeal, it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. *Turner v. Holden*, 109 N.C. 182, 13 S.E. 731 (1891).

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In *re Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).

Scope of Court's Review. — Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In *re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).

To say that the superior court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In *re* Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Duty of Clerk to Transmit Record.

— On appeal from the assessment of damages for lands taken by the State Highway Commission, the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge, within his supervisory power, may order that this be done. *Sneed v. State Hwy. Comm'n*, 194 N.C. 46, 138 S.E. 350 (1927).

Docketing Tax Not Applicable. —

Where an appeal is taken from an order of the clerk of the superior court to the judge thereof under this section, the

judge has jurisdiction by mandate of § 1-276, and no "docketing" in a technical sense is involved; hence, former § 105-93, requiring a tax of \$2.00 for "docketing" and appeal from a lower court in the superior court, did not apply. *Windsor v. McVay*, 206 N.C. 730, 175 S.E. 83 (1934).

A party cannot be aggrieved by an order dismissing someone else's appeal. *Poston v. Ragan*, 14 N.C. App. 134, 187 S.E.2d 503 (1972).

Applied in *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962).

Stated in *North Carolina State Hwy. & Pub. Works Comm'n v. Mullican*, 243 N.C. 68, 89 S.E.2d 738 (1955).

Cited in *Daniel v. Bellamy*, 91 N.C. 78 (1884); *Edwards v. Cobb*, 95 N.C. 4 (1886); *Chowan & S.R.R. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890); *Adams v. Guy*, 106 N.C. 275, 11 S.E. 535 (1890); *Holly Shelter R.R. v. Newton*, 133 N.C. 136, 45 S.E. 549 (1903); *In re Hardin*, 248 N.C. 66, 102 S.E.2d 420 (1958); *In re Estate of Nixon*, 2 N.C. App. 422, 163 S.E.2d 274 (1968); *Macon v. Edinger*, 49 N.C. App. 620, 272 S.E.2d 411 (1980); *Phil Mechanic Constr. Co. v. Haywood*, 56 N.C. App. 464, 289 S.E.2d 134 (1982).

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

If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court. (C.C.P., c. 115; Code, s. 256; Rev., s. 588; C.S., s. 634; 1971, c. 381, s. 12.)

CASE NOTES

Transfer of Case where Issues of Fact Are Raised. — Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the superior court to be tried. *Brittain v. Mull*, 91 N.C. 498 (1884).

When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the clerk to place the proceeding on the docket of the trial term for trial. *Jones v. Desern*, 94 N.C. 32 (1886).

If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action. In *re*

Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Probate Proceedings. — A clerk of the superior court may probate a will in solemn form, without the verdict of a jury, where interested parties are cited to appear or come in voluntarily and raise no issue of fact. But where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of *devisavit vel non*, which issue must be tried by a jury. Such procedure is required by this section. In *re* *Will of Ellis*, 235 N.C. 27, 69 S.E.2d 25 (1952).

Under a strict construction of this section and § 1-272 as they affect § 7A-251,

in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In *re Estate of Adamee*, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Proceedings for Partition. — In an *ex parte* proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment, involves questions of fact, properly determinable by the judge, under this section. *Ex parte Beckwith*, 124 N.C. 111, 32 S.E. 393 (1899).

Dower Proceedings. — For case holding that this section rather than § 1-274 was applicable to an appeal from the judgment of the clerk in dower proceedings involving issues of law and of fact, prior to abolition of dower, see *McLawhorn v. Smith*, 211 N.C. 513, 191 S.E. 35 (1937).

Waiver. — In special proceedings,

pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury, even if it is conceded that the statute gives them the right to demand it. *Chowan & S.R.R. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890).

Applied in *In re Daughtridge*, 25 N.C. App. 141, 212 S.E.2d 519 (1975); *Oxendine v. Catawba County Dep't of Social Servs.*, 49 N.C. App. 570, 272 S.E.2d 417 (1980); *Oxendine v. Catawba County Dep't of Social Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981).

Quoted in *Davidson v. Gaston County Dep't of Social Servs.*, 56 N.C. App. 806, 290 S.E.2d 399 (1982).

Stated in *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981).

Cited in *Vance v. Vance*, 118 N.C. 864, 24 S.E. 768 (1896); *Sneed v. State Hwy. Comm'n*, 194 N.C. 46, 138 S.E. 350 (1927); *Boone v. Sparrow*, 235 N.C. 396, 70 S.E.2d 204 (1952); *In re Will of Wood*, 240 N.C. 134, 81 S.E.2d 127 (1954); *In re Hill*, 36 N.C. App. 765, 245 S.E.2d 378 (1978).

§ 1-274. Duty of clerk on appeal.

On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision. (C.C.P., s. 110; Code, s. 254; Rev., s. 612; C.S., s. 635.)

CASE NOTES

Duty of Clerk to Prepare Statement. — Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is the duty of the clerk to prepare and make a

statement of the case and send it to the judge. *Little v. Duncan*, 149 N.C. 84, 62 S.E. 770 (1908).

And to Transmit Record. — The clerk is required by this section to transmit the entire record to the court

upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. *Sneed v. State Hwy. Comm'n*, 194 N.C. 46, 138 S.E. 350 (1927). But see, *Hicks v. Wooten*, 175 N.C. 597, 96 S.E. 107 (1918), in which it was held that the neglect of the clerk in sending up the appeal would not excuse gross laches of the appellant.

When Clerk Need Not Prepare and Transmit Statement. — In appeals from the clerk in that class of cases of which he has jurisdiction not as and for the court as in special proceedings, but in his capacity as clerk, such as auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. *Ex parte Spencer*, 95 N.C. 271 (1886).

It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal. *Cape Fear & N.R.R. v. Stewart*, 132 N.C. 248, 43 S.E. 638 (1903).

Court May Order Preparation of Statement. — The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

And Transmission of the Record. — Where the clerk has failed to transmit the record to the court upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. *Sneed v. State Hwy. Comm'n*, 194 N.C. 46, 138 S.E. 350 (1927).

Unless Clerk Has Left Office. — Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. *Ex parte Spencer*, 95 N.C. 271 (1886).

No Appeal Lies from Order to Send Up Transcript. — No appeal lies from an order of the superior court directing

the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

What Statement Should Contain. — The statement should embrace the material facts and copies of necessary paper writings or such papers themselves, so that the judge may review the decision of the clerk appealed from upon its full merits. *Brooks v. Austin*, 94 N.C. 222 (1886); *Carolina Power & Light Co. v. Merritt*, 41 N.C. App. 438, 255 S.E.2d 225 (1979).

Clerk Should Give Reasons. — Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings, he may and should state his reason for such refusal, even after appeal to the court in term. *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889).

Clerk Should Docket Case without Court Order. — It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial, it being the duty of the clerk to do this without such order when an issue of fact is joined. *Jones v. Desern*, 94 N.C. 32 (1886).

Waiver. — Where an appeal from an order of the clerk was noted at the time and was heard without objection at the term of the superior court beginning two days thereafter, but upon failure of the judge to decide the appeal before leaving the district it was placed on the calendar and reached the second term following, at which time without objection the parties appeared and argued the matter before the presiding judge, any irregularity in procedure was waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with this section was untenable. *Cody v. Hovey*, 219 N.C. 369, 14 S.E.2d 30 (1941).

Applied in *Windsor v. McVay*, 206 N.C. 730, 175 S.E. 83 (1934).

Cited in *Lovinier v. Pearce*, 70 N.C. 168 (1874); *Byrd v. Nivens*, 189 N.C. 621, 127 S.E. 673 (1925).

§ 1-275. Duty of judge on appeal.

It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after such receipt notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law. (C.C.P., s. 113; Code, s. 255; Rev., s. 613; C.S., s. 636.)

CASE NOTES

Full Jurisdiction of Case Vested on Appeal. — Under this section, an appeal in a partition action from an order of the clerk overruling a demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. *Thompson v. Rospigliosi*, 162 N.C. 145, 77 S.E. 113 (1913).

Procedure when Issues of Fact Are Tried. — When issues of fact are tried, the court will remand the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. *Brittain v. Mull*, 91 N.C. 498 (1884). But see § 1-276.

Issue of Law Joined in Special Proceedings. — When an issue of law is joined in a special proceeding, it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. *Jones v. Desern*, 94 N.C. 32 (1886). But see § 1-276.

In appeals in cases in which the clerk does not act for the court, it is the duty of the judge to determine the questions of fact and law raised, and for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he sees fit, he can submit issues for his better information to the jury. *Ex parte Spencer*, 95 N.C. 271 (1886).

Nature of Controversy in Partition Proceedings, Generally. — The controversy involved in a special pro-

ceeding for the partition in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

Appeal from Clerk's Decision upon Commissioners' Report as to Allotment in Partition Proceedings. — In an *ex parte* proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment, involved questions of fact, properly determinable by the judge under this section. *Ex parte Beckwith*, 124 N.C. 111, 32 S.E. 393 (1899).

A proceeding to sell lands to make assets to pay debts of the deceased is appealable from the clerk of the superior court, and is open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and may be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N.C. 445, 102 S.E. 772 (1920).

Where clerk of superior court dismisses a proceeding for appointment of a trustee for want of jurisdiction, on appeal the judge of the superior court may make such appointment. *Roseman v. Roseman*, 127 N.C. 494, 37 S.E. 518 (1900).

Where Appeals May Be Heard. — Appeals from the clerk may be heard at

chambers at any place in the district. *Monroe v. Lewald*, 107 N.E. 655, 12 S.E. 287 (1890).

Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district. *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

Motion Pending Appeal from Clerk. — A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

What Evidence May Be Heard. — Upon an appeal from an order of the clerk to the judge, the latter may hear

any evidence that would have been competent before the former, even though in fact it was not introduced. *McAden v. Banister*, 63 N.C. 479 (1869).

Notice Held Unreasonable. — Where notice of appeal from action by the clerk was served on the day before the hearing, the notice was not reasonable within this section. *Byrd v. Nivens*, 189 N.C. 621, 127 S.E. 673 (1925).

Presumption as to Propriety of Proceedings. — Where nothing in the record indicated that a judge who rendered a judgment on an appeal from the clerk of the superior court was requested in writing to fix a time for hearing and to give the parties notice, it would be presumed that the proceeding was rightly and regularly conducted. *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

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

Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (1887, c. 276; Rev., s. 614; C.S., s. 637.)

CASE NOTES

- I. In General.
- II. Scope of Court's Jurisdiction and Authority.
- III. Illustrative Cases.

I. IN GENERAL.

History. — By passing this section in 1887, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in *Brittain v. Mull*, 91 N.C. 498 (1884). In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law presented, and then remand the matter, including his decision, to the clerk.

Liberal Construction. — Because of its beneficial results this section has always received a liberal interpretation.

Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

This section must be construed in pari materia with § 1-272, which allows appeals from the clerk only by parties aggrieved. *Journeys Int'l, Inc. v. Corbett*, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

As this section and § 1-272 deal with the same subject matter, they must be construed in *pari materia* and harmonized to give effect to each. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967).

Section Not Applicable to Probate Proceedings. — Upon appeal from

action taken by the clerk of the superior court in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and the provisions of this section are not applicable. *In re Will of Spinks*, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

Upon appeal to the superior court from action of the clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and this section does not apply. Thus, where a clerk was without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error was not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order of the clerk. *In re Will of Hine*, 228 N.C. 405, 45 S.E.2d 526 (1947).

Procedure Where Issue of Devisavit Vel Non Is Raised. — Under the statutes governing probate matters, the superior court, as a mere court of law and equity, has no jurisdiction to determine the issue of whether a disputed writing is the last will of a deceased person in an ordinary civil action. However, when an issue of *devisavit vel non* is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the superior court in term has jurisdiction to determine the whole matter in controversy as well as the issue of *devisavit vel non*. *Morris v. Morris*, 245 N.C. 30, 95 S.E.2d 110 (1956).

Appointment and Removal of Administrators. — The jurisdiction of the superior court on appeal from an order of the clerk in removing an administrator and appointing a successor is solely derivative. *In re Estate of Johnson*, 232 N.C. 59, 59 S.E.2d 223 (1950).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, this section, which provides that "whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction," has no application to probate matters. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).

For case holding that on appeal of clerk's order appointing an administrator the superior court could reverse the order but should then remand the case,

see *In re Styers*, 202 N.C. 715, 164 S.E. 123 (1932).

For case holding that upon appeal of clerk's order removing certain executors and administrators, c.t.a., and appointing others in their place, by virtue of this section, the superior court judge, in the exercise of his discretionary powers, could retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administer the estate subject to the orders of the court, the entire matter being before the superior court on appeal, see *Wright v. Ball*, 200 N.C. 620, 158 S.E. 192 (1931).

Appointment and Removal of Guardians. — In the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. *In re Simmons*, 266 N.C. 702, 147 S.E.2d 231 (1966).

Applied in *Wynne v. Conrad*, 220 N.C. 355, 17 S.E.2d 514 (1941); *Garner v. Phillips*, 229 N.C. 160, 47 S.E.2d 845 (1948); *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954); *Yale v. National Indem. Co.*, 602 F.2d 642 (4th Cir. 1979).

Quoted in *Sharpe v. Sharpe*, 210 N.C. 92, 185 S.E. 634 (1936); *Rich v. Norfolk S. Ry.*, 244 N.C. 175, 92 S.E.2d 768 (1956); *Davidson v. Gaston County Dep't of Social Servs.*, 56 N.C. App. 806, 290 S.E.2d 399 (1982).

Stated in *In re Will of Lamb*, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

Cited in *Foreman v. Hough*, 98 N.C. 386, 3 S.E. 912 (1887); *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889); *Skinner v. Carter*, 108 N.C. 106, 12 S.E. 908 (1891); *Nash v. Sutton*, 109 N.C. 550, 14 S.E. 77 (1891); *Fowler v. Fowler*, 131 N.C. 169, 42 S.E. 563 (1902); *Settle v. Settle*, 141 N.C. 553, 54 S.E. 445 (1906); *Carolina Power & Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871 (1930); *County of Buncombe v. Arbogast*, 205 N.C. 745, 172 S.E. 354 (1934); *Vann v. Coleman*, 206 N.C. 451, 174 S.E. 301 (1934); *Dailey v. Bay*, 215 N.C. 652, 3 S.E.2d 14 (1939); *In re Reynolds' Estate*, 221 N.C. 449, 20 S.E.2d 348 (1942); *Woody v. Barnett*, 235 N.C. 73, 68 S.E.2d 810 (1952); *In re Will of Wood*, 240 N.C. 134, 81 S.E.2d 127 (1954); *McDaniel v. Fordham*, 264 N.C. 62, 140 S.E.2d 736 (1965); *In re Estate of Nixon*, 2 N.C. App. 422, 163 S.E.2d 274 (1968); *In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

II. SCOPE OF COURT'S JURISDICTION AND AUTHORITY.

The superior court acquires jurisdiction of any special proceeding sent to it from the clerk on any ground whatever, with discretionary power to remand. *Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E.2d 74 (1949).

Whenever a special proceeding begun before the clerk is, for any ground whatever, sent to the superior court, the judge has jurisdiction. *Hudson v. Fox*, 257 N.C. 789, 127 S.E.2d 556 (1962).

And Court's Jurisdiction Is Not Derivative. — This section means that the clerk is really an arm of the superior court. When a proceeding is brought before the court, the court's jurisdiction is not appellate or derivative; it is original. *Hassell v. Wilson*, 301 N.C. 307, 272 S.E.2d 77 (1980).

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, the superior court's jurisdiction is not derivative; rather, the court has jurisdiction to hear and determine all matters in controversy in the proceeding. *Perry v. Bassenger*, 219 N.C. 838, 15 S.E.2d 365 (1941). See *ex parte Wilson*, 222 N.C. 99, 23 S.E.2d 262 (1942); *Potts v. Howser*, 267 N.C. 484, 148 S.E.2d 836 (1966); *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

Necessity of Appeal by a Party Aggrieved. — The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967).

Judge May Determine Entire Controversy. — Under this section, the judge now has final jurisdiction to determine the whole matter in controversy. *Lictie v. Chappell*, 111 N.C. 347, 16 S.E. 171 (1892); *Faison v. Williams*, 121 N.C. 152, 28 S.E. 188 (1897); *Oldham v. Rieger*, 145 N.C. 254, 58 S.E. 1091 (1907); *Hall v. Artis*, 186 N.C. 105, 118 S.E. 901 (1923); *Sale v. State Hwy. & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955).

When plaintiff appeals from the clerk's order to the judge, the judge is not limited to a review of the action of the clerk, but is vested with jurisdiction "to hear and determine all matters in controversy in such action," and he may render such judgment or order, within the limits pro-

vided by law, as he deems proper under the circumstances. *Hendrix v. Alsop*, 278 N.C. 549, 180 S.E.2d 802 (1971).

As If It Were Originally before Him. — When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if it were originally before him. *Langley v. Langley*, 236 N.C. 184, 72 S.E.2d 235 (1952).

Even where Clerk Exceeded Authority. — Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if it were originally before him. *McDaniel v. Leggett*, 224 N.C. 806, 32 S.E.2d 602 (1945).

When the clerk of the superior court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the whole matter. *Bradshaw v. Warren*, 216 N.C. 354, 4 S.E.2d 883 (1939).

Although an order by the clerk was a nullity, when the matter came before the judge of the superior court by appeal the judge had jurisdiction to proceed to hear and determine all matters in controversy. *In re Foreclosure of Deed of Trust*, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

When defendants made a motion to set aside clerk's entry of default and default judgment, the trial court was not limited to a review of the action of the clerk, but was vested with jurisdiction to hear and determine all matters in controversy and render a judgment or order within the limits provided by law, including default judgment, and that principle would apply even though the order by the clerk was a nullity. *Webb v. James*, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Or where Proceedings Were Improperly Brought before Clerk. — When a case which is properly cognizable in the superior court but which is erroneously brought before a clerk gets in the superior court on any ground, the judge has jurisdiction to retain and hear the cause as if it were originally instituted in the superior court. *Robeson v. Hodges*, 105 N.C. 49, 11 S.E. 263 (1890);

Hall v. Artis, 186 N.C. 105, 118 S.E. 901 (1923). See also, Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917); Spence v. Granger, 207 N.C. 19, 175 S.E. 824 (1934).

Even when the proceeding originally had before the clerk is void for want of jurisdiction, the superior court may yet proceed in the matter. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

Upon the failure or refusal of surviving partners to file the bond required by § 59-74 or the inventory required by § 59-76, the clerk of the superior court could not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquired jurisdiction of the entire proceeding and the appeal was erroneously dismissed in the superior court on the ground of want of jurisdiction. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Or where the Proceeding Was Erroneously Transferred. —

Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the Commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Where the clerk of the superior court erroneously transferred proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom was taken to the superior court, the judge thereof acquired jurisdiction for the hearing and determination of the controversy under the provisions of this section, and could order other proper or necessary parties to be made for the further determination of the cause. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

A motion in the superior court to dismiss for want of jurisdiction on the ground that the proceeding was

erroneously transferred to the civil issue docket is untenable. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Judge Need Not Remand Case to Clerk for Determination of Motion. —

After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941).

When a motion to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court was made at the next term after judgment was entered, it was error for the judge to hold that he had no power to entertain it. In re Smith, 105 N.C. 167, 10 S.E. 982 (1890).

The court has the right in its discretion to remand the cause to the clerk for further proceedings. York v. McCall, 160 N.C. 276, 76 S.E. 84 (1912).

Remand of Partition Proceedings Held Improper. —

Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of such case on the merits, and he had no power to merely reverse the clerk's action and remand the case to him, even though there may have been irregularities in the proceedings before the clerk. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Trial judge has full power to deny motion to enlarge the time to file complaint and dismiss the action as to defendant. This discretionary ruling as to enlargement of time to file complaint, in effect, ends the action. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

Power to Permit Untimely Answer

to Remain of Record. — Upon appeal from denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquired jurisdiction of the entire cause, and he had the power to permit the answer to remain of record, even though it was filed after time for answering had expired. Bailey v. Davis, 231 N.C. 86, 55 S.E.2d 919 (1949).

The judge has power to make amendments to give jurisdiction.

Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Ewbank v. Turner, 134 N.C. 77, 46 S.E. 508 (1903).

And he may strike out an answer that is irrelevant. Commissioners of Yancey County v. Piercy, 72 N.C. 181 (1875).

Judge May Add Issues. — The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. *In re Herring*, 152 N.C. 258, 67 S.E. 570 (1910).

Judge May Set Aside Clerk's Order and Substitute His Own. — The superior court acquires jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein; the judge may set aside a previous order of the clerk and substitute therefor an order of his own without finding that the clerk abused his discretion or committed an error of law in signing the order, the clerk being but a part of the superior court. *Bynum v. Fidelity Bank*, 219 N.C. 109, 12 S.E.2d 898 (1941).

Judge May Set Aside Judgment. — The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. *Faison v. Williams*, 121 N.C. 152, 28 S.E. 188 (1897).

Court's Conflicting Ruling Held Null and Void. — Where the superior court ruled that a clerk had no authority under § 28-111 to appoint a referee to hear a claim against the estate of a deceased, a further ruling that the referee's report was binding on other grounds was a nullity, notwithstanding the broad jurisdiction of the superior court under this section. *In re Shutt*, 214 N.C. 684, 200 S.E. 372 (1939).

III. ILLUSTRATIVE CASES.

Question of Price of Land Sold under Mortgage. — The discretion vested in the superior court judge on appeal from the clerk cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority to further pass thereon in the absence of an increased bid. *In re Mortgage Sale of Ware Property*, 187 N.C. 693, 122 S.E. 660 (1924).

Resale on Foreclosure of Mortgage. — Where a commissioner appointed to hold a foreclosure sale advertised and sold the property in conformity with the order, but reported that the last and highest bid was less than the value of the property and recommended a resale, and the clerk ordered a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, had jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. *Harriss v. Hughes*, 220 N.C. 473, 17 S.E.2d 679 (1941).

A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and is open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require; it may be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897); *Perry v. Perry*, 179 N.C. 445, 102 S.E. 772 (1920). See also, *Harrington v. Hatton*, 129 N.C. 146, 39 S.E. 780 (1901).

Partition Proceedings. — In a suit for partition of land, the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. *Wooten v. Cunningham*, 171 N.C. 123, 88 S.E. 1 (1916).

The clerk has authority and jurisdiction, initially to pass upon exceptions to the report of the commissioners in a special proceeding for partition. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962).

Clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. *Southern State Bank v. Leverette*, 187 N.C. 743, 123 S.E. 68 (1924).

Proceedings to Subject Lands to Dower. — An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges

thereon, prior to abolition of dower, could not be had before the clerk and on appeal could be dismissed by the judge for want of jurisdiction. In re Hybart's Estate, 129 N.C. 130, 39 S.E. 779 (1901).

Drainage Assessment Proceedings.

— Under this section, giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and § 156-29, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken

from an order of the clerk to the superior court. *Spence v. Granger*, 207 N.C. 19, 175 S.E. 824 (1934).

Appointment of Receiver for Partnership.

— While the clerk of the superior court had no jurisdiction to appoint a receiver for a partnership under § 59-77 when the surviving partners failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding acquired jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

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

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P.R.; C.C.P., s. 299; Code, s. 548; Rev., s. 587; C.S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

Cross References. — As to appellate jurisdiction of the Supreme Court and Court of Appeals, see N.C. Const., Art. IV, § (12). As to who may appeal, see § 1-271. As to appealability of judgment as to one or more but fewer than all claims or parties, see Rule 54(b) of the Rules of Civil Procedure (§ 1A-1). As to costs on appeal, see § 6-23 et seq. As to the jurisdiction of the Supreme Court and the Court of Appeals, and as to appeals of right and discretionary review, see Article 5 of Chapter 7A. As to appeals in criminal cases, see

Subchapter XIV of Chapter 15A. For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

CASE NOTES

I. In General.

II. From What Decisions, etc., Appeal Lies.

A. In General.

B. Interlocutory Orders.

C. Grant or Denial of New Trial.

D. Jurisdiction.

E. Injunctions.

F. Costs.

III. Scope of Review.

IV. Presumptions and Burden of Proof.

V. Illustrative Cases.

A. Appellant Held Entitled to Appeal.

B. Appellant Not Entitled to Appeal.

I. IN GENERAL.

Purpose of Section. — The reason for this section, along with § 7A-27 and Rule 54 of the Rules of Civil Procedure (§ 1A-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. *Blue Ridge Sportcycle Co. v. Schroeder*, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

As to the reason for this section, see also *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975).

This section and § 7A-27 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. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

This section was not repealed or nullified by enactment of Chapter 1A of the General Statutes, prescribing the presently effective Rules of Civil Procedure. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

Right of Appeal Not Restricted by Rule 54(b) Requirements. — The General Assembly did not restrict the right of appeal provided by this section and § 7A-27(d) by engrafting the requirements of § 1A-1, Rule 54 upon them. *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

This section is not such an express authorization of review of a final judgment upon multiple claims or involving multiple parties as is referred to in the second sentence of Rule 54(b). *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

As to the appeal certification procedure under § 1A-1, Rule 54(b), see *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, — S.E.2d — (1980).

Extent to which Certification Procedure of Rule 54(b) May Be Bypassed. — To the extent that judgments as to one or more but fewer than all parties are determined by the

appellate courts of this State to affect a "substantial right" of one of the litigants under this section and § 7A-27(d), the procedure for trial court certification of such judgments as appealable established in § 1A-1, Rule 54(b) is bypassed and the appellate court is substituted as the true dispatcher of appeals. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, — S.E.2d — (1980). See also, *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Actions by the trial court, if not final or if final but not properly certified by the trial judge pursuant to § 1A-1, Rule 54(b), are nonetheless immediately appealable if denial of an immediate appeal would affect a substantial right and work an injury to the appellant. *Harris v. DePencier*, 52 N.C. App. 161, 278 S.E.2d 759 (1981).

Purpose of Appeal. — The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits. *Rush v. Halcyon Steamboat Co.*, 67 N.C. 47 (1872), modified on rehearing, 68 N.C. 72 (1873).

Remedy for Legal Errors Is Appeal. — Where an adjudication is based on the erroneous application of legal principles, the proper remedy to correct the error is by a proceeding in appeal. *Stafford v. Gallops*, 123 N.C. 19, 31 S.E. 265 (1898); *McLeod v. Graham*, 132 N.C. 473, 43 S.E. 935 (1903); *Rawls v. Mayo*, 163 N.C. 177, 79 S.E. 298 (1913).

And Not Application to Another Superior Court Judge. — The proper method for obtaining relief from legal errors is by appeal under this section and not by application to another superior court. In such cases, a judgment entered by one judge of the superior court may not be modified, reversed or set aside by another superior court judge. *Nowell v. Neal*, 249 N.C. 516, 107 S.E.2d 107 (1959); *North Carolina State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967).

Record Must Show Jurisdiction. — As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. *Gordon v. Sanderson*, 83 N.C. 1 (1880).

Jurisdiction of an appeal cannot be given by consent of the parties. *Rodman v. Davis*, 53 N.C. 134 (1860); *J.R. Cary Co. v. Allegood*, 121 N.C. 54, 28 S.E. 61 (1897).

An attempted appeal from a nonappealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction. *Harris v. Harris*, 58 N.C. App. 175, 292 S.E.2d 775 (1982), rev'd on other grounds, — N.C. —, 300 S.E.2d 369 (1983).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961).

But Right of Appeal Depends on Compliance with Rules and Statutes. — An appeal is not a matter of absolute right; rather, appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98 (1912); *Byrd v. Southerland*, 186 N.C. 384, 119 S.E. 2 (1923).

An appellant's right of appeal is dependent upon his observance of the rules regulating appeals. *Lindsey v. Supreme Lodge of Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916); *Kerr v. Drake*, 182 N.C. 764, 108 S.E. 393 (1921).

Dismissal for Failure to Comply. — Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals, and where the appellant has failed to comply with these rules the appeal will be dismissed. *Rose v. Rocky Mount*, 184 N.C. 609, 113 S.E. 506 (1922).

An appeal must be prosecuted by the aggrieved real party in interest. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982).

Where a party is not aggrieved, his appeal will be dismissed. *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 132 S.E.2d 345 (1963).

A party not appealing or assigning any errors is not in position to complain of a ruling. *Hannah v. Hyatt*, 170 N.C. 634, 87 S.E. 517 (1916).

No Right to Object to Order in Furtherance of Own Demand — In General. — A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. *Leak v. Covington*, 87 N.C. 501 (1882); *Hocutt v. Wilmington & W.R.R.*, 124 N.C. 214, 32 S.E. 681 (1899).

Same — Joinder of Party. — A defendant cannot ask that a party be brought in and then object because he is an improper party. *Armfield Co. v. Saleeby*, 178 N.C. 298, 100 S.E. 611 (1919).

Same — Instructions. — A party to an action cannot except to an instruction which was given by the trial court at his request. *Bell v. Harrison*, 179 N.C. 190, 102 S.E. 200 (1920); *Washington Horse Exch. Co. v. Bonner*, 180 N.C. 20, 103 S.E. 907 (1920).

Evidence Elicited by Own Cross-Examination. — The defendant cannot object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness. *Jenkins v. Long*, 170 N.C. 269, 87 S.E. 47 (1915).

No appeal lies from a consent judgment. *Union Bank v. Commissioners of Oxford*, 119 N.C. 214, 25 S.E. 966 (1896); *Overman v. Lanier*, 156 N.C. 537, 72 S.E. 575 (1911); *Hartsoe v. Southern Ry.*, 161 N.C. 215, 76 S.E. 684 (1912).

No Right to Appeal from Favorable Judgment. — A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. *Doe v. South*, 32 N.C. 237 (1849); *Hoke v. Carter*, 34 N.C. 327 (1851).

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial, his appeal must be dismissed. *McCulloch v. North Carolina R.R.*, 146 N.C. 316, 59 S.E. 882 (1907).

Nor from Errors Favorable to Party Complaining. — A party cannot complain of error in his favor. *Shaw v. North Carolina Pub. Serv. Corp.*, 168 N.C. 611, 84 S.E. 1010 (1915); *Gaston Farmers Whse. Co. v. American Agrl. Chem. Co.*, 176 N.C. 509, 97 S.E. 472 (1918); *Nance v. King*, 178 N.C. 574, 101 S.E. 212 (1919).

A ruling in appellant's favor is not reviewable, where appellee does not complain of it. *Hendon v. North Carolina R.R.*, 127 N.C. 110, 37 S.E. 155 (1900); *Miller v. Curl*, 162 N.C. 1, 77 S.E. 952 (1913).

A party cannot complain of charges favorable to himself. *Lupton v. Southern Express Co.*, 169 N.C. 671, 86 S.E. 614 (1915); *Borden v. Carolina Power & Light Co.*, 174 N.C. 72, 93 S.E. 442 (1917); *Belk v. Belk*, 175 N.C. 69, 94 S.E. 726 (1917).

Plaintiff cannot complain of technical error where he could not recover in any event. *Wilcox v. McLeod*, 182 N.C. 637, 109 S.E. 875 (1921); *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32 (1922).

Where the jury's answer to one issue was a complete bar to plaintiff's right of action, and no error was alleged in the determination of that issue, it was unnecessary to consider exceptions relating to other issues. *Lamm v. Hölloman*, 176 N.C. 686, 97 S.E. 161 (1918).

Duty to Dismiss Appeal. — It is the duty of an appellate court to dismiss an appeal if there is no right to appeal. *Pasour v. Pierce*, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

Dismissal of Frivolous or Dilatory Appeal. — Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. *Blount v. Jones*, 175 N.C. 708, 95 S.E. 541 (1918); *Barnes v. Saleeby*, 177 N.C. 256, 98 S.E. 708 (1919).

An appeal by defendant from an order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground would be dismissed as made for delay. *Ludwick v. Uwarra Mining Co.*, 171 N.C. 60, 87 S.E. 949 (1916).

Separate Appeals in Related Causes. — Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. *Williams v. Carolina & W.R.R.*, 144 N.C. 498, 57 S.E. 216 (1907).

A party who loses on appeal cannot review such decision by a second appeal, but the only way is by petition to rehear. *Carter v. White*, 134 N.C. 466, 46 S.E. 983 (1904); *Holland v. Railroad*, 143 N.C. 435, 55 S.E. 835 (1906).

Causes coming before a judge are in the bosom of the court during term time (session). — So long as his orders, judgments and rulings do not fall within the classifications set out in this section, no appeal therefrom will lie. *Hollingsworth GMC Trucks, Inc. v. Smith*, 249 N.C. 764, 107 S.E.2d 746 (1959).

Applied in *Goldston v. Wright*, 257 N.C. 279, 125 S.E.2d 462 (1962); *Pearsall v. Duke Power Co.*, 258 N.C. 639, 129 S.E.2d 217 (1963); *Rouse v. Snead*, 269 N.C. 623, 153 S.E.2d 1 (1967); *Decker v. Coleman*, 6 N.C. App. 102, 169 S.E.2d 487 (1969); *Patrick v. Hurdle*, 16 N.C. App. 28, 190 S.E.2d 871 (1972); *In re Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972); *Sides v. Cabarrus Mem. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974); *Wachovia Bank & Trust Co., N.A. v. Smith*, 24 N.C. App. 133, 210 S.E.2d 212 (1974); *Sides v. Cabarrus Mem. Hosp.*, 287 N.C. 14, 213 S.E.2d 297 (1975); *State Farm Mut. Auto. Ins. Co. v. Ingram*, 288 N.C. 381, 218 S.E.2d 364 (1975); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 216 S.E.2d 379 (1975); *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E.2d 579 (1975); *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976); *Bridges v. Bridges*, 29 N.C. App. 209, 223 S.E.2d 845 (1976); *In re Metric Constructors, Inc.*, 31 N.C. App. 88, 228 S.E.2d 533 (1976); *Lundy Packing Co. v. Amalgamated Meat Cutters*, 31 N.C. App. 595, 230 S.E.2d 181 (1976); *Lineberry v. Wilson*, 36 N.C. App. 649, 244 S.E.2d 702 (1978); *Smith v. American Radiator & Std. San. Corp.*, 38 N.C. App. 457, 248 S.E.2d 462 (1978); *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 261 S.E.2d 899 (1980); *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980); *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981); *Newbold v. Globe Life Ins. Co.*, 50 N.C. App. 628, 274 S.E.2d 905 (1981); *Boyce v. Boyce*, 51 N.C. App. 422, 276 S.E.2d 494 (1981); *Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 280 S.E.2d 501 (1981); *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); *American Motors Sales Corp. v. Peters*, 58 N.C. App. 684,

294 S.E.2d 764 (1982); *Peloquin Assocs. v. Polcaro*, — N.C. App. —, 300 S.E.2d 477 (1983).

Quoted in *Waldron Buick Co. v. GMC*, 251 N.C. 201, 110 S.E.2d 870 (1959); *State ex rel. Gold v. Equity Gen. Ins. Co.*, 255 N.C. 145, 120 S.E.2d 452 (1961); *North Carolina State Bar v. DuMont*, 298 N.C. 564, 259 S.E.2d 280 (1979).

Stated in *Veazey v. City of Durham*, 231 N.C. 354, 57 S.E.2d 375 (1950); *City of Raleigh v. Edwards*, 234 N.C. 528, 67 S.E.2d 669 (1951); *Smith v. Pacific Intermountain Express Co.*, 34 N.C. App. 694, 239 S.E.2d 614 (1977); *Bacon v. Leatherwood*, 52 N.C. App. 587, 279 S.E.2d 86 (1981); *Journeys Int'l, Inc. v. Corbett*, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Cited in *Love v. Johnston*, 34 N.C. 367 (1851); *Patton v. Porter*, 48 N.C. 539 (1856); *Graham v. Skinner*, 57 N.C. 94 (1858); *McLenan v. Chisholm*, 64 N.C. 323 (1870); *Rush v. Halcyon Steamboat Co.*, 67 N.C. 47 (1872); *Clegg v. New York White Soap Stone Co.*, 67 N.C. 302 (1872); *Gray v. Gaither*, 71 N.C. 55 (1874); *Blake v. Askew*, 76 N.C. 325 (1877); *Wilson v. Seagle*, 84 N.C. 110 (1881); *Arrington v. Arrington*, 91 N.C. 301 (1884); *Scroggs v. Stevenson*, 100 N.C. 354, 6 S.E. 11 (1888); *Pritchard v. Baxter*, 108 N.C. 129, 12 S.E. 906 (1891); *Alexander v. Alexander*, 120 N.C. 472, 27 S.E. 121 (1897); *Jones v. Sugg*, 136 N.C. 143, 48 S.E. 575 (1904); *Rogerson v. Lumber Co.*, 136 N.C. 266, 48 S.E. 647 (1904); *Bernard v. Shemwell*, 139 N.C. 446, 52 S.E. 64 (1905); *Johnson v. Railroad Co.*, 140 N.C. 574, 53 S.E. 362 (1906); *Gray v. James*, 147 N.C. 139, 60 S.E. 906 (1908); *Thompson v. Seaboard Air Line Ry.*, 147 N.C. 412, 61 S.E. 286 (1908); *Rice v. McAdams*, 149 N.C. 29, 62 S.E. 774 (1908); *Billings v. The Charlotte Observer*, 150 N.C. 540, 64 S.E. 435 (1909); *Worth v. Knickerbocker Trust Co.*, 152 N.C. 242, 67 S.E. 590 (1910); *Kerr v. Hicks*, 154 N.C. 265, 70 S.E. 468 (1911); *H.L. Beck & Co. v. Bank of Thomasville*, 157 N.C. 105, 72 S.E. 632 (1911); *Morse v. Freeman*, 157 N.C. 385, 72 S.E. 1056 (1911); *Gill v. Board of Comm'rs*, 160 N.C. 176, 76 S.E. 203 (1912); *Kistler v. Southern Ry.*, 170 N.C. 666, 79 S.E. 676 (1914); *Fourth Nat'l Bank v. Wilson*, 168 N.C. 557, 84 S.E. 866 (1915); *Gambier v. Kimball*, 168 N.C. 642, 85 S.E. 3 (1915); *In re Will of Rawlings*, 170 N.C. 58, 86 S.E. 794 (1915); *In re Will of Staub*, 172 N.C. 138, 90 S.E. 119 (1916); *Grove v. Baker*, 174

N.C. 745, 94 S.E. 528 (1917); *Taylor v. City of Greensboro*, 175 N.C. 423, 95 S.E. 771 (1918); *Raulf v. Elizabeth City Light & Power Co.*, 176 N.C. 691, 97 S.E. 236 (1918); *Pegram v. Canton*, 179 N.C. 700, 103 S.E. 371 (1920); *Shepherd v. Shepherd*, 180 N.C. 494, 105 S.E. 4 (1920); *Corporation Comm'n v. Farmers Bank & Trust Co.*, 183 N.C. 170, 110 S.E. 839 (1922); *Davenport v. Board of Educ.*, 183 N.C. 570, 112 S.E. 246 (1922); *Beard v. Sovereign Lodge of Woodmen of World*, 184 N.C. 154, 113 S.E. 661 (1922); *Garland v. Linville Imp. Co.*, 184 N.C. 551, 115 S.E. 164 (1922); *United States v. Ovens*, 13 F.2d 376 (4th Cir. 1926); *Robinson v. J.B. Ivey & Co.*, 193 N.C. 805, 138 S.E. 173 (1927); *State v. Williams*, 209 N.C. 57, 182 S.E. 711 (1935); *In re Estate of Suskin*, 214 N.C. 218, 198 S.E. 661 (1938); *Sanderson v. Aetna Life Ins. Co.*, 218 N.C. 270, 10 S.E.2d 802 (1940); *Childers v. Powell*, 243 N.C. 711, 92 S.E.2d 65 (1956); *Harrill v. Taylor*, 247 N.C. 748, 102 S.E.2d 223 (1958); *Coburn v. Roanoke Land & Timber Corp.*, 260 N.C. 173, 132 S.E.2d 340 (1963); *Bell v. Smith*, 263 N.C. 814, 140 S.E.2d 542 (1965); *State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc.*, 264 N.C. 139, 141 S.E.2d 10 (1965); *North Carolina State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967); *Hagins v. Aero Mayflower Transit Co.*, 1 N.C. App. 51, 159 S.E.2d 592 (1968); *GMAC v. Feder*, 12 N.C. App. 696, 184 S.E.2d 383 (1971); *George W. Shipp Travel Agency, Inc. v. Dunn*, 20 N.C. App. 706, 202 S.E.2d 812 (1974); *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975); *Digsby v. Gregory*, 35 N.C. App. 59, 240 S.E.2d 491 (1978); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119 (1978); *Hamilton v. Hamilton*, 36 N.C. App. 755, 245 S.E.2d 399 (1978); *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978); *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979); *Nichols v. State Employees' Credit Union*, 46 N.C. App. 294, 264 S.E.2d 793 (1980); *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 889 (1981); *Harris v. Jim Stacy Racing, Inc.*, 53 N.C. App. 597, 281 S.E.2d 455 (1981); *Southern Spindle & Flyer Co. v. Milliken & Co.*, 53 N.C. App. 785, 281 S.E.2d 734 (1981); *Glyk & Assocs. v. Winston-Salem Southbound Ry.*, 55 N.C. App. 165, 285 S.E.2d 277 (1981); *Patterson v. Phillips*, 56 N.C. App. 454, 289 S.E.2d 48 (1982); *Wake*

County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982); Wright v. Fiber Indus., Inc., — N.C. App. —, 299 S.E.2d 284 (1983); Swindell v. Overton, — N.C. App. —, 300 S.E.2d 864 (1983); Terry's Floor Fashions, Inc. v. Murray, — N.C. App. —, 300 S.E.2d 888 (1983); Schmitt v. Schmitt, — N.C. App. —, 301 S.E.2d 741 (1983).

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

A. In General.

Right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. In re Estate of Reynolds, 221 N.C. 449, 20 S.E.2d 348 (1942).

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

When Immediate Right of Appeal Is Available. — This section gives any party to a lawsuit a right to an immediate appeal from every judicial determination which affects a substantial right of that party, or which constitutes a final adjudication, even when that determination disposes of only a part of the lawsuit. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

An appeal lies in all cases from judgment applying the law to the facts found. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899); Ladd v. Teague, 126 N.C. 544, 36 S.E. 45 (1900); Stokes v. Cogdell, 153 N.C. 181, 69 S.E. 65 (1910).

But No Appeal Lies to Review the Jury's Findings of Fact. — Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. Pender v. North State Life Ins. Co., 163 N.C. 98, 79 S.E. 293 (1913).

Cause of Action at Issue Must Be Directly Affected. — An appeal lies from an order or determination in an action which affects the right litigated, i.e., the cause of action in controversy therein, in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and which does not affect directly the cause of

action litigated. Bynum v. Board of Comm'rs, 101 N.C. 412, 8 S.E. 136 (1888).

And Appellant's Substantial Rights Must Be Affected. — If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Substantial Right May Be Affected Despite Procedures for Staying Execution of Judgment. — The existence of the procedures under §§ 1-269, 1-289 and 1A-1, Rule 62 for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Except where statute otherwise expressly provides, appeal lies only from final judgment or one in its nature final. Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950). See also, Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

As a general rule, an appeal will not lie until there is a final disposition of the whole case. Moore v. Hinnant, 87 N.C. 505 (1882); Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885); Hailey v. Gray, 93 N.C. 195 (1885); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

All issues should be determined, and a final judgment rendered, before an appeal should be permitted. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

An appeal lies from a final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Nonfinal Orders and Judgments Are Not Generally Reviewable. — As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Unless the Right to Appeal Is Conferred by Statute. — Where the right to appeal is conferred by statute, i.e., where a substantial right of the parties would be affected if immediate appeal were not permitted under this section or § 7A-27, the judgment is appealable whether it is final or interlocutory in nature. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, — S.E.2d — (1980).

What Is a Final Judgment. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. *Atkins v. Beasley*, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Decision Ending Proceedings Is Final. — Any decision, order or decree of the circuit court which puts an end to the proceedings between the parties to a cause in that court is final, and may be reviewed upon appeal. *Ex parte Spencer*, 95 N.C. 271 (1886); *Bain v. Bain*, 106 N.C. 239, 11 S.E. 327 (1890).

As Is Decision Disposing of One Branch of the Matter at Issue. — A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. *North Carolina State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967).

The appellate court will not entertain premature or fragmentary appeals. *Cape Fear & Y.V. Ry. v. King*, 125 N.C. 454, 34 S.E. 541 (1899); *Thomas v. Carteret*, 180 N.C. 109, 104 S.E. 75 (1920); *Farr v. Babcock Lumber Co.*, 182 N.C. 725, 109 S.E. 833 (1921). See also, *Joyner v. Reflector Co.*, 176 N.C. 274, 97 S.E. 44 (1918).

When No Substantial Right Is Jeopardized. — Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. *Brown v. Nimocks*, 126 N.C. 808, 36 S.E. 278 (1900).

Where no final judgment was given, nor any interlocutory order or determination that put an end to the proceeding or that could destroy or seriously impair some substantial right of the appellants should the appeal be delayed until final judgment, an appeal would not lie. Fragmentary appeals are not allowed. *Leak v. Covington*, 95 N.C. 193 (1886); *Martin v. Flippin*, 101 N.C. 452, 8 S.E. 345 (1888).

When Appeal Is Premature. — Where the pleadings present issues of fact that have not been tried below, an appeal is premature. *Goode v. Rogers*, 126 N.C. 62, 35 S.E. 185 (1900).

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. *Graded School Trustees v. Hinton*, 156 N.C. 586, 71 S.E. 1087 (1911); *Ingle v. McCurry*, 243 N.C. 65, 89 S.E.2d 745 (1955).

The appellate court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. *Taylor v. Johnson*, 171 N.C. 84, 87 S.E. 981 (1916); *Bargain House v. Jefferson*, 180 N.C. 32, 103 S.E. 922 (1920).

Even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E.2d 382 (1962); *Barrier v. Randolph*, 260 N.C. 741, 133 S.E.2d 655 (1963).

An order of the superior court remanding a case to the Industrial Commission is an interlocutory order, and an appeal therefrom to the appellate court is premature and is subject to dismissal. However, the appellate court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. *Edwards v. City of Raleigh*, 240 N.C. 137, 81 S.E.2d 273 (1954).

As a Guide in Further Proceedings. — On dismissal of a fragmentary appeal, the appellate court may in its discretion express its opinion upon the merits, so far as it may be a guide in further proceedings in the court below. *Penn-Allen Cement Co. v. Phillips*, 182 N.C. 437, 109 S.E. 257 (1921).

And Its Opinion Will Be Authoritative on Subsequent Appeal. — Where appellate court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion would be authoritative on subsequent appeal. *Yates v. Dixie Fire Ins. Co.*, 176 N.C. 401, 97 S.E. 209 (1918); *North Carolina Pub. Serv. Co. v. Southern Power Co.*, 181 N.C. 356, 107 S.E. 226 (1921).

But agreement that other cases would abide determination in the case at hand was a matter between the parties, and does not authorize the appellate court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. *Belden v. Snead*, 84 N.C. 243 (1881).

As to appeals involving orders of reference and referee's reports, see *Vest v. Cooper*, 68 N.C. 131 (1873); *Sutton v. Schonwald*, 80 N.C. 20 (1879); *Sloan v. McMahon*, 85 N.C. 296 (1881); *Lutz v. Cline*, 89 N.C. 186 (1883); *Jones v. Call*, 89 N.C. 188 (1883); *Grant v. Reese*, 90 N.C. 3 (1884); *Braid v. Lukins*, 95 N.C. 123 (1886); *Leak v. Covington*, 95 N.C. 193 (1886); *Stevenson v. Felton*, 99 N.C. 58, 5 S.E. 399 (1888); *Wallace Bros. v. Douglas*, 105 N.C. 42, 10 S.E. 1043 (1890); *Jones v. Beaman*, 117 N.C. 259, 23 S.E. 248 (1895); *Royster v. Wright*, 118 N.C. 152, 24 S.E. 746 (1896); *Austin v. Stewart*, 126 N.C. 525, 36 S.E. 37, appeal dismissed, 127 N.C. 580, 38 S.E. 1006 (1900); *Jones v. Wooten*, 137 N.C. 421, 49 S.E. 915 (1905); *Duckworth v. Duckworth*, 144 N.C. 620, 57 S.E. 396 (1907); *Richardson v. Southern Express Co.*, 151 N.C. 60, 65 S.E. 616 (1909); *Pritchard v. Panacea Spring Co.*, 151 N.C. 249, 65 S.E. 968 (1909); *Pritchett v. Greensboro Supply Co.*, 153 N.C. 344, 69 S.E. 249 (1910); *Smith v. Miller*, 155 N.C. 242, 71 S.E. 353 (1911); *John Church Co. v. Dawson*, 157 N.C. 566, 72 S.E. 1009 (1911); *International Waste Co. v. Bloomfield Mfg. Co.*, 168 N.C. 92, 83 S.E. 609 (1914); *State ex rel. Marler-Dalton-Gilmer Co. v. Golden*, 172 N.C. 823, 90 S.E. 909 (1916); *Lewis v. May*, 173 N.C. 100, 91 S.E. 691 (1917); *Leroy v. Saliba*, 182 N.C. 757, 108 S.E. 303 (1921); *Cox v. Shaw*, 243 N.C. 191, 90 S.E.2d 327 (1955); *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961).

As to appeals involving nonsuits prior to enactment of the Rules of Civil Procedure (§ 1A-1), see *Wharton v. Commissioners of Currituck*, 82 N.C. 11 (1880); *Hedrick v. Pratt*, 94 N.C. 101 (1886); *Warner v. Western N.C.R.R.*, 94 N.C. 250 (1886); *Davis v. Ely*, 100 N.C. 283, 5 S.E. 239 (1888); *Tiddy v. Harris*, 101 N.C. 589, 8 S.E. 227 (1888); *Hayes v. Railroad*, 140 N.C. 131, 52 S.E. 416 (1905); *Midgett v. Manufacturing Co.*, 140 N.C. 361, 53 S.E. 178 (1906); *Morton v. Blades Lumber Co.*, 144 N.C. 31, 56 S.E. 551 (1907); *White v. Harris*, 166 N.C. 227, 81 S.E. 687 (1914); *Gilbert v. Waccamaw Shingle Co.*, 167 N.C. 286, 83 S.E. 337 (1914); *Ridge v. Norfolk S.R.R.*,

167 N.C. 510, 83 S.E. 762 (1914); *Quelch v. Futch*, 172 N.C. 316, 90 S.E. 259 (1916); *McKinney v. Patterson*, 174 N.C. 483, 93 S.E. 967 (1917); *Munick v. City of Durham*, 181 N.C. 188, 106 S.E. 665 (1921); *Allen v. Gardner*, 182 N.C. 425, 109 S.E. 260 (1921); *Farr v. Babcock Lumber Co.*, 182 N.C. 725, 109 S.E. 833 (1921); *City of Goldsboro v. Holmes*, 183 N.C. 203, 111 S.E. 1 (1922); *Caldwell v. Caldwell*, 189 N.C. 805, 128 S.E. 329 (1925); *Cox v. Cox*, 246 N.C. 528, 98 S.E.2d 879 (1957); *Hollingsworth GMC Trucks, Inc. v. Smith*, 249 N.C. 764, 107 S.E.2d 746 (1959).

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 final decree. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978); *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

As to the purpose of the general rule against immediate appeal of interlocutory orders, see *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961); *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

Section Prohibits Appeal of Interlocutory Orders Unless Substantial Right Is Affected. — This section and § 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right. *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E.2d 310 (1975); *Williams v. Williams*, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

The effect of both this section and § 7A-27(d) is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978); *Clark v. Clark*, 42 N.C. App. 84, 255 S.E.2d 568 (1979).

This section serves as a roadblock to appeals from interlocutory orders which do not deprive appellant of a substantial right. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975).

An appeal does not lie to the appellate court from an interlocutory order of the superior court unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. *Shelby v. Lackey*, 235 N.C. 343, 69 S.E.2d 607 (1952); *Childers v. Powell*, 243 N.C. 711, 92 S.E.2d 65 (1956); *Tucker v. State Hwy. & Pub. Works Comm'n*, 247 N.C. 171, 100 S.E.2d 514 (1957); *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Setzer v. Annas*, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E.2d 310 (1975); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976); *Lundy Packing Co. v. Amalgamated Meat Cutters*, 31 N.C. App. 595, 230 S.E.2d 181 (1976); *Citicorp Person-to-Person Fin. Center, Inc. v. Stallings 601 Sales, Inc.*, 49 N.C. App. 187, 270 S.E.2d 567 (1980); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982); *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

"Substantial" Defined. — The word "substantial" is defined as "of real worth and importance; of considerable value, valuable." *Setzer v. Annas*, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

A substantial right is one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. 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. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

Avoidance of Rehearing or Trial Is Not a Substantial Right. — An inter-

locutory order which does not affect a "substantial right" of one of the parties under this section and § 7A-27(d) is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." *Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

Avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

When Interlocutory Orders Are Appealable. — An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. *Skinner v. Carter*, 108 N.C. 106, 12 S.E. 908 (1891); *Warren v. Stancill*, 117 N.C. 112, 23 S.E. 216 (1895). See *Privette v. Privette*, 230 N.C. 52, 51 S.E.2d 925 (1949).

It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error is not corrected at once, and before the final hearing, that an appeal lies before final judgment. *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

Appeals will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. *Martin v. Flippin*, 101 N.C. 452, 8 S.E. 345 (1888).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 133 S.E.2d 197 (1963); *North Carolina State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976); *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979); *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *Ball v. Ball*, 55 N.C. App. 98, 284

S.E.2d 555 (1981); *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982); *Sims v. Ritter Constr., Inc.*, — N.C. App. —, 302 S.E.2d 293 (1983).

Where an interlocutory order "affects a substantial right" of the party appealing or "in effect determines the action and prevents a judgment from which an appeal might be taken" the party has a right to appeal under this section or § 7A-27. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

An appeal from an interlocutory order will not be considered premature if it adversely affects a substantial right of the appellants. *Freeland v. Greene*, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

This section and § 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

Where the question to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the appellate court may determine the appeal on the merits even though the appeal is from an interlocutory order and is premature. *Moses v. State Hwy. Comm'n*, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

When Appeal from Interlocutory Order Will Be Dismissed. — An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. *Cole v. Farmers Bank & Trust Co.*, 221 N.C. 249, 20 S.E.2d 54 (1942); *Privette v. Privette*, 230 N.C. 52, 51 S.E.2d 925 (1949); *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950); *Gardner v. Price*, 239 N.C. 651, 80 S.E.2d 478 (1954); *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 133 S.E.2d 197 (1963); *Bell v. Moore*, 31 N.C. App. 386, 229 S.E.2d 235 (1976); *Lundy Packing Co. v. Amalgamated Meat Cutters*, 31 N.C. App. 595, 230 S.E.2d 181 (1976); *Wachovia Realty Invs. v. Housing, Inc.*,

292 N.C. 93, 232 S.E.2d 667 (1977).

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceeding. *Norfolk & S.R.R. v. Warren*, 92 N.C. 620 (1885).

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. *Perry v. Tupper*, 71 N.C. 380 (1874).

Reviewability of Nonappealable Interlocutory Orders on Appeal from Final Judgment. — A nonappealable interlocutory order which involves the merits and necessarily affects the judgment, is reviewable on appropriate exception upon an appeal from the final judgment in the cause. An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979); *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980); *Shaw v. Pedersen*, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

An order allowing amendment of a pleading is interlocutory and not appealable. *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Unless Substantial Rights Are Affected. — Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. *George E. Nissen Co. v. Nissen*, 198 N.C. 808, 153 S.E. 450 (1930).

Motions to Strike Allegations from Motion. — While the appellate court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. *Privette v. Privette*, 230 N.C. 52, 51 S.E.2d 925 (1949).

If a motion to dismiss is allowed, plaintiff would have a right of immediate appeal, because further proceedings would be precluded by the order. *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862, cert.

denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

But an appeal does not lie from refusal to dismiss an action. *Winder v. Penniman*, 181 N.C. 7, 105 S.E. 884 (1921); *Capps v. Atlantic Coast Line R.R.*, 182 N.C. 758, 108 S.E. 300 (1921); *City of Goldsboro v. Holmes*, 183 N.C. 203, 111 S.E. 1 (1922); *Johnson v. Pilot Life Ins. Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939); *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971). See also, *Mitchell v. Kilburn*, 74 N.C. 483 (1876); *Mitchell v. Hubbs*, 74 N.C. 484 (1876); *Mitchell v. West*, 74 N.C. 485 (1876).

Refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. *Cox v. Cox*, 246 N.C. 528, 98 S.E.2d 879 (1957); *Broadbudd v. Broadbudd*, 45 N.C. App. 666, 263 S.E.2d 842 (1980).

Ordinarily, there is no right of appeal from refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

While an appeal lies from the dismissal of an action or of an appeal from a justices' court, it does not lie from a refusal to dismiss; in such a case, an exception should be noted, and an appeal will lie from the final judgment. *Bargain House v. Jefferson*, 180 N.C. 32, 103 S.E. 922 (1920).

An order granting a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under subsection (a) of this section, because it determines or discontinues the action. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982).

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of subsection (a) of this section, and it does not affect a substantial right, and is not appealable. *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

An order denying a motion under § 1A-1, Rule 12(b)(6) is interlocutory and clearly not appealable. *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

The trial court's refusal to allow defendant's motion to dismiss for failure to

state a claim upon which relief can be granted pursuant to § 1A-1, Rule 12(b)(6) did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

As to appeals involving demurrers prior to abolition of demurrer by § 1A-1, Rule 7(c), see *State ex rel. Commissioners of Wake County v. Magnin*, 78 N.C. 181 (1878); *Gay v. Brookshire*, 82 N.C. 409 (1880); *Bazemore v. Bridges*, 105 N.C. 191, 10 S.E. 888 (1890); *Walters v. Starness*, 118 N.C. 842, 24 S.E. 713 (1896); *Pender v. Maliett*, 122 N.C. 163, 30 S.E. 324 (1898); *Abbott v. Hancock*, 123 N.C. 89, 31 S.E. 271 (1898); *Morgan v. Harris*, 141 N.C. 358, 54 S.E. 381 (1906); *Shelby v. Charlotte Elec. Ry., Light & Power Co.*, 147 N.C. 537, 61 S.E. 377 (1908); *Chambers v. Seaboard Air Line Ry.*, 172 N.C. 555, 90 S.E. 590 (1916); *Headman v. Board of Comm'rs*, 177 N.C. 261, 98 S.E. 776 (1919); *Joyner v. Champion Fibre Co.*, 178 N.C. 634, 101 S.E. 373 (1919); *Teal v. Liles*, 183 N.C. 678, 111 S.E. 617 (1922); *Mills v. Richardson*, 240 N.C. 187, 81 S.E.2d 409 (1954); *Etheridge v. Carolina Power & Light Co.*, 249 N.C. 367, 106 S.E.2d 560 (1959); *Mercer v. Hilliard*, 249 N.C. 727, 107 S.E.2d 554 (1959); *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E.2d 382 (1962); *Housing Auth. v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962); *Hardin v. American Mut. Fire Ins. Co.*, 261 N.C. 67, 134 S.E.2d 142 (1964); *Kleibor v. Rogers*, 265 N.C. 304, 144 S.E.2d 27 (1965); *Quick v. High Point Mem. Hosp.*, 269 N.C. 450, 152 S.E.2d 527 (1967); *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E.2d 108 (1967); *Davis v. North Carolina State Hwy. Comm'n*, 271 N.C. 405, 156 S.E.2d 685 (1967); *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

Denial of Motion to Strike Answer and Counterclaim. — An order which denies plaintiff's motion to strike defendant's answer and counterclaim does not affect a substantial right of plaintiff, nor does it in effect determine the action, and therefore no appeal lies from that order. *Wachovia Bank & Trust Co. v. Parker Motors, Inc.*, 13 N.C. App. 632, 186 S.E.2d 675 (1972).

If summary judgment is allowed, the aggrieved party may have appellate review as a matter of right. *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980),

cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981). See also, *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976).

Generally, orders denying motions for summary judgment are not appealable. *Hill v. Smith*, 38 N.C. App. 625, 248 S.E.2d 455 (1978).

Ordinarily, denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

An order setting aside without prejudice a summary judgment on the grounds of procedural irregularity is interlocutory and not immediately appealable. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978).

Unless a Substantial Right Is Affected. — The denial of summary judgment is interlocutory in nature and not appealable under this section and § 7A-27, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to § 1A-1, Rule 54(b), that there is "no just reason for delay," an appeal is premature unless the order allowing summary judgment affects a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

There is a right of appeal under this section from an order granting summary judgment, notwithstanding the failure to meet the requirements for appeal under § 1A-1, Rule 54(b) where a substantial right is affected. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Appeal does not lie from denial of a motion for judgment on the pleadings. *Barrier v. Randolph*, 260 N.C. 741, 133 S.E.2d 655 (1963).

Ordinarily no appeal will lie from an order permitting intervention of parties, unless the order adversely affects a substantial right which the appellant may lose if not granted on appeal before final judgment. The rule applies with equal vigor without regard

to whether the trial court grants a motion to intervene as a matter of right pursuant to § 1A-1, Rule 24(a) or as permissive intervention pursuant to § 1A-1, Rule 24(b). *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. *Guy v. Guy*, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980); *Casey v. Grice*, — N.C. App. —, 298 S.E.2d 744 (1983).

If the desired discovery would not have delayed trial or have caused the opposing party any reasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable. *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Refusal to Join Parties. — The addition of parties where they are not necessary is a matter within the trial court's discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. *Henredon Furn. Indus., Inc. v. Southern Ry.*, 27 N.C. App. 331, 219 S.E.2d 238 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 697 (1976).

Denial of a motion to strike an order vacating a default judgment does not affect a substantial right within the meaning of this section. *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal

pursuant to § 7A-27(d). *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981), overruling *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

When a motion on which an order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movant may appeal immediately and have his motion decided there on its merits. *Parrish v. Atlantic Coast Line R.R.*, 221 N.C. 292, 20 S.E.2d 299 (1942).

C. Grant or Denial of New Trial.

Application for New Trial Is within Discretion of Trial Judge. — An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. *Thomas v. Myers*, 87 N.C. 31 (1882); *Carson v. Dellinger*, 90 N.C. 226 (1884).

And Is Not Reviewable Absent Abuse. — The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. *Coats v. Norris*, 180 N.C. 77, 104 S.E. 71 (1920); *Harrill v. Seaboard Air Line Ry.*, 181 N.C. 315, 107 S.E. 136 (1921).

Appeal Only Lies as to Matters of Law. — An appeal from an order granting or refusing a new trial only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question whether or not a party to the action is entitled to a new trial as of right and as a matter of law. *Braid v. Lukins*, 95 N.C. 123 (1886).

The appellate court has jurisdiction to review, upon appeal, the decision of the court below granting or refusing to grant a new trial where a matter of law or legal inference is involved. *Johnson v. Bell*, 74 N.C. 355 (1876).

Order setting aside verdict as a matter of law is appealable. *Tuthill v. Norfolk S.R.R.*, 174 N.C. 77, 93 S.E. 446 (1917).

Grant of Partial New Trial. — The language in subsection (a) of this section which provides that an appeal may be taken from every judicial order or determination of a judge of a superior or district court which "grants or refuses a new trial" does not apply to an order which grants only a partial new trial. *Unigard*

Carolina Ins. Co. v. Dickens, 41 N.C. App. 184, 254 S.E.2d 197 (1979).

New Trial on Damage Issue. — Defendant may not appeal from an order directing a new trial solely on the issue of damages. *Johnson v. Garwood*, 49 N.C. App. 462, 271 S.E.2d 544 (1980).

Contents of Record when Grant or Denial of New Trial Is Appealed. — To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review or a matter of discretion which is not. *Carson v. Dellinger*, 90 N.C. 226 (1884).

D. Jurisdiction.

Purpose of Subsection (b). — Subsection (b) of this section simply allows a defendant, when the trial court has denied his motion to dismiss on the ground that the court lacked jurisdiction over the defendant, a means of immediate appellate determination as to whether the trial court has jurisdiction, so that it can then proceed to answer the questions raised by the lawsuit. *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) was not enacted as a means of allowing litigants to seek advisory opinions from the appellate courts before necessary questions are resolved by the trial courts. *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) Applies to Jurisdictional Power. — Subsection (b) of this section applies to the State's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. If the court has the jurisdictional power to require that the party defend, and the challenge is merely to the process or service used to bring the party before the court, subsection (b) does not apply. *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982); *Sigman v. R.R. Tydings, Inc.*, 59 N.C. App. 346, 296 S.E.2d 659 (1982).

And Is Limited as "Minimum Contacts" Questions. — The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under subsection (b) of this section, is limited to rulings on "minimum contacts" questions. To the extent that they are inconsistent with this interpretation, the

decisions in *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E.2d 579 (1975); *Smith v. American Radiator & Std. San. Corp.*, 38 N.C. App. 457, 248 S.E.2d 462, cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1978); *Kahan v. Lonziotti*, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), are overruled. *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

Allowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this State will never be forced to trial against their wishes. *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

Subsection (b) of this section allows immediate appeals concerning only "minimum contacts" questions: the question of whether the courts of this state have the authority to require defendant to defend the claim. This question involves a two-fold determination: whether the North Carolina statutes permit the courts of this jurisdiction to entertain this action against defendant, and, if so, whether this exercise of jurisdiction violates due process. *Styleco, Inc. v. Stoutco, Inc.*, — N.C. App. —, 302 S.E.2d 888 (1983).

Appeal as to Personal Jurisdiction Lies at Any Stage. — An immediate appeal lies from an adverse ruling as to the personal, in rem or quasi in rem jurisdiction of the court at any stage of the proceedings. *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E.2d 217 (1980).

Denial of Motions Challenging Personal and Subject Matter Jurisdiction Distinguished. — While subsection (b) of this section permits the immediate appeal of an order denying a motion made pursuant to § 1A-1, Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, it does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. Such orders, like other orders not determinative of an action, are interlocutory and therefore not immediately appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982).

Subsection (b) of this section has no application in 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. *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 283 S.E.2d 526 (1981).

Refusal to Dismiss Suit on Grounds of Governmental Immunity. — An immediate appeal lies under subsection (b) of this section from the trial court's refusal to dismiss a suit against the State on the grounds of governmental immunity. *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E.2d 217 (1980); *Huyck Corp. v. C.C. Mangum, Inc.*, 58 N.C. App. 532, 293 S.E.2d 846 (1982).

Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction is crucial in this State because subsection (b) of this section allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982).

E. Injunctions.

Appeal from Order Refusing Injunction. — A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. *First Nat'l Bank v. Jenkins*, 64 N.C. 719 (1870).

Appeal from Order Continuing Injunction. — While the overruling of a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected, when an injunction has been issued an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. *Warlick v. H.P. Reynolds & Co.*, 151 N.C. 606, 66 S.E. 657 (1910).

An appeal from an interlocutory order will not be considered premature if a substantial right of the appellant would be adversely affected by continuance of an injunction in effect pending final determination of the case. *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 178 S.E.2d 781 (1971); *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

An order granting or refusing a preliminary injunction is an interlocutory order governed by the require-

ments of this section. *Gunkel v. Kimbrell*, 29 N.C. App. 586, 225 S.E.2d 127 (1976).

When Grant of Preliminary Injunction Is Appealable. — 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. If no such right is endangered, the appeal cannot be maintained. *State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School*, 229 N.C. 351, 261 S.E.2d 908, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Appeal from an interlocutory injunction is not considered premature and will be entertained by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. *Cablevision of Winston-Salem v. City of Winston-Salem*, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Scope of Review of Order Granting or Refusing Preliminary Injunction. — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975).

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, the Court of Appeals is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. *Cablevision of Winston-Salem v. City of Winston-Salem*, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Dissolution of Restraining Order Involving Act Already Committed. — The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed. *Wallace v. Town of N. Wilkesboro*, 151 N.C. 614, 66 S.E. 657 (1910); *Moore v. Cooper Monument Co.*, 166 N.C. 211, 81 S.E. 170 (1914); *Kilpatrick v. Harvey*, 170 N.C. 668, 86 S.E. 596 (1915); *Galloway v. Board of Educ.*, 184 N.C. 245, 114 S.E. 165 (1922).

F. Costs.

Appeal Involving Only Costs Will Generally Be Dismissed. — An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. *Martin v. Sloan*, 69 N.C. 128 (1873); *State v. Richmond & D.R.R.*, 74 N.C. 287 (1876); *Hasty v. Funderburk*, 89 N.C. 993 (1883); *Russell v. Campbell*, 112 N.C. 404, 17 S.E. 149 (1893).

Where, pending appeal, the subject matter of an action or the cause of action is destroyed, the appellate court will not consider the abstract question of which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. *Wikel v. Board of Comm'rs*, 120 N.C. 451, 27 S.E. 117 (1897); *Herring v. Pugh*, 125 N.C. 437, 34 S.E. 538 (1899).

Unless a Substantial Right Is Involved. — If some important substantial right is involved, an exception will be made to the general rule that the appellate court will not decide a mere question of costs and an opinion will be given. *Martin v. Sloan*, 69 N.C. 128 (1873).

When Appeal Lies for Costs. — The appellate court will decide the question of costs when the very question at issue is the legality of a particular item of costs. *Elliott v. Tyson*, 117 N.C. 114, 23 S.E. 102 (1895); *Blount v. Simmons*, 120 N.C. 19, 26 S.E. 649 (1897).

The appellate court will decide the question of costs where, taking the case below as properly decided, the issue is whether the costs of the lower court were adjudicated against the proper party. *Herring v. Pugh*, 125 N.C. 437, 34 S.E. 538 (1899).

Rulings Founded upon Lack of Power. — A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. *Martin v. Bank of Fayetteville*, 131 N.C. 121, 42 S.E. 558 (1902); *Horner v. Oxford Water & Elec. Co.*, 156 N.C. 494, 72 S.E. 624 (1911).

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, was appealable. *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182 (1919).

Denial of Motion to Retax Costs. — Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from the party

taxed, or whether one or more items have been erroneously inserted in bills of costs. *Van Dyke v. Aetna Life Ins. Co.*, 174 N.C. 78, 93 S.E. 444 (1917).

Order Staying Collection of Deposition Costs. — There was no right or injury to justify an immediate appeal from a discretionary order staying collection of deposition costs where the moving party had clearly expressed an intention to institute an action in which the same depositions would be material, and where the nonmoving party incurred those costs three months after filing responsive motions and over one month after taking an affidavit which revealed insufficiency of service of process, and then waited an additional six months for a hearing upon a motion to dismiss for insufficient service. *Bell v. Moore*, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

Fiduciaries. — Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." *May v. Darden*, 83 N.C. 237 (1880).

III. SCOPE OF REVIEW.

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. *Jenkins v. North Carolina Ore Dressing Co.*, 65 N.C. 563 (1871).

Where the record discloses no error of law or legal inference made upon the trial, the appellate court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175 (1927).

Judgment of Superior Court Is Final as to Matters of Fact. — The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it; its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. *State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co.*, 218 N.C. 233, 10 S.E.2d 824 (1940).

Finality of Matters in Discretion of the Trial Court. — The discretion of the trial court will not be reviewed unless it appears that such discretion was abused or that the ruling was based upon a matter of law. *Fayetteville Light & Power Co. v. Lessem Co.*, 174 N.C. 358,

93 S.E. 836 (1917); *Gordon v. Pintsch Gas Co.*, 178 N.C. 435, 100 S.E. 878 (1919).

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subject to review in any event, unless there has been an abuse of discretion on his part. *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

Constitutional Questions. — The appellate courts will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the trial court. *Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 73, 273 S.E.2d 299 (1980).

Order Setting Aside Verdict. — When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. *Atkins v. Doub*, 260 N.C. 678, 133 S.E.2d 456 (1963).

If the verdict of the jury is, in the opinion of the presiding judge, contrary to the weight of the evidence, the judge has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. *Watts v. Beli*, 71 N.C. 405 (1874).

Orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980).

Review of Evidence on Appeal from Grant or Denial of Preliminary Injunction. — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself. *Setzer v. Annas*, 286 N.C. 534, 212 S.E.2d 154 (1975).

Review of Probate Matters. — Where a case is appealed from the probate court to the judge, and there is a further appeal from the judge to the appellate court, the latter tribunal can review no point before the probate court that was not passed upon by the judge. *Rowland v. Thompson*, 64 N.C. 714 (1870).

The appellate court will only pass on questions decisive of the appeal. *Richardson v. Southern Express Co.*, 151 N.C. 60, 65 S.E. 616 (1909).

And Not on Questions which May Not Arise on New Trial. — Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. *Supervisor & Comm'rs v. Jennings*, 181 N.C. 393, 107 S.E. 312 (1921); *Moore v. Chicago Bridge & Iron Works*, 183 N.C. 438, 111 S.E. 776 (1922).

Moot Cases Will Not Be Decided. — Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only in the event of a favorable decision. *In re Morris*, 225 N.C. 48, 33 S.E.2d 243 (1945).

Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. *Kistler v. Southern Ry.*, 170 N.C. 666, 79 S.E. 676 (1914); *Waters v. Boyd*, 179 N.C. 180, 102 S.E. 196 (1920); *Greenleaf Johnson Lumber Co. v. Valentine*, 179 N.C. 423, 102 S.E. 774 (1920).

The appellate court will not entertain a cause to settle abstract propositions that are no longer at issue. *Reid v. Norfolk S.R.R.*, 162 N.C. 355, 78 S.E. 306 (1913); *Davis v. Pierce*, 167 N.C. 135, 83 S.E. 182 (1914).

Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. *Page v. Page*, 167 N.C. 350, 83 S.E. 627 (1914); *Cannon v. Commissioners of Pender County*, 170 N.C. 677, 87 S.E. 31 (1915).

To warrant reversal, error must be prejudicial. *McKeel v. Holloman*, 163 N.C. 132, 79 S.E. 445 (1913); *Brogden v. Gibson*, 165 N.C. 16, 80 S.E. 966 (1914); *Steeley v. Dare Lumber Co.*, 165 N.C. 27, 80 S.E. 963 (1914).

Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails. *Carter v. Seaboard Air Line R.R.*, 165 N.C. 244, 81 S.E. 321 (1914).

A finding for defendant upon an issue renders any error in regard to that issue harmless, and judgment for plaintiff is not reversible therefor. *Vickers v. Leigh*, 104 N.C. 248, 10 S.E. 308 (1889); *Perry v. Insurance Co.*, 137 N.C. 402, 49 S.E. 889 (1905), petition for rehearing dismissed, 140 N.C. 649, 52 S.E. 1039 (1906).

And Material. — Mere error in the trial of a cause is not sufficient grounds for reversal, but it should be made to appear that the ruling was material and prejudicial to appellant's rights. *Schas v. Equitable Life Assurance Soc'y of U.S.*, 170 N.C. 420, 87 S.E. 222 (1915); *Shaw Cotton Mills v. Acme Hosiery Mills*, 181 N.C. 33, 106 S.E. 24 (1921).

And Involve Denial of a Substantial Right. — Verdicts and judgments will not be set aside nor new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right; this rule applies especially where the trial involved a long and vigorous contest. *In re Will of Ross*, 182 N.C. 477, 109 S.E. 365 (1921).

No Reversal for Trivial Errors. — Courts do not lightly grant reversals or set aside verdicts, and a motion for such, to be meritorious, should not be based on any merely trivial errors committed manifestly without prejudice. *Rierson v. Carolina Steel & Iron Co.*, 184 N.C. 363, 114 S.E. 467 (1922).

A judgment will be affirmed where the correct result was accomplished, even though it was irregularly rendered. *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32 (1922).

A correct judgment will not be disturbed because the trial court gave a wrong reason therefor. *Burns v. McFarland*, 146 N.C. 382, 59 S.E. 1011 (1907); *Brown v. Elm City Lumber Co.*, 167 N.C. 9, 82 S.E. 961 (1914); *King v. McRacken*, 171 N.C. 752, 88 S.E. 226 (1916).

IV. PRESUMPTIONS AND BURDEN OF PROOF.

On appeal there is a presumption against error. *In re Will of Ross*, 182 N.C. 477, 109 S.E. 365 (1921); *Fellows v. Dowd*, 182 N.C. 776, 109 S.E. 69 (1921); *Carstarphen v. Carstarphen*, 193 N.C. 541, 137 S.E. 658 (1927); *Mason v. Andrews*, 193 N.C. 854, 138 S.E. 341 (1927).

And in Favor of the Correctness of the Courts' Rulings. — The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. *Rawls v. Lupton*, 193 N.C. 428, 138 S.E. 175 (1927).

Unchallenged Findings Are Presumed Correct. — Where findings of

fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence and are binding upon appeal. *Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 73, 273 S.E.2d 299 (1980).

Prejudicial error will not be presumed. *Blevins v. Norfolk & W. Ry.*, 184 N.C. 324, 114 S.E. 298 (1922).

Where the testimony on which the trial court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. *Caldwell v. Robinson*, 179 N.C. 518, 103 S.E. 75 (1920).

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. *Bowers v. Bryan Lumber Co.*, 152 N.C. 604, 68 S.E. 19 (1910).

Where the charge is not in the record, it will be presumed that it correctly stated the law. *Ellison v. Western Union Tel. Co.*, 163 N.C. 5, 79 S.E. 277 (1913); *Harrison v. Western Union Tel. Co.*, 163 N.C. 18, 70 S.E. 281 (1913).

Burden Is on Appellant to Show Error. — The burden is on the party alleging error to show it affirmatively by the record. *Quelch v. Futch*, 175 N.C. 694, 94 S.E. 713 (1917); *Baggett v. Lanier*, 178 N.C. 129, 100 S.E. 254 (1919); *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175 (1927).

And Resulting Prejudice. — The burden is on the appellant to show clearly that error was prejudicial. *Mercer v. Frank Hitch Lumber Co.*, 173 N.C. 49, 91 S.E. 588 (1917); *Universal Oil & Fertilizer Co. v. Burney*, 174 N.C. 382, 93 S.E. 912 (1917); *Quelch v. Futch*, 175 N.C. 694, 94 S.E. 713 (1917).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

An order appointing a next friend for plaintiff was an order affecting a substantial right from which plaintiff could appeal. *Hagins v. Redevelopment Comm'n*, 1 N.C. App. 40, 159 S.E.2d 584 (1968), rev'd on other grounds, 275 N.C. 90, 165 S.E.2d 490 (1969).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that

proceeding, was an order affecting a substantial right of defendant, from which appeal would lie under this section. *State ex rel. Hooks v. Flowers*, 247 N.C. 558, 101 S.E.2d 320 (1958).

An order requiring petitioners in a boundary dispute to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition affected a substantial right and was appealable. *Jenkins v. Trantham*, 244 N.C. 422, 94 S.E.2d 311 (1956).

Order Granting Claim for Alimony and Child Support. — An order granting a plaintiff-wife's claim for \$4,225.00 in alimony and child-support arrearages and granting full faith and credit to a decree imposing a continuing support obligation affected a "substantial right" of defendant and was therefore reviewable by virtue of this section and § 7A-27(d), even though the trial court's order did not determine all the issues raised in the action. *McGinnis v. McGinnis*, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Contempt Order in Child Custody Case Where Punishment Was Withheld. — Plaintiff was entitled to appeal the order of the trial court finding that she was in contempt of child custody orders even though the trial court withheld punishment and only made the findings a part of the record, since withholding punishment without further limitation retains the right to impose it in the future. Under such circumstances the order holding the plaintiff in contempt affected a substantial right and was therefore appealable. *Clark v. Clark*, 294 N.C. 554, 243 S.E.2d 129 (1978).

Interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights affected a substantial right and was immediately appealable. *In re Ferguson*, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

The trial court's entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under this section and § 7A-27, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay" under § 1A-1, Rule 54(b). *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, — S.E.2d — (1980).

Partial Summary Judgment Coupled with Mandatory Injunction.

— While ordinarily the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable, where a mandatory injunction was part of the order for partial summary judgment, it clearly affected a "substantial right" of the defendant and the allowance of the motion for partial summary judgment was appealable. *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979).

Where defendants would immediately suffer the consequences of complying with the mandatory injunction order that they remove anchors and boat slips constructed on plaintiff's submerged lands this affected a substantial right of defendants, giving them the right to appeal from the interlocutory order granting summary judgment for plaintiffs except on the issue of damages. *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980).

Order Allowing Assertion of Counterclaims Only as Set-offs. — In an action arising out of a contract whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass, but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim, was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Order Prohibiting Taking of Deposition of Plaintiff's Expert. — Where the order of the superior court prohibiting the taking of the deposition of the plaintiff's expert metallurgist by the defendant effectively precluded the defendant from introducing evidence of "readings" concerning the hardness of the metal obtained by the tests which the expert made, the order affected a sub-

stantial right of the defendant and was appealable. *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E.2d 597 (1977).

Order Dismissing Charge of Indirect Civil Contempt. — An appeal would lie under subsection (a) of this section to review an order dismissing a charge of indirect civil contempt where the order affected a substantial right claimed by the appellant. *Piedmont Equip. Co. v. Weant*, 30 N.C. App. 191, 226 S.E.2d 688 (1976).

Removal of Public Officer. — An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office would be allowed by this section. *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920).

B. Appellant Not Entitled to Appeal.

Denial of Motion to Dismiss Punitive Damages Claim. — An order denying defendant's motion to dismiss plaintiff's claim for punitive damages was not immediately appealable. *Williams v. East Coast Sales, Inc.*, 50 N.C. App. 565, 274 S.E.2d 276 (1981).

Grant of Partial Summary Judgment on Issue of Liability. — An order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was not appealable. *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979).

Partial summary judgment holding that third party defendant must indemnify defendant for any judgment on plaintiff's claim was interlocutory and not appealable under this section or § 7A-27(d) since the judgment would not work injury to third party defendant if not corrected before appeal from a final judgment. *Cook v. Export Leaf Tobacco Co.*, 47 N.C. App. 187, 266 S.E.2d 754 (1980).

An order setting aside default judgment did not affect a substantial right of plaintiffs, the avoidance of a full trial on the merits not being a substantial right in the case. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980).

Order with Regard to Interrogatories and Requested Admissions. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories,

denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. *First Union Nat'l Bank v. Olive*, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Order of the trial court that plaintiff not be required to answer certain interrogatories did not affect a substantial right of defendant where defendant had received answers to other interrogatories which gave it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy and the information denied to the defendant was not crucial to its defense. *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 255 S.E.2d 267, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Order Limiting Scope of Lis Pendens. — In an action to quiet title to property which defendants had incorporated into a residential subdivision, an order limiting the scope of the lis pendens filed by plaintiffs only to the area of the subdivision which they claimed was interlocutory and not immediately appealable. *Whyburn v. Norwood*, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

Denial of Motion to Dismiss for Failure to Join Necessary Party. — No substantial right of the defendant was impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party. The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be dismissed for that purpose. Defendant still had adequate opportunity in the trial court for a determination on the question of the joinder of parties. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Summary Judgment on Dependent Claim. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. *Blue Ridge Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Alimony, Child Support, and Attorney's Fees Pendente Lite. — Husband's appeal of an order by the trial

court in a divorce action for alimony pendente lite, child support pendente lite, and attorney fees pendente lite was premature and would be dismissed. *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Order to Submit to Psychiatric Examination in Custody Case. — An order that the parties and the child submit to a psychiatric examination prior to final determination on the question of custody was interlocutory and did not deprive plaintiff of a substantial right which she might lose if the order was not reviewed before a final determination of custody. *Williams v. Williams*, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

An appeal from an order requiring resident father to have child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, who were separated but not divorced, was premature and would be dismissed, since the order was interlocutory and affected no substantial right. *In re Fitzgerald*, 242 N.C. 732, 89 S.E.2d 462 (1955).

Order to Allow Surveyor to Enter upon Land. — Interlocutory order by which defendants were simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property was not appealable. *Ball v. Ball*, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud did not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void was premature and would be dismissed. *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E.2d 382 (1962).

An order by the trial court denying defendants' motions for judgment on special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as might be necessary to determine the rights of the parties, with leave to file amended pleadings, was not a final judgment. *Thomas v. Carteret*, 180 N.C. 109, 104 S.E. 75 (1920).

Order denying plaintiff's motion to reconsider an order denying attorney's motion for admission pro hac vice was an interlocutory order and was

not immediately appealable; it did not come within the statutory appeals in §§ 1-277(a) or 7A-27(d). *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

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

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (C.C.P., s. 313; Code, s. 562; Rev., s. 589; C.S., s. 640.)

Cross References. — As to appeals from interlocutory orders, see also § 1-277 and the case notes thereto.

CASE NOTES

Applied in *Patterson v. Durham Hosiery Mills*, 214 N.C. 806, 200 S.E. 906 (1939); *Goldston v. Wright*, 257 N.C. 279, 125 S.E.2d 462 (1962). **Stated** in *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). **Cited** in *City of Raleigh v. Edwards*, 234 N.C. 528, 67 S.E.2d 669 (1951); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

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

(a) From Judgments and Orders Rendered in Session. — Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by:

- (1) Giving oral notice of appeal at trial, or at any hearing of a timely motion under G.S. 1A-1, Rule 59, for a new trial or to alter or amend a judgment, or under G.S. 1A-1, Rule 50, for judgment notwithstanding the verdict with or without a motion for a new trial; or
- (2) Filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(b) From Judgments and Orders Rendered Out of Session. — Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(c) Time When Taken by Written Notice. — If not taken by oral notice as provided in subsection (a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subsection, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under G.S. 1A-1, Rule 50(b), for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under G.S.

1A-1, Rule 52(b), to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (iii) a motion under G.S. 1A-1, Rule 59, to alter or amend a judgment; (iv) a motion under G.S. 1A-1, Rule 59, for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content and Service of Notice of Appeal.** — The content and mode of service of the notice of appeal required by this section are as prescribed by the rules of appellate procedure. (C.C.P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C.S., s. 641; 1971, c. 381, s. 12; c. 989; 1975, c. 391, s. 3.)

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, which rewrote this section, provides in s. 16: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divi-

sions, the Utilities Commission, the Industrial Commission and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

CASE NOTES

Editor's Note. — Some of the cases cited below were decided prior to the 1975 amendment, which rewrote this section.

Rule 3(a) of the Rules of Appellate Procedure is almost identical to subsection (a) of this section, and both are jurisdictional. *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The provisions of this section are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it. *Aycock v. Richardson*, 247 N.C. 233, 100 S.E.2d 379 (1957); *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963); *Teague v. Teague*, 266 N.C. 320, 146 S.E.2d 87 (1966); *Oliver v. Williams*, 266 N.C. 601, 146 S.E.2d 648 (1966); *Dunn v. North Carolina State Hwy. Comm'n*, 1 N.C. App. 116, 160 S.E.2d 113 (1968); *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979); *Woodworth v. Woodworth*, 58 N.C. App. 237, 292 S.E.2d 774 (1982).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of this section and Rules 3 and 26 of the Rules of Appellate Procedure are met, the appeal must be dismissed. *Smith v. Smith*, 43 N.C. App. 338, 258 S.E.2d 833

(1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with this section and N.C.R. App. P., Rule 3, is jurisdictional, and an untimely attempt to appeal must be dismissed. *Booth v. Utica Mut. Ins. Co.*, — N.C. —, 301 S.E.2d 98 (1983).

This section provides that notice of appeal must be given within 10 days after entry of judgment. *Woodworth v. Woodworth*, 58 N.C. App. 237, 292 S.E.2d 774 (1982).

Announcing of the court's decision in open court constitutes "entry" for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since § 1A-1, Rule 58 provides that the rendering of judgment in open court constitutes entry of judgment for purposes of the Rules of Civil Procedure. *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, — U.S. —, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

Letter to Clerk Not Notice of Appeal. — Where defendant, challenging a divorce judgment, wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, her letter was not a written notice of appeal showing that she sought a

review by the Court of Appeals, but was a motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. *Williford v. Williford*, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Appeal to Be Dismissed Absent Timely Notice. — Where the notice of appeal is dated and filed more than 10 days after the rendition of a default judgment, and no notice of appeal is served on the plaintiff, the appeal from the entry of the judgment should be dismissed because timely notice was not given or properly served. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Where an appeal is taken more than 10 days after the "entry" of judgment and the time within which appeal can be taken is not otherwise tolled as provided in this section and Appellate Rule 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. *Brooks v. Matthews*, 29 N.C. App. 614, 225 S.E.2d 159 (1976); *Housing Auth. v. Truesdale*, 40 N.C. App. 425, 253 S.E.2d 47 (1979); *Cochrane v. Sea Gate, Inc.*, 42 N.C. App. 375, 256 S.E.2d 504 (1979).

For case holding that the filing by defendant of its motion pursuant to § 1A-1, Rules 60(b), 52(a), and 52(b) did not toll the running of time within which to file notice of appeal, since motions pursuant to these rules apply only to final judgments and orders and have no application to interlocutory orders, see *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Intimation of Intent to Appeal. — It is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute

within the time prescribed by law. *Russell v. Hearne*, 113 N.C. 361, 18 S.E. 711 (1893).

Applied in *Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 51 S.E.2d 6 (1948); *Van Mitchell v. North Carolina*, 247 F. Supp. 139 (E.D.N.C. 1964); *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971); *Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975); *State v. Harold*, 27 N.C. App. 588, 219 S.E.2d 528 (1975); *Clark v. Wallace*, 27 N.C. App. 589, 219 S.E.2d 501 (1975); *Arnold v. Varnum*, 34 N.C. App. 22, 237 S.E.2d 272 (1977); *Ramsey v. Rudd*, 49 N.C. App. 665, 272 S.E.2d 162 (1980); *Byrd v. Byrd*, 51 N.C. App. 707, 277 S.E.2d 472 (1981); *North Carolina State Bar v. Frazier*, — N.C. App. —, 302 S.E.2d 648 (1983).

Cited in *Brantley v. Jordan*, 90 N.C. 25 (1884); *Jones v. City of Asheville*, 114 N.C. 620, 19 S.E. 631 (1894); *Delafield v. Lewis Mercer Constr. Co.*, 115 N.C. 21, 20 S.E. 167 (1894); *Houston v. Lumber Co.*, 136 N.C. 328, 48 S.E. 738 (1904); *Fisher v. Fisher*, 164 N.C. 105, 80 S.E. 395 (1913); *Seaboard Air Line Ry. v. Brunswick County*, 198 N.C. 549, 152 S.E. 627 (1930); *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950); *Harrell v. Harrell*, 253 N.C. 758, 117 S.E.2d 728 (1961); *State v. Ferebee*, 266 N.C. 606, 146 S.E.2d 666 (1966); *Fox v. North Carolina*, 266 F. Supp. 19 (E.D.N.C. 1967); *Hagins v. Redevelopment Comm'n*, 1 N.C. App. 40, 159 S.E.2d 584 (1968); *Hagins v. Aero Mayflower Transit Co.*, 1 N.C. App. 51, 159 S.E.2d 592 (1968); *Summey v. McDowell*, 4 N.C. App. 62, 165 S.E.2d 768 (1969); *Partin v. Carolina Power & Light Co.*, 40 N.C. App. 630, 253 S.E.2d 605 (1979); *Condie v. Condie*, 51 N.C. App. 522, 277 S.E.2d 122 (1981); *Rokes v. Rokes*, 55 N.C. App. 397, 285 S.E.2d 306 (1982).

§ 1-280: Repealed by Session Laws 1975, c. 391, s. 4.

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of

the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

§ 1-281. Appeals from judgments not in session.

When appeals are taken from judgments of the clerk or judge not made in session, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C.S., s. 642(a); 1971, c. 381, s. 12.)

CASE NOTES

Cited in *Little v. Sheets*, 239 N.C. 430, 80 S.E.2d 44 (1954).

§ 1-282: Repealed by Session Laws 1975, c. 391, s. 7.

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of

the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

§ 1-283. Trial judge empowered to settle record on appeal; effect of leaving office or of disability.

Except as provided in this section, only the judge of superior court or of district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order. Proceedings for judicial settlement when the judge empowered by this section to settle the record on appeal is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the State shall be as provided by the rules of appellate procedure. (C.C.P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C.S., s. 644; 1971, c. 381, s. 12; 1975, c. 391, s. 8.)

Editor's Note. — Session Laws 1975, c. 391, which rewrote this section, provides in s. 16: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the

Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

CASE NOTES

For cases involving this section as it read prior to the 1975 amendment, which rewrote the section, see *Whitesides v. Williams*, 66 N.C. 141 (1872); *Kirkman v. Dixon*, 66 N.C. 406 (1872); *Isler v. Haddock*, 72 N.C. 119 (1875); *Adams v. Reeves*, 74 N.C. 106 (1876); *Simonton v. Simonton*, 80 N.C. 7 (1879); *McDaniel v. King*, 89 N.C. 29 (1883); *Mott v. Ramsay*, 91 N.C. 249 (1884); *Owens v. Phelps*, 92 N.C. 231 (1885); *McCoy v. Lassiter*, 94 N.C. 131 (1886); *State v. Gooch*, 94 N.C. 982 (1886); *Board of Comm'rs v. Old Dominion S.S. Co.*, 98 N.C. 163, 3 S.E. 505 (1887); *Walton v. McKesson*, 101 N.C. 428, 7 S.E. 566 (1888); *Rodman v. Harvey*, 102 N.C. 1, 8 S.E. 888 (1889); *Walker v. Scott*, 102 N.C. 487, 9 S.E. 488 (1889); *Walker v. Scott*, 106 N.C. 56, 11 S.E. 364 (1890); *Boyer v. Teague*, 106 N.C. 571, 11 S.E. 330 (1890); *Booth v. Ratcliffe*, 107 N.C. 6, 12 S.E. 112 (1890); *Peebles v. Braswell*, 107 N.C. 68, 12 S.E. 44 (1890); *State v. Williams*, 109 N.C. 846, 13 S.E. 880 (1891); *Arrington v. Arrington*, 114 N.C. 115, 19 S.E. 145 (1894); *Ritter v. Grimm*, 114 N.C. 373, 19 S.E. 239 (1894); *McDaniel v. Scurlock*, 115 N.C. 295, 20 S.E. 451 (1894); *Heath v. Lancaster*, 116 N.C. 69, 20 S.E. 962 (1895); *State v. King*, 119 N.C. 910, 26 S.E. 261 (1896); *Stroud v. Western Union Tel. Co.*, 133 N.C. 253, 45 S.E. 592 (1903); *Blair v. Coakley*, 136 N.C. 405, 48 S.E. 804 (1904); *Cameron v. Power Co.*, 137 N.C. 99, 49 S.E. 76 (1904); *Barber v. Justice*, 138 N.C. 20, 50 S.E. 445 (1905); *Slocumb v. Construction Co.*, 142 N.C. 349, 55 S.E. 196 (1906); *Gaither v. Carpenter*, 143 N.C. 240, 55 S.E. 625 (1906); *Board of Water & Light Comm'rs v. Chapman*, 151 N.C. 327, 66 S.E. 221 (1909); *Chauncey v. Chauncey*, 153 N.C. 12, 68 S.E. 906 (1910); *Burlingham v. Canady*, 156 N.C. 177, 72 S.E. 324 (1911); *Queen v. Snowbird Valley R.R.*, 161 N.C. 217, 76 S.E. 682 (1912); *Green v. Dunn*, 162 N.C. 340, 78 S.E. 211 (1913); *Waynesville Transp. Co. v. Waynesville Lumber Co.*, 168 N.C. 60, 84 S.E. 54 (1915); *Turner v. Southern Gas*

Imp. Co., 171 N.C. 750, 87 S.E. 970 (1916); *Thompson v. Williams*, 175 N.C. 696, 95 S.E. 100 (1918); *Ingram v. Yadkin River Power Co.*, 181 N.C. 359, 107 S.E. 209 (1921); *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923); *King v. Taylor*, 188 N.C. 450, 124 S.E. 751 (1924); *Waller v. Dudley*, 193 N.C. 749, 138 S.E. 128 (1927); *State v. Angel*, 194 N.C. 715, 140 S.E. 727 (1927); *Metropolitan Life Ins. Co. v. Boddie*, 196 N.C. 666, 146 S.E. 598 (1929); *Penland v. French Broad Hosp.*, 199 N.C. 314, 154 S.E. 406 (1930); *McMahan v. Southern Ry.*, 203 N.C. 805, 167 S.E. 225 (1933); *Weaver v. Hampton*, 206 N.C. 741, 175 S.E. 110 (1934); *Messick v. Hickory*, 211 N.C. 531, 191 S.E. 43 (1937); *State v. Parnell*, 214 N.C. 467, 199 S.E. 601 (1938); *White Way Laundry, Inc. v. Underwood*, 220 N.C. 152, 16 S.E.2d 703 (1941); *Chozen Confections, Inc. v. Johnson*, 220 N.C. 432, 17 S.E.2d 505 (1941); *Lindsay v. Brawley*, 226 N.C. 468, 38 S.E.2d 528 (1946); *State v. Cannon*, 227 N.C. 336, 42 S.E.2d 343 (1947); *Hoke v. Atlantic Greyhound Corp.*, 227 N.C. 374, 42 S.E.2d 407 (1947); *Russos v. Bailey*, 228 N.C. 783, 47 S.E.2d 22 (1948); *Western N.C. Conference v. Talley*, 229 N.C. 1, 47 S.E.2d 467 (1948); *State v. Johnson*, 230 N.C. 743, 55 S.E.2d 690 (1949); *Hall v. Hall*, 235 N.C. 711, 71 S.E.2d 471 (1952); *Richardson v. Cooke*, 238 N.C. 449, 78 S.E.2d 208 (1953); *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960); *Wiggins v. Tripp*, 253 N.C. 171, 116 S.E.2d 355 (1960); *Wagner v. Eudy*, 257 N.C. 199, 125 S.E.2d 598 (1962); *Twiford v. Harrison*, 260 N.C. 217, 132 S.E.2d 321 (1963); *American Floor Mach. Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963); *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965); *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968); *State v. Waddell*, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Applied in *State v. Allen*, 283 N.C. 354, 196 S.E.2d 256 (1973).

Cited in *Lewter v. Herndon*, 13 N.C. App. 242, 184 S.E.2d 926 (1971).

§ 1-284: Repealed by Session Laws 1975, c. 391, s. 9.

Cross References. — For the North Carolina Rules of Civil Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in

respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts

of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

§ 1-285. Undertaking on appeal; filing; waiver.

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 such sum as may be ordered by the court, not exceeding two hundred fifty dollars (\$250.00), 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 as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. (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.)

Cross References. — As to appeals in forma pauperis, see § 1-288. As to undertaking to stay execution on a money judgment, see § 1-289, et seq. As to costs on appeal, see § 6-33. For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, which deleted the former last two sentences of the section, providing that no appeal should be dismissed for failure to file an undertaking or make a deposit if the undertaking was filed or the deposit made before the record was transmitted, and authorizing the

appellate division, for good cause shown, to allow the undertaking to be filed or the deposit made after the record in the case had been transmitted, provides in s. 16: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

CASE NOTES

This section has no application to appeals from a justice of the peace to the superior court. *Massenburg v. Fogg*, 256 N.C. 703, 124 S.E.2d 868 (1962).

Bond Requirements Are Jurisdictional. — Giving bond on appeal or the granting of leave to appeal without bond are jurisdictional, and unless the statute is complied with, the appeal will be dismissed. *Smith v. Reeves*, 85 N.C. 594 (1881); *Honeycutt v. Watkins*, 151 N.C. 652, 65 S.E. 762 (1909). See also, *Brown v. S.H. Kress & Co.*, 207 N.C. 722, 178 S.E. 248 (1935).

Necessity of Security to Perfect Appeal. — An appeal bond or undertaking is necessary to the perfection of an appeal. *Hinton v. Pritchard*, 107 N.C. 128, 12 S.E. 242 (1890); *Ex parte Berry*, 107 N.C. 326, 12

S.E. 125 (1890).

The appellate court has no power to order a certiorari without requiring bond and security thereon. *Weber v. Taylor*, 66 N.C. 412 (1872). See also, *Walsh v. Burleson*, 154 N.C. 174, 69 S.E. 680 (1910).

Effect of Failure to Give Undertaking. — Absent an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. *Lunsford v. Alexander*, 162 N.C. 528, 78 S.E. 275 (1913).

Duty of Appellant to Provide Bond. — Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the

party appealing, who is, in the relation of principal, responsible for his laches. *Lunsford v. Alexander*, 162 N.C. 528, 78 S.E. 275 (1913).

Trial Court Has No Jurisdiction after Perfection of Appeal. — When an appeal is perfected, the trial court no longer has any jurisdiction of the cause, and he cannot require an additional bond. *McRae v. Board of Comm'rs*, 74 N.C. 415 (1876).

New Security after Remand. — After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. *Spence v. Tapscott*, 93 N.C. 250 (1885).

Deposit as Security. — Under this section, the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. *Graves v. Hines*, 106 N.C. 323, 11 S.E. 362 (1890); *State v. Parish*, 151 N.C. 659, 65 S.E. 762 (1909).

No Substitute for Undertaking or Deposit. — The clerk has no authority to accept any substitute for the undertaking or deposit provided for by the statute. *Eshon v. Board of Comm'rs*, 95 N.C. 75 (1886).

Waiver of Timely Filing. — The necessity of filing the appeal bond within the prescribed time may be waived by agreement. *Wade v. City of Newbern*, 72 N.C. 498 (1875).

Agreement to Waiver Must Appear of Record. — No agreement of parties waiving the necessity of timely filing of an appeal bond will be respected by the appellate court unless it appears on the record. *Wade v. City of Newbern*, 72 N.C. 498 (1875).

Verbal agreements to waive the statutory requirements will not be regarded. *McCanless v. Reynolds*, 91 N.C. 244 (1884). See also, *Skinner v. Bland*, 91 N.C. 1 (1884).

Effect of Acceptance of Bond in Court. — Where the appellant was in court and the bond was offered and accepted without objection, and this was noted in the record, this was construed to be a sufficient waiver in writing under the statute. *Howerton v. Henderson*, 86 N.C. 718 (1882); *Harshaw v. McDowell*, 89 N.C. 181 (1883).

Effect of Delay in Making Objection. — Where the absence of a bond on appeal was not objected to for two years, and in the meantime the cause was con-

tinued, and witnesses were summoned, respondent would be deemed to have waived objection to the defect. *Arrington v. Smith*, 26 N.C. 59 (1843).

An appeal bond made payable to the State is void. The State will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law, such as guardian bonds, etc. *Dorsey v. Raleigh & G.R.R.*, 91 N.C. 201 (1884).

Liability of Surety Misinformed Concerning Legal Effect of Bond. — One who has signed a bond given to stay execution pending an appeal cannot defend on the ground that he was misinformed concerning the legal effect of the bond. *McMinn v. Patton*, 92 N.C. 371 (1885). See also, *Oakley v. Van Noppen*, 100 N.C. 287, 5 S.E. 1 (1888).

An appeal bond given to secure "all costs" means appellee's costs. *Morris v. Morris*, 92 N.C. 142 (1885).

And Sureties Are Not Liable for Appellant's Costs. — When there is a judgment in the appellate court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee or their principal. *Clerk's Office v. Huffsteller*, 67 N.C. 449 (1872). See also, *Kenney v. Seaboard Air Line Ry.*, 166 N.C. 566, 82 S.E. 849 (1914).

Effect of Party Acting as Surety. — An undertaking on appeal may be good even though it is signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. *Syme v. Badger*, 91 N.C. 272 (1884).

Appellee as Obligee. — An undertaking on appeal, though not so expressed, is by implication taken to be made with the appellee. *Clerk's Office v. Huffsteller*, 67 N.C. 449 (1872).

The undertaking for costs and damages on appeal operates in favor of the respondent, although he is not required to be named in it as a party. *Clerk's Office v. Huffsteller*, 67 N.C. 449 (1872).

The signature of the appellant is not essential to a bond or undertaking on appeal or error. *Cohoon v. Morton*, 49 N.C. 256 (1857); *Walker v. Williams*, 88 N.C. 7 (1883).

Omission of Obligor's Name. — The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. *Chamblee v. Baker*, 95 N.C. 98 (1886).

Surety's Signature by Mark. — An appeal bond may be executed by the

surety making his mark. *State v. Byrd*, 93 N.C. 624 (1885).

A misstatement in the appeal bond of the date of the judgment or order appealed from is not a fatal error if the judgment or order is otherwise correctly and sufficiently described. *Lackey v. Pearson*, 101 N.C. 651, 8 S.E. 121 (1888).

A magistrate who has rendered a judgment on a warrant is not a fit person to sign the name of another as obligor on the appeal bond. *Weaver v. Parish*, 8 N.C. 319 (1821).

Where defendant appeals, plaintiff cannot be principal obligor on appeal bond. *Speed v. Harris*, 4 N.C. 317 (1816).

Cited in Cape Fear & Deep River Nav. Co. v. Costen, 63 N.C. 264 (1869); *Robeson v. Lewis*, 64 N.C. 734 (1870);

Wade v. City of Newbern, 72 N.C. 498 (1875); *Sever v. McLaughlin*, 82 N.C. 332 (1880); *Smith v. Reeves*, 85 N.C. 594 (1881); *Applewhite v. Fort*, 85 N.C. 596 (1881); *McCanless v. Reynolds*, 90 N.C. 648 (1884); *Worthy v. Brady*, 91 N.C. 265 (1884); *Boyden v. Williams*, 92 N.C. 546 (1885); *Chamblee v. Baker*, 95 N.C. 98 (1886); *Gwathney v. Savage*, 101 N.C. 103, 7 S.E. 661 (1888); *Harrison v. Hoff*, 102 N.C. 25, 8 S.E. 887 (1889); *Jones v. Wilson*, 103 N.C. 13, 9 S.E. 580 (1889); *Howerton v. Sexton*, 104 N.C. 75, 10 S.E. 148 (1889); *Graves v. Hines*, 106 N.C. 323, 11 S.E. 362 (1890); *Jones v. City of Asheville*, 114 N.C. 620, 19 S.E. 631 (1894); *In re Snow's Will*, 128 N.C. 100, 38 S.E. 295 (1901); *Richardson v. Cooke*, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-286. Justification of sureties.

The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within the ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days. (C.C.P., s. 310; Code, s. 560; 1887, c. 121; Rev., s. 594; C.S., s. 647.)

CASE NOTES

Purpose of Section. — The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing unless a sum of money is deposited with the clerk by order of the court in lieu of the undertaking. The language is plain and mandatory and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects. *State v. Wagner*, 91 N.C. 521 (1884).

Necessity for Justification. — An appeal bond is of no effect unless it is accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. *Greenlee v. McCelvey*, 92 N.C. 530 (1885); *Singer Mfg. Co. v. Barrett*, 94 N.C. 219 (1886).

An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof.

McCanless v. Reynolds, 91 N.C. 244 (1884); *State v. Roper*, 94 N.C. 859 (1886).

Justification Must Be by Surety. — The justification of a surety to an undertaking on appeal must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. *Morphew v. Tatem*, 89 N.C. 183 (1883).

Endorsement of Clerk Not a Substitute for Justification. — An endorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance with the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. *Bryson v. Lucas*, 85 N.C. 397 (1881).

When Justification Is Sufficient. — The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified,

without stating that it is above his liabilities and homestead and exemption allowed by law. *Witt v. Long*, 93 N.C. 388 (1885).

Failure to Show Proper Amount. — A justification of two sureties that each is worth the amount of the bond is not a sufficient compliance with this section. *Anthony v. Carter*, 91 N.C. 229 (1884).

Justification May Be Waived. — While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily void the bond. It is a defect which may be cured by waiver. *McMillan v. Baker*, 92 N.C. 111 (1885); *Becton v. Dunn*, 137 N.C. 559, 50 S.E. 289 (1905).

As to necessity of written waiver, see *Lytle v. Lytle*, 90 N.C. 647 (1884).

Where approval of unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present or afterwards assents. *Gruber v. Washington & J.R.R.*, 92 N.C. 1 (1885).

Acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified cannot be sustained. *Jones v. Potter*, 89 N.C. 220 (1883).

Waiver Held Sufficient. — Where the record stated "Plaintiff appealed. Notice waived. Bond filed," and was signed by the judge, it was a sufficient waiver in writing of a formal justification of the bond, and the appeal would not be dismissed because the sureties did not justify in double the amount. *Singer Mfg. Co. v. Barrett*, 94 N.C. 219 (1886).

An acceptance by the appellee of the surety tendered on an appeal bond constituted a waiver of the justification required by statute. *Greenlee v. McCelvey*, 92 N.C. 530 (1885).

When it appeared by the case settled that the appellees were present when the appeal bond was taken and made no objection to the sufficiency of the sureties, such objection would be deemed waived. *Gruber v. Washington & J.R.R.*, 92 N.C. 1 (1885); *Moring v. Little*, 95 N.C. 87 (1886).

An entry on the record, "Bond fixed at \$25; filed and approved," was held a sufficient waiver in writing. *Hancock v. Bramlett*, 85 N.C. 393 (1881). See also, *State v. Wagner*, 91 N.C. 521 (1884).

Cited in *Howerton v. Henderson*, 86 N.C. 718 (1882); *McMillan v. Nye*, 90 N.C. 11 (1884); *Gruber v. Washington & J.R.R.*, 92 N.C. 1 (1885).

§ 1-287: Repealed by Session Laws 1975, c. 391, s. 2.

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of

the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

§ 1-287.1: Repealed by Session Laws 1975, c. 391, s. 10.

Cross References. — For the North Carolina Rules of Appellate Procedure, see Volume 4A, Appendix I (2A).

Editor's Note. — Session Laws 1975, c. 391, s. 16, provides: "This act shall be in effect on and after July 1, 1975, in respect of all appeals from the courts of

the trial divisions, the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance to the courts of the appellate division which shall be taken on and after the effective date. This act shall not apply to appeals taken prior to its effective date."

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

When any party to a civil action tried and determined in the superior or district court at the time of trial desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said court to make an order allowing said party to appeal from the judgment to the Appellate Division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the session at which the judgment was rendered or within 10 days from the expiration by law of the session, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said court that he has examined the affiant's case, and is of opinion that the decision of the court, in said action, is contrary to law. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge or the clerk has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Appellate Division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C.S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8; 1971, c. 268, s. 12.)

Legal Periodicals. — For comment on access of indigents to the civil

courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Purpose of Section. — The statutory provision for appeals in forma pauperis is designed to preserve the right of appeal for those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. *Perry v. Perry*, 230 N.C. 515, 53 S.E.2d 457 (1949).

This section is applicable to appeals in juvenile proceedings tried in the district court. Compliance with its terms is necessary to entitle juveniles to an order allowing them to appeal in forma pauperis. The requirements are mandatory and must be observed. In *re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd sub nom. McKiever v.*

Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

The requirements of this section are mandatory and jurisdictional, and unless this section is complied with the appellate court will take no cognizance of a case, except to dismiss it. *Clark v. Clark*, 225 N.C. 687, 36 S.E.2d 261 (1945); *Dobson v. Johnson*, 237 N.C. 275, 74 S.E.2d 652 (1953); *Anderson v. Worthington*, 238 N.C. 577, 78 S.E.2d 333 (1953).

The requirements of this section are mandatory, not directory, and a failure to comply with the requirements deprives the appellate court of any appellate jurisdiction. *Williams v. Tillman*, 229 N.C. 434, 50 S.E.2d 33 (1948); *Dobson v. Johnson*, 237 N.C. 275, 74 S.E.2d 652 (1953); *Prevatte v.*

Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Where a party to a civil action which has been tried in the superior court desires to appeal from a judgment rendered at such trial to the appellate court without giving security, he must comply strictly with the provisions of this section, which are mandatory. McIntire v. McIntire, 203 N.C. 631, 166 S.E. 732 (1932).

Application May Be Made to Either Trial Judge or Clerk. — Under this section, the party aggrieved by the judgment of the superior court may apply to either the trial judge or the clerk of the superior court for leave to appeal to the appellate division in forma pauperis. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Necessity of Obtaining Order Allowing Appeal. — To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912).

Failure to Obtain Order Allowing Appeal. — Where the judge wrote on the judgment that plaintiff would be allowed to appeal in forma pauperis upon compliance with this section, but plaintiff obtained no order allowing appeal in forma pauperis after the filing of an affidavit of poverty subsequent to the term, the appeal would be dismissed for failure to comply with the mandatory provisions of this section. Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Order Must Be Obtained within Statutory Time. — An order allowing an appeal in forma pauperis, entered by the clerk after the expiration of the statutory time, was beyond the clerk's authority, and such appeal would be dismissed, the provisions of this section being mandatory and not directory. Powell v. Moore, 204 N.C. 654, 169 S.E. 281 (1933); Franklin v. Gentry, 222 N.C. 41, 21 S.E.2d 828 (1942).

Where application to the clerk of the superior court, supported by affidavit and certificate, for leave to appeal in forma pauperis, was not made until more than 10 days after expiration of the term of court at which the judgment was rendered, the appeal would be dismissed, the requirements of this section being mandatory and jurisdictional. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Necessity of Affidavit. — In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the appellate court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit. Brown v. S.H. Kress & Co., 207 N.C. 722, 178 S.E. 248 (1935).

Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and in such a case the appellate court will acquire no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. Williams v. Tillman, 229 N.C. 434, 50 S.E.2d 33 (1948). See also, Gilmore v. Imperial Life Ins. Co., 214 N.C. 674, 200 S.E. 407 (1939).

Statement of Attorney. — On an appeal in forma pauperis, an affidavit not containing the averment that appellant is advised by counsel that there is error in matter of law in the decision of the superior court is fatally defective. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893); Honeycutt v. Watkins, 151 N.C. 652, 65 S.E. 762 (1909). See also, Hanna v. Timberlake, 203 N.C. 556, 166 S.E. 733 (1932); Lupton v. Hawkins, 210 N.C. 658, 188 S.E. 110 (1936).

Applicability of Proviso Permitting Correction of Affidavit or Certificate. — The proviso permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal applies only to this section pertaining to appeals in civil actions. State v. Mitchell, 221 N.C. 460, 20 S.E.2d 292 (1942).

Untimely Filing of Affidavit or Certificate Not Permitted. — The proviso at the end of this section does not permit the filing of an affidavit or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. Clark v. Clark, 225 N.C. 687, 36 S.E.2d 261 (1945).

An affidavit which is defective in that it fails to aver that appellant is advised that there is error of law in the judgment may not be cured by an additional affidavit filed after the expiration of the time prescribed by the statute, or filed after the date for docketing the appeal. Berwer v. Union Cent. Life Ins. Co., 210 N.C. 814, 188 S.E. 618 (1936).

Effect of Order Allowing Appeal. — An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. *Leach v. Jones*, 86 N.C. 404 (1882).

Duty of Appellant to Pay for Transcript. — An order granted under this section, permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of the costs of the transcript

in advance. *Martin v. Chasteen*, 75 N.C. 96 (1876); *Speller v. Speller*, 119 N.C. 356, 26 S.E. 160 (1896).

Stated in *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in *Mason v. Osgood*, 71 N.C. 212 (1874); *Russell v. Hearne*, 113 N.C. 361, 18 S.E. 711 (1893); *Skipper v. Kingsdale Lumber Co.*, 158 N.C. 322, 74 S.E. 342 (1912); *Richardson v. Cooke*, 238 N.C. 449, 78 S.E.2d 208 (1953).

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

If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (C.C.P., ss. 304, 311; Code, s. 554; Rev., s. 598; C.S., s. 650.)

Cross References. — As to stay of proceedings to enforce a judgment, see Rule 62 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

Applicability of Section to Alimony Order. — This section is applicable only in cases involving a "judgment directing the payment of money," and the courts have generally held that an order requiring the payment of alimony is a "judgment directing the payment of money." *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Portions of a judgment requiring a defendant to pay alimony and counsel fees constituted a "judgment directing the payment of money" within the meaning of this section, and the court had authority to require the defendant to post a bond in order to stay execution pending appeal of the judgment; however, the court did not have authority under this section to dismiss the defendant's appeal for failure to post the required bond, but had authority only to dissolve any stay already issued. *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Undertaking Not Necessary to Appeal. — Security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. *Bledsoe v. Nixon*, 69 N.C. 82 (1873).

No Particular Form Required. — No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such an undertaking which are repugnant to its intent, they will be rejected as surplusage. *Oakley v. Van Noppen*, 100 N.C. 287, 5 S.E. 1 (1888).

Bond Given to Mortgagee by Mortgagor. — This section did not apply to a bond given by a mortgagor to the mortgagee stipulating that the mortgagor would not commit waste on the premises and that if the judgment was affirmed, that he would pay for the use and occupation. *Alderman v. Rivenbark*, 96 N.C. 134, 1 S.E. 644 (1887).

Operation of Security as Stay. — Upon compliance with this section, there will be a stay of execution as to parties appealing from a final judgment. *Bryan v. Hubbs*, 69 N.C. 423 (1873); *Smith v. Miller*, 155 N.C. 247, 71 S.E. 355 (1911).

Trial court's order that appellant

file supersedeas bond with another surety, upon its finding that the surety upon the first bond was not sufficient, was not error, as such matter rested within the sound discretion of the court. *Love v. Queen City Lines*, 206 N.C. 575, 174 S.E. 514 (1934).

Surety Held Bound when Defendant Abandoned Appeal. — Where the trial judge, upon sufficient findings, properly adjudged that the defendant had abandoned his appeal to the appellate court, it was not required that the appeal should have been docketed and dismissed in the appellate court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. *Murray v. Bass*, 184 N.C. 318, 114 S.E. 303 (1922).

Effect of Appeal on Trial Courts' Jurisdiction. — Where plaintiff appealed to the appellate court from an order of the superior court requiring him to pay alimony pendente lite and counsel fees, and the cause was removed thereto, the superior court was thereafter without jurisdiction to order the sale of plaintiff's land to satisfy the judgment or the execution of a stay bond. *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492 (1937).

Applied in *Hamilton v. Southern Ry.*, 203 N.C. 136, 164 S.E. 834 (1932); *Hamilton v. Southern Ry.*, 203 N.C. 468, 166 S.E. 392 (1932); *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963).

Quoted in *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Stated in *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

Cited in *Hinson v. Adrian*, 91 N.C. 372 (1884); *Adams v. Guy*, 106 N.C. 275, 278, 11 S.E. 535 (1890); *Laffoon v. Kerner*, 138 N.C. 281, 50 S.E. 654 (1905); *Murray v. Bass*, 184 N.C. 318, 114 S.E. 303 (1922); *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934); *Current v. Church*, 207 N.C. 658, 178 S.E. 82 (1935); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

§ 1-290. How judgment for personal property stayed.

If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (C.C.P., s. 305; Code, s. 555; Rev., s. 599; C.S., s. 651.)

CASE NOTES

No Authority to Dismiss Appeal for Failure to Post Bond. — While this section and § 1-292 give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dis-

miss an appeal for an appellant's failure to post the bond. *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Cited in *Adams v. Guy*, 106 N.C. 275, 11 S.E. 535 (1890); *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-291. How judgment directing conveyance stayed.

If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (C.C.P., s. 306; Code, s. 556; Rev., s. 600; C.S., s. 652.)

CASE NOTES

Duty of Clerk to Notify Sheriff. — After the undertaking has been given, it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. *Bryan v. Hubbs*, 69 N.C. 423 (1873).

Cited in *Hancock v. Bramlett*, 85 N.C. 393 (1881); *Hannon v. Commissioners of Halifax*, 89 N.C. 123 (1883); *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934); *Taylor v. Crisp*, 286 N.C. 488, 212 S.E.2d 381 (1975).

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

If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to

be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (C.C.P., s. 307; Code, s. 557; Rev., s. 601; C.S., s. 653.)

CASE NOTES

Effect of § 45-21.16. — Section 45-21.16 governs only the bond covering the appeal from the clerk to the trial court; bonds for appeals from the traditional trial courts to the Court of Appeals in foreclosure actions are governed as they previously were by this section. *In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

No Authority to Dismiss for Failure to Post Bond. — While § 1-290 and this section give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dismiss an appeal for an appellant's failure to post the bond. *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to § 45-21.16(d), and a superior court judge may require a bond upon appeal from that court pursuant to this section, and if the bond is not posted, the trustee may proceed with foreclosure; however, neither statute gives the clerk or judge the power to make the posting of a bond a condition to the appeal, and it is error for the superior court to dismiss an appeal from that court when the bond required by the court is not posted. *In re Coley Properties, Inc.*, 50 N.C. App. 413, 273 S.E.2d 738 (1981).

Measure of Damages under Bond. — The only proper measure of damages under a bond using the very same language as this section would be waste plus

the value of the use and occupation of the property. *In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Use of Interest on Indebtedness as Measure of Damages. — Where the bond posted by respondents protected petitioner from "any probable loss by reason of delay" in a proceeding to foreclose a deed of trust, there was no error in the trial court's use of interest on the indebtedness as a measure of damages, even though this section does not require a bond using language so expansive. *In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Liability of Purchaser where Sale Overturned. — Where an appeal was taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust, and an appeal bond was filed to stay execution under this section and §§ 1-293 and 1-294, and the judgment of the lower court was reversed on appeal, the purchaser at the sale could be held liable to the mortgagor for having taken immediate possession of the property. *Dixon v. Smith*, 204 N.C. 480, 168 S.E. 683 (1933).

Applied in *Nugent v. Beckham*, 43 N.C. App. 703, 260 S.E.2d 172 (1979).

Quoted in *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215 (W.D.N.C. 1977).

Cited in *Cox v. Hamilton*, 69 N.C. 30 (1873); *Hancock v. Bramlett*, 85 N.C. 393 (1881); *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934); *Taylor v. Bailey*, 49 N.C. App. 216, 271 S.E.2d 296 (1980).

§ 1-293. Docket entry of stay.

When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the

pendency of the appeal. (C.C.P., s. 254; Code, s. 435; 1887, c. 192; Rev., s. 621; C.S., s. 654.)

CASE NOTES

Cited in Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Queen

v. DeHart, 209 N.C. 414, 184 S.E. 7 (1936).

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

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars (\$50,000), where it would otherwise exceed that sum. (C.C.P., s. 308; Code, s. 558; Rev., s. 602; C.S., s. 655.)

Cross References. — As to effect of stay on the judgment, see § 1-296. As to stay of proceedings to enforce a judgment, see Rule 62 of the Rules of Civil

Procedure (§ 1A-1).

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

CASE NOTES

Section Not Controlling over Specific Statute. — Although this section states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling where there is a specific statute such as § 7A-668 addressing the matter in question. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

The perfection of an appeal terminates the authority of the inferior court. Governor ex rel. State Bank v. Twitty, 13 N.C. 386 (1830).

An appeal does not take the case beyond the control of the superior court, until it is perfected. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

An appeal removes a cause from the trial court, which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court. Upton v. Upton, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

An appeal takes the case out of the jurisdiction of the trial court. Carpenter v. Carpenter, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

And Operates as a Stay of All Proceedings in the Trial Court. — An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court relating to the issues included therein, until the matters are determined in the appellate court. Pruett v. Charlotte Power Co., 167 N.C. 598, 83 S.E. 830 (1914); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

An appeal from a judgment rendered in the superior court suspends all further proceedings in the cause in that court, pending the appeal. Harris v. Fairly, 232 N.C. 555, 61 S.E.2d 619 (1950).

An appeal, timely docketed and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the

statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the appellate court. *Combes v. Adams*, 150 N.C. 64, 63 S.E. 186 (1908); *Sykes v. Everett*, 167 N.C. 600, 83 S.E. 585 (1914).

Where a cause has been ordered to the appellate court, no subsequent action of the court below can affect it. *Murry v. Smith*, 8 N.C. 41 (1820).

Stay on Appeal of Interlocutory Order. — An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court, and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. *Safie Mfg. Co. v. Arnold*, 228 N.C. 375, 45 S.E.2d 577 (1947).

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly discovered evidence cannot be entertained. *Combes v. Adams*, 150 N.C. 64, 63 S.E. 186 (1908).

When Proceedings Not Stayed by Interlocutory Appeal. — When an appeal is taken to the appellate court from an interlocutory order of the superior court which is not subject to appeal, the superior court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the appellate court. *Veazey v. City of Durham*, 231 N.C. 354, 57 S.E.2d 375 (1950).

An attempted appeal from a nonappealable interlocutory order is a nullity and does not divest the superior court of jurisdiction to proceed in the action. *Cox v. Cox*, 246 N.C. 528, 98 S.E.2d 879 (1957).

When an appeal is taken from an interlocutory order from which no appeal is allowed by law, which is not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and pro-

crastinate a final judgment. *Carleton v. Byers*, 71 N.C. 331 (1874).

An appeal carries the whole cause up to the appellate court, whether security is given to stay proceedings or for costs only. *Bledsoe v. Nixon*, 69 N.C. 82 (1873); *Isler v. Brown*, 69 N.C. 125 (1873).

Pending an appeal the trial judge is functus officio. *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

Trial court does not have jurisdiction to conduct contempt proceedings while appeal is pending, because under this section all proceedings below are stayed; therefore any order finding a defendant in contempt is void, at least until appeal is perfected. *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

Where defendant appealed an order with respect to child visitation privileges, the trial court was without jurisdiction pending the appeal to entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt for failure to comply with the order appealed from and seeking to have the order modified. *Webb v. Webb*, 50 N.C. App. 677, 274 S.E.2d 888 (1981).

But Appeal Did Not Authorize Violation of Contempt Order. — While an appeal stayed contempt proceedings until the validity of the order was determined, taking the appeal did not authorize a violation of the order. *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

Relation Back of Perfection of Appeal. — Where defendants appealed the order of the trial judge appointing operating receivers for a corporation, the corporate defendants' subsequent perfection of their appeal related back to the time of the giving of notice of appeal, and therefore all orders entered by the trial judge after defendants' notice of appeal were void for want of jurisdiction; thus, orders approving the payment of fees and expenses for attorneys, accountants and receivers would be vacated. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

Authority to Allow Proceedings by Lower Court. — Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the appellate court may direct that certain matters should not be suspended. *Pender v. Mallett*, 123 N.C. 57, 31 S.E. 351 (1898).

Power of Lower Court over Matters Not Affected by Judgment.

— During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders not affected by the judgment appealed from. *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900).

Refusal of Lower Court to Dispose of Collateral Matter. — Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. *Penniman v. Daniel*, 91 N.C. 431 (1884).

An appeal from a decree of distribution did not bring up the fund, the court below retaining charge of its safekeeping and investment pending the appeal. *Hinson v. Adrian*, 91 N.C. 372 (1884).

An appeal perfected pending a motion to set aside a verdict, the time for the hearing of which was extended by consent, did not divest the trial court of jurisdiction to determine the motion. *Myers v. Stafford*, 114 N.C. 231, 19 S.E. 232 (1894).

An appeal from an order refusing to discharge an attachment took the case out of the jurisdiction of the court whose order was appealed from, and an order could not subsequently be made by that court discharging the attachment. *Pasour v. Lineberger*, 90 N.C. 159 (1884).

Appointment of Receiver Pending Appeal of Order Allowing Amended Complaint. — The pendency of an appeal from an order allowing plaintiff to file an amended complaint did not deprive the superior court of jurisdiction to appoint a receiver based on allegations in the amended complaint. *York v. Cole*, 251 N.C. 344, 111 S.E.2d 334 (1959).

Second Trial Pending Appeal Held Unlawful. — Where a cause was tried at

a previous term of the court, and the judge set aside the verdict under the appellant's exception, and pending his due prosecution of his appeal, without laches on his part, the judge forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial was contrary to this section and a new trial would be ordered on appeal. *Likas v. Lackey*, 186 N.C. 398, 119 S.E. 763 (1923).

Confirmation of Referee's Report Stricken. — Where, after appeal from a formal judgment overruling a demurrer, the trial court proceeded to hear exceptions to the report of the referee, the appellate court, upon affirming the judgment overruling the demurrer, would order the judgment confirming the report of the referee stricken out, because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. *Griffin v. Bank of Coleridge*, 205 N.C. 253, 171 S.E. 71 (1933).

Applied in *Cox v. Cox*, 33 N.C. App. 73, 234 S.E.2d 189 (1977); *In re Will of Worrell*, 35 N.C. App. 278, 241 S.E.2d 343 (1978); *State ex rel. Jacobs v. Sherard*, 39 N.C. App. 464, 250 S.E.2d 923 (1979).

Cited in *Bledsoe v. Nixon*, 69 N.C. 82 (1873); *Isler v. Brown*, 69 N.C. 125 (1873); *Skinner v. Bland*, 87 N.C. 168 (1882); *Allen v. Gooding*, 174 N.C. 271, 93 S.E. 740 (1917); *Bohannon v. Virginia Trust Co.*, 198 N.C. 702, 153 S.E. 263 (1930); *Scott v. Jordan*, 235 N.C. 244, 69 S.E.2d 557 (1952); *Faught v. Faught*, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

§ 1-295. Undertaking in one or more instruments; served on appellee.

The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (C.C.P., s. 309; Code, s. 559; Rev., s. 603; C.S., s. 656.)

Cross References. — As to undertaking to stay executions, see § 1-289, et seq. As to undertaking for costs, see § 1-285.

CASE NOTES

Effect of Insolvency of One Surety.

— Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and dis-

tingent, the appellant has a right to have his appeal heard, even though the surety to the undertaking to stay execution is insolvent. *Alderman v. Rivenbark*, 96 N.C. 134, 1 S.E. 644 (1887).

Cited in *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-296. Judgment not vacated by stay.

The stay of proceedings provided for in this Article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this Chapter, until such judgment is reversed or modified by the appellate division. (1887, c. 192; Rev., s. 604; C.S., s. 657; 1969, c. 44, s. 9.)

Cross References. — As to effect of appeal on proceedings in lower court generally, see § 1-294.

CASE NOTES

A judgment is not annulled by an appeal therefrom. *State ex rel. Williams v. Mizell*, 32 N.C. 279 (1849).

An appeal from an order to vacate a judgment leaves such judgment, and any execution issued under it, in full force. *Murphy v. Merritt*, 63 N.C. 502 (1869).

Quoted in *Abbott v. Town of Highlands*, — N.C. App. —, 302 S.E.2d 280 (1983).

Cited in *Dixon v. Smith*, 204 N.C. 480, 168 S.E. 683 (1933); *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934).

§ 1-297. Judgment on appeal and on undertakings; restitution.

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the appellate division on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (1785, c. 233, s. 2, P.R.; 1810, c. 793, P.R.; 1831, c. 46, s. 2; R.C., c. 4, s. 10; C.C.P., s. 314; Code, s. 563; Rev., s. 605; C.S., s. 658; 1969, c. 44, s. 10.)

CASE NOTES

Whole Case Taken Up on Appeal.

— Under this section, an appeal on the trial and determination of the cause in the inferior court carries the whole case to the appellate court for review, and such court has plenary jurisdiction to reverse, affirm or modify the judgment. *Hudson v. Charleston, C. & C.R.R.*, 55 F. 252 (W.D.N.C. 1893).

What Relief Available on Appeal.

— On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief, they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved. *Voorhees v. Porter*, 134 N.C. 591, 47 S.E. 31 (1904).

The appellate court may affirm the judgment of the trial court. *Wilson v. Jones*, 176 N.C. 205, 97 S.E. 18 (1918); *Selwyn Hotel Co. v. Griffin*, 182 N.C. 539, 109 S.E. 371 (1921).

The appellate court has power to grant a new trial. *Hall v. Hall*, 131 N.C. 185, 42 S.E. 562 (1902); *Hawk v. Pine Lumber Co.*, 149 N.C. 10, 62 S.E. 752 (1908).

The appellate court may order a new trial and direct further proceedings in lower court. *Williams v. Kearney*, 177 N.C. 531, 98 S.E. 705 (1919).

Where it appears that a necessary party is missing from the case, or that the issues are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. *Vaughan v. Davenport*, 159 N.C. 369, 74 S.E. 967 (1912).

When the judgment is not supported by the record, as where the record shows that there was no verdict, or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. *McCanless v. Flinchum*, 98 N.C. 358, 4 S.E. 359 (1887).

Grant of New Trial for Newly Discovered Evidence. — The appellate court may, in its discretion, order a new trial for newly discovered evidence, on motion in that court. *Clark v. Riddle*, 118 N.C. 692, 24 S.E. 492 (1896).

Discretion to Refuse New Trial for Newly Discovered Evidence. — The appellate court, in its discretion, may refuse to grant a new trial for newly discovered evidence. *Brown v. Mitchell*,

102 N.C. 347, 9 S.E. 702 (1889); *Sledge v. Elliott*, 116 N.C. 712, 21 S.E. 797 (1895).

New Trial on All Issues. — While the appellate court has power to grant either a general or partial new trial, when the court grants a new trial generally without further disposition, the new trial is upon all of the issues. *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164 (1911).

Restriction of New Trial to Certain Issues. — The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necessary to a proper determination of the cause. *Davis v. Southern Ry.*, 176 N.C. 186, 96 S.E. 945 (1918).

On appeal, it is within the discretion of the court whether to restrict a new trial to the issues affected by the error; whenever the error is confined to one or more issues that are separable from the others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. *Huffman v. Ingold*, 181 N.C. 426, 107 S.E. 453 (1921).

A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby. *Burleson v. Helton*, 258 N.C. 782, 129 S.E.2d 491 (1963).

The appellate court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant. *Cauble v. Southern Express Co.*, 182 N.C. 448, 109 S.E. 267 (1921).

Setting Aside Part of Verdict. — Ordinarily, for error in the charge or the reception or rejection of evidence the verdict will be set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. *Burton v. Wilmington & W.R.R.*, 84 N.C. 192 (1881).

Setting Aside Part of Judgment. — Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part. *Newberry v. Seaboard Air Line R.R.*, 160 N.C. 156, 76 S.E. 238 (1912).

Modification of Amount of Recovery. — Although on appeal an issue involving several items cannot be amended where one item is erroneous

and appeal is on that item, the court can allow appellee to deduct that much or stand a new trial. *Ragland v. Lassiter-Ragland, Inc.*, 174 N.C. 579, 94 S.E. 100 (1917).

Remand for Further Proceedings. — After appeal, a cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. *Springs v. Wilson*, 17 N.C. 385 (1833).

Remand for Fuller Findings of Fact. — The appellate court has power to remand a cause so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. *Gulf Ref. Co. v. McKernan*, 178 N.C. 82, 100 S.E. 121 (1919).

Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. *Kitchen v. Troy*, 72 N.C. 50 (1875).

On appeal, a cause may be remanded for a special finding as to the right to costs. *Smith v. Smith*, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891).

Judgment Not Reversed for Technical Errors. — Where appellant has had a fair submission of the real issues and the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. *Smith v. Hancock*, 172 N.C. 150, 90 S.E. 127 (1916).

Nor in Absence of Prejudice. — Courts will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. *Ball-Thrash Co. v. McCormack*, 172 N.C. 677, 90 S.E. 916 (1916).

Power to Direct Entry of Judgment on Verdict. — A party litigant has a substantial right in a verdict obtained in his favor; and where a verdict has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the appellate court will direct that judgment be entered on

the verdict as rendered. *Wilson v. Rankin*, 129 N.C. 447, 40 S.E. 310 (1901); *Ferrall v. Ferrall*, 153 N.C. 174, 69 S.E. 60 (1910).

Separate Judgments for Codefendants. — Under this section an action may be dismissed as to one defendant and affirmed as to the other. *Kimbrough v. Hines*, 182 N.C. 234, 109 S.E. 11 (1921).

Judgment on Compromise by Parties Pending Appeal. — As the appellate court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. *Chavis v. Brown*, 174 N.C. 122, 93 S.E. 471 (1917).

Remand to Carry out Agreement. — Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause would be remanded to the trial court with directions to carry out the agreement. *Stokes-Grimes Grocery Co. v. Hill*, 176 N.C. 697, 97 S.E. 468 (1918).

Judgment against Sureties on Undertaking. — Upon the affirmance by the appellate court of a judgment of the superior court in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmance is conclusive of the liability of the sureties. *Oakley v. Van Noppen*, 100 N.C. 287, 5 S.E. 1 (1888).

The appellate court will not determine the rights of persons who do not appeal. *Van Dyke v. Aetna Life Ins. Co.*, 173 N.C. 700, 91 S.E. 600 (1917).

Cited in *Baxter v. Wilson*, 95 N.C. 137 (1886); *Everett v. Raby*, 104 N.C. 479, 10 S.E. 526 (1889); *Sedbury v. Southern Express Co.*, 164 N.C. 363, 79 S.E. 286 (1913); *Johnson v. Whilden*, 166 N.C. 104, 81 S.E. 1057 (1914); *Geitner v. Jones*, 173 N.C. 591, 92 S.E. 493 (1917); *Holmes v. Bullock*, 178 N.C. 376, 100 S.E. 530 (1919); *Hodgin v. North Carolina Pub. Serv. Corp.*, 179 N.C. 449, 102 S.E. 748 (1920); *Planters Stores Co. v. Bullock*, 180 N.C. 656, 104 S.E. 65 (1920).

§ 1-298. Procedure after determination of appeal.

In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its

modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division. (1887, c. 192, s. 2; Rev., s. 1526; C.S., s. 659; 1969, c. 44, s. 11; 1971, c. 268, s. 13.)

CASE NOTES

This section applies only to judgments of the superior court which have been affirmed or modified on appeal. *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966).

It has no application to a decision of the appellate court reversing a judgment of the lower court. *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966).

Appellate Court without Jurisdiction after Remand. — The appellate court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. *Seaboard Air Line Ry. v. Horton*, 176 N.C. 115, 96 S.E. 954 (1918); *Davis v. Southern Ry.*, 176 N.C. 186, 96 S.E. 945 (1918).

Mandate of the appellate court is binding on the trial court, which must strictly adhere to its holdings. *Campbell v. First Baptist Church*, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

Power of Lower Court after Affirmance. — After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the appellate court, it becomes final, and the court below has no power to remit or modify it. *In re Griffin*, 98 N.C. 225, 3 S.E. 515 (1887).

Interpreting Decision of Appellate Court. — Expressions contained in an appellate court decision must be interpreted in the context of the factual situation under review or the framework of the particular case. *Campbell v. First Baptist Church*, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

Where a judgment has been affirmed or reversed, but no final judgment has been entered by the appellate court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the appellate court. *Lancaster*

v. Bland, 168 N.C. 377, 84 S.E. 529 (1915).

Docket Entry Held Sufficient. — When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not vacated by the appeal, the affirmance by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. *Bond v. Wool*, 113 N.C. 20, 18 S.E. 77 (1893).

For case holding that defendants had no legal right to make a final assessment against plaintiff's property before the appellate court's opinion was certified to the superior court and while the questions presented on the appeal were yet in fieri, see *Atlantic Coast Line R.R. v. Sanford*, 188 N.C. 218, 124 S.E. 308 (1924).

An order "That execution of said judgment do proceed" was pro forma under this section. *North Carolina R.R. v. Story*, 193 N.C. 362, 137 S.E. 166 (1927).

A judgment in appellant's favor taxing the costs of the action, at variance with the decision of the appellate court rendered on appeal, signed upon appellant's motion in the superior court after examination had been afforded to the appellee's attorney, was not irregular, and when not taken through mistake, inadvertence, surprise or excusable neglect, the procedure would be by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. *Phillips v. Ray*, 190 N.C. 152, 129 S.E. 177 (1925).

Applied in *Hamilton v. Southern Ry.*, 203 N.C. 136, 164 S.E. 834 (1932).

§§ 1-299 to 1-301: Repealed by Session Laws 1971, c. 268, s. 34.

Cross References. — As to abolition of office of justice of the peace, see § 7A-176.

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-302. Judgment enforced by execution.

Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (C.C.P., s. 257; Code, s. 441; Rev., s. 615; C.S., s. 663.)

Cross References. — As to contempt generally, see Chapter 5A.

CASE NOTES

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. *Sheppard v. Bland*, 87 N.C. 163 (1882).

Execution as Procedure for Enforcing Judgment. — A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. *Vegehn v. Smith*, 95 N.C. 254 (1886).

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. *Cheshire v. Drake*, 223 N.C. 577, 27 S.E.2d 627 (1943).

No Execution against Counties. — A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them

to levy a tax for the satisfaction of the judgment. *Gooch v. Gregory*, 65 N.C. 142 (1871).

Remedy for Refusal of Clerk to Issue Execution. — Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) He may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) He may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. *Gooch v. Gregory*, 65 N.C. 142 (1871); *Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co.*, 128 N.C. 199, 38 S.E. 831 (1901).

An order taxing the costs of an action against a party is, in effect, a judgment, upon which an execution may be issued under this section. *Sheppard v. Bland*, 87 N.C. 163 (1882).

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by pro-

ceeding in rem, or pursue both remedies at the same time. *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

Funds in Hands of Third Person. — Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the funds. *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

Applied in *Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church*, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Cited in *Broyles v. Young*, 81 N.C. 315 (1879); *Sawyers v. Sawyers*, 93 N.C. 321 (1885); *Williams v. Weaver*, 94 N.C. 34 (1886); *Lupton v. Edmundson*, 220 N.C. 188, 16 S.E.2d 840 (1941); *Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co.*, 264 N.C. 749, 142 S.E.2d 694 (1965).

§ 1-303. Kinds of; signed by clerk; when sealed.

There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (C.C.P., s. 258; Code, s. 442; Rev., s. 616; C.S., s. 664.)

Cross References. — As to forms of executions, see § 1-313. For execution against the person, see §§ 1-311 and 1-313.

CASE NOTES

Sealing of Execution Issued to Another County. — Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. *Governor ex rel. Shackelford v.*

M'Rea, 10 N.C. 226 (1824); *Shepherd v. Lane*, 13 N.C. 148 (1828); *Seawell v. Bank of Cape Fear*, 14 N.C. 279 (1831); *Finley v. Smith*, 15 N.C. 95 (1833); *Freeman v. Lewis*, 27 N.C. 91 (1844); *Taylor v. Taylor*, 83 N.C. 116 (1880).

§ 1-304. Against married woman.

An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (C.C.P., s. 259; Code, s. 443; Rev., s. 617; C.S., s. 665.)

Cross References. — As to the property rights of married persons, see Article X, § 4 of the North Carolina Constitution and § 52-1.

CASE NOTES

Effect of Section. — Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to a man or an unmarried woman. *Harvey v. Johnson*, 133 N.C. 352, 45 S.E. 644 (1903).

As to effect of this section, see also *McLeod v. Williams*, 122 N.C. 451, 30

S.E. 129 (1898); *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914); *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916).

Applied in *Dougherty v. Sprinkle*, 88 N.C. 300 (1883); *McLeod v. Williams*, 122 N.C. 451, 30 S.E. 129 (1898); *Harvey v. Johnson*, 133 N.C. 352, 45 S.E. 644 (1903).

§ 1-305. Clerk to issue, in six weeks; penalty; limitations on issuance.

(a) Subject to the provisions of G.S. 1A-1 (Rule 62) and subsection (b) below, the clerk of superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars (\$100.00) for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond.

(b) The clerk may not issue an execution unless

- (1) The judgment debtor's exemptions have been designated, or
- (2) The judgment debtor has waived his exemptions as provided in G.S. 1C-1601(c), or
- (3) The clerk determines that the exemptions are inapplicable to the particular claim as authorized by G.S. 1C-1603(a)(3). (1850, c. 17, ss. 1, 2, 3; R.C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C.S., s. 666; 1953, c. 470; 1959, c. 1295; 1973, c. 1070, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, designated the former provisions of this section as subsection (a) and added subsection (b). In present subsection (a), the amendment inserted "and subsection (b) below" near the beginning of the first sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides:

"This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Duty of Clerk to Issue Execution. — It is the duty of the clerk, as a ministerial officer of the court, to issue execution. *Gooch v. Gregory*, 65 N.C. 142 (1871). See also, *Spencer v. Hawkins*, 39 N.C. 288 (1846).

The clerk of the superior court, not the judge, is the proper officer to issue execution. *McKethan v. McNeill*, 74 N.C. 663 (1876).

A deputy clerk has power to issue execution in the name of the clerk. *Miller v. Miller*, 89 N.C. 402 (1883).

The signature of the clerk is an

absolute necessity to the validity of the writ, all the more so since the legislature has dispensed with the other indicium of the writ's authenticity, that is, a seal, when the writ is to be executed within the county in which it issued. *Shepherd v. Lane*, 13 N.C. 148 (1828).

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it. *Shepherd v. Lane*, 13 N.C. 148 (1828).

As to endorsement on execution docket, see *Bank of Cape Fear v. Stafford*, 47 N.C. 98 (1854).

Delivery Necessary to Execution.

— It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. *McKeithen v. Blue*, 149 N.C. 95, 62 S.E. 769 (1908).

A writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk, is not sufficient. *State v. McLeod*, 50 N.C. 318 (1858).

As to remedy for refusal of clerk to issue execution, see *Gooch v. Gregory*, 65 N.C. 142 (1871).

Payment of Fees as Condition of Clerk's Liability. — This section and § 138-2, providing that the clerk shall not be compelled to perform any services unless his fees are paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for

failure to issue execution within six weeks unless the plaintiff pays or tenders him his fees for that service. *Bank of Oxford v. Bobbitt*, 111 N.C. 194, 16 S.E. 169 (1892). See *Board of Educ. v. Gallop*, 227 N.C. 599, 44 S.E.2d 44 (1947).

Issuance to One of Two Counties.

— An allegation that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties would not justify an amercement under this section. *Bank of Cape Fear v. Stafford*, 47 N.C. 98 (1854).

This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. *Simpson v. Simpson*, 63 N.C. 534 (1869).

As to suspension of the statute by the Ordinance of 1866, see *Badham v. Jones*, 64 N.C. 655 (1870); *McIntyre v. Merritt*, 65 N.C. 558 (1871); *Richardson v. Wicken*, 80 N.C. 172 (1879); *Williamson v. Kerr*, 88 N.C. 11 (1883).

Applied in *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

Cited in *McIntyre v. Merritt*, 65 N.C. 558 (1871).

§ 1-306. Enforcement as of course.

The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this Article; provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directing the payment of alimony. (C.C.P., s. 255; Code, s. 437; Rev., s. 619; C.S., s. 667; 1927, c. 24; 1935, c. 98.)

CASE NOTES

Judgment Directing Payment of Alimony. — The statute of limitations does not apply to a judgment directing the payment of alimony. *Morse v. Zatkiewiez*, 5 N.C. App. 242, 168 S.E.2d 219 (1969).

A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the

property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Enforcement of Certain Criminal Judgments by United States. — No

limitation period, state or federal, bars the United States from enforcing a judgment on an unpaid criminal fine. *United States v. Welborn*, 495 F. Supp. 833 (M.D.N.C. 1980).

Sale Must Be Completed within 10 Years. — This section and § 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of 10 years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the 10 years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948).

Expiration of Lien of Judgment when Docketed in Another County.

— Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of 10 years from the date of rendition of the judgment and not the date of docketing. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Allotment of homestead suspends the running of the statute of limitations. *Cleve v. Adams*, 222 N.C. 211, 22 S.E.2d 567 (1942).

A party may not enjoin execution until the statute has run and then plead the bar of the statute against the judgment. *Holden v. Totten*, 228 N.C. 204, 44 S.E.2d 874 (1947).

Procedure for Obtaining New Judgment. — Under the proviso in this section no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof; the only procedure whereby the owner of a judgment may obtain a new judgment for the amount is by an independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as with any other action to recover a judgment on a debt, which action must, under § 1-47, be commenced within 10 years from the date of the rendition of the judgment. *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417 (1955).

The concept of a dormant judgment and scire facias for leave to issue execution thereon is now obsolete. *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417 (1955).

Cited in *Williams v. Mullis*, 87 N.C. 159 (1882); *Exum v. Carolina R.R.*, 222 N.C. 222, 22 S.E.2d 424 (1942).

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

Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, one thousand nine hundred and forty-five, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (1871-2, c. 74; 1881, c. 75; Code, s. 444; Rev., s. 623; C.S., s. 669; 1945, c. 773.)

Cross References. — As to penalty for false return by sheriff, see § 162-14.

CASE NOTES

This section and § 1-352 must be construed in pari materia with other statutes relating to the same matter. *Essex Inv. Co. v. Pickelsimer*, 210 N.C. 541, 187 S.E. 813 (1936).

Executions May Issue Only from Court Rendering Judgment. — Under the original Code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-72, ch. 74, § 1, executions shall issue only from the court in which the judgment was rendered. *Hasty v. Simpon*, 77 N.C. 69 (1877); *Daniels v. Yelverton*, 239 N.C. 54, 79 S.E.2d 311 (1953).

Under this section, only the clerk of the superior court in the county where a judgment is rendered may issue execution, even though the judgment is docketed in other counties. *Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Return to Another County Not Authorized. — Since the passage of the Act of 1870-71, ch. 42, the clerk of the superior court of one county cannot issue a summons returnable in the superior court of another. *Howerton v. Tate*, 66 N.C. 431 (1872).

Execution on Tax Certificate. — Where the Commissioner (now the Secretary) of Revenue had the clerk of a superior court docket his certificate setting forth the tax due by a resident of the county pursuant to former § 105-242(c), execution on such judgment directed to the sheriff of the county had to be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it could not be issued by the Commissioner. *Daniels v. Yelverton*, 239 N.C. 54, 79 S.E.2d 311 (1953).

Applied in *North Carolina Nat'l Bank v. Sharpe*, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

§ 1-308. To what counties issued.

When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution is to be issued. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Execution may be issued at the same time to different counties. (C.C.P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905, c. 412; Rev., s. 622; C.S., s. 670; 1953, c. 884.)

CASE NOTES

Where a writ was issued against three defendants, and two of them were in one county while the other was in another county, in which the judgment was rendered, in the absence of special instructions, the clerk might issue an

execution to either county. *Bank of Cape Fear v. Stafford*, 47 N.C. 98 (1854).

Applied in *North Carolina Nat'l Bank v. Sharpe*, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

§ 1-309. Sale of land under execution.

Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (C.C.P., s. 259; Code, s. 443; Rev., s. 622; C.S., s. 671.)

CASE NOTES

Section Not Applicable to Foreclosure Sales. — The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. *Kidder v. McIlhenny*, 81 N.C. 123 (1879).

Sale by Successor in Office. — Where a fieri facias was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing and must be completed by the hand which commenced it. *Sanderson v. Rogers*, 14 N.C. 38 (1831).

Where a sheriff has levied on lands

and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. *Tarkinton v. Alexander*, 19 N.C. 87 (1836), explaining and reconciling the cases of *Holliday v. Eastwood*, 12 N.C. 157 (1827), and *Sanderson v. Rogers*, 14 N.C. 38 (1831), with those of *Barden v. M'Kinne*, 11 N.C. 279 (1826), and *Seawell v. Bank of Cape Fear*, 14 N.C. 279 (1831), and approving them all.

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. *Tarkinton v. Alexander*, 19 N.C. 87 (1836).

Cited in *Weir v. Weir*, 196 N.C. 268, 145 S.E. 281 (1928).

§ 1-310. When dated and returnable.

Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than 90 days from said date, and no executions against property shall issue until 10 days after entry of judgment. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624; C.S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697; 1971, c. 381, s. 12; 1973, c. 1070, s. 2; 1977, c. 74, s. 1.)

CASE NOTES

By this statute the legislature has fixed the life of an execution. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. *Gardner v. McDonald*, 223 N.C. 555, 27 S.E.2d 522 (1943).

The term "return" implies that the process is taken back, with such endorsements as the law requires, to the place from when it originated. *Brogden Prod.*

Co. v. Stanley, 267 N.C. 608, 148 S.E.2d 689 (1966).

Computation of Time for Return. — In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. *Taylor v. Harris*, 82 N.C. 25 (1880).

As to directory effect of former requirement of attestation of the execution, see *Bryan v. Hubbs*, 69 N.C. 423 (1873); *Williams v. Weaver*, 94 N.C. 134 (1886).

Applied in *Board of Educ. v. Gallop*,

227 N.C. 599, 44 S.E.2d 44 (1947); *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Cited in *Boyd v. Teague*, 111 N.C. 246, 16 S.E. 338 (1892).

§ 1-311. Against the person.

If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the Article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. Such findings of fact shall include a finding that the defendant either (i) is about to flee the jurisdiction to avoid paying his creditors, (ii) has concealed or diverted assets in fraud of his creditors, or (iii) will do so unless immediately detained. If defendant appears at the hearing on the debt and the judge has reason to believe that the defendant is indigent, he shall inform the defendant that if he is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. If defendant appears at the hearing on the debt and the judge provisionally concludes he is indigent, counsel should be appointed immediately. (C.C.P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C.S., s. 673; 1947, c. 781; 1977, c. 649, s. 1.)

Editor's Note. — The reference in this section to "the Article Arrest and Bail" was apparently meant to refer to Article 34 of this Chapter, entitled "Arrest and

Bail." See § 1-409 et seq.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

Editor's Note. — The cases cited below were decided prior to the 1977 amendment to this section, which added the last three sentences.

Constitutionality. — It is not irrational for the General Assembly to view execution against the body (which may issue only upon a judgment, an express finding of fraud and a writ of fieri facias returned nulla bona) as a step both necessary and reasonably calculated to com-

pel disclosure of possibly hidden assets. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

An equal protection attack against this section, as it read prior to the 1977 amendment thereto, was without merit because the thrust of this section is simply against all debtors who have defrauded or committed other torts under § 1-410, some of whom may later

prove to be indigent and some of whom are well off and are concealing substantial assets. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

When Execution against Person of Judgment Debtor May Issue. — Where the complaint alleges a cause of arrest, whether the same is necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. *Ledford v. Emerson*, 143 N.C. 527, 55 S.E. 969 (1906); *Turlington v. Aman*, 163 N.C. 555, 79 S.E. 1102 (1913).

If a judgment is rendered against a defendant for a cause of action specified in § 1-410 (1), this section authorizes an execution against the person of the judgment debtor after the return of an execution against his property is wholly or partly unsatisfied. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Two Alternative Conditions Pre-requisite. — There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) A lawful arrest before judgment; or (b) A complaint averring such facts as would have justified an order for an arrest. *H.M. Houston & Co. v. Walsh*, 79 N.C. 35 (1878).

Three Classes of Cases Contemplated. — **In General.** — This section, taken in connection with § 1-411, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint; (2) Where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) Where the cause set forth in the complaint is essential to the plaintiff's claim. *State ex rel. Peebles v. Foote*, 83 N.C. 102 (1880).

This section contemplates three classes where execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit; (2) Where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action; and (3) Where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967).

Same — First Class. — In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. *State ex rel. Peebles v. Foote*, 83 N.C. 102 (1880).

Same — Second Class. — In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. *State ex rel. Peebles v. Foote*, 83 N.C. 102 (1880).

Same — Third Class. — In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. *State ex rel. Peebles v. Foote*, 83 N.C. 102 (1880).

As to an execution against the person upon a docketed judgment of a justice of the peace, see *McAden v. Banister*, 63 N.C. 479 (1869).

Necessity for Sufficient Allegations. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under § 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967).

But an execution against the person cannot issue simply because of allegations in the complaint. The facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment. *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967). See also, *Stewart v. Bryan*, 121 N.C. 46, 28 S.E. 18 (1897).

Cause Must Be Pleaded and Proved and Issue Determined. — In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirma-

tively determined by the jury and judgment rendered. *Turlington v. Aman*, 163 N.C. 555, 79 S.E. 1102 (1913).

Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. *H.M. Houston & Co. v. Walsh*, 79 N.C. 35 (1878).

Allegation of Malice in Malpractice Action. — In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N.C. 340, 1 S.E.2d 870 (1939).

Where plaintiff suggests fraud in defendant's affidavit of insolvency, he must sufficiently allege and prove fraud or the proceeding will be dismissed. *Hayes v. Lancaster*, 202 N.C. 515, 163 S.E. 602 (1932).

Facts Must Enter into Judgment. — An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. *Doyle v. Bush*, 171 N.C. 10, 86 S.E. 165 (1915).

What Must Be Embraced in Findings of Fact. — As a matter of procedural due process, the statutorily prescribed "finding of facts establishing the right to execution against the person" under this section embraces not only findings with respect to the wrong of the debtor upon his creditor, but in addition a finding of probable cause to believe that he has committed or will commit further wrongs in order to cheat his creditors. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Before a *capias* of execution against the body of a person may issue there must be findings of fact sufficient to support a conclusion of probable cause to believe that the debtor is about to flee the jurisdiction or has concealed or diverted assets or that unless he is immediately detained he will probably do so. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C.), *aff'd*, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Execution for Conversion. — Under this section and § 1-410, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse,

converted it by selling the horse while in his possession, such defendant was subject to execution against the person. *Doyle v. Bush*, 171 N.C. 10, 86 S.E. 165 (1915).

Under this section an affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, was sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial and a specific finding of fraud being unnecessary. *East Coast Fertilizer Co. v. Hardee*, 211 N.C. 653, 191 S.E. 725 (1937).

Execution for Injury Committed to Plaintiff's Person. — Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff, who appealed without giving bond to stay execution, it was held that upon the return of execution against defendant's property unsatisfied an execution upon the person could issue, that filing an inventory of his property, etc., would not exempt the defendant from arrest, and that the execution could only be stayed by giving a bond securing the judgment. *Howie v. Spittle*, 156 N.C. 180, 72 S.E. 207 (1911).

Wilfully Inflicted Injury. — Where the pleadings, evidence and verdict were that an injury was wilfully inflicted, and order for execution against the person of the defendant upon the return of execution against his property unsatisfied was proper under this section and § 1-410. *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929).

Allegations and evidence tending to show that defendant, while drunk, drove his automobile on the wrong side of a city street where traffic was heavy at a rate of 45 or 50 miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby, were sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. *Foster v.*

Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

Discharge of Person under Execution. — The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of \$50.00. *Raisin Fertilizer Co. v. Grubbs*, 114 N.C. 470, 19 S.E. 597 (1894).

When a person is taken by authority of an execution against his person by virtue of the provisions of this section, he can be discharged from imprisonment only by payment or by giving notice and surrendering all his property in excess of \$50.00 as provided in § 23-23 and §§ 23-30 through 23-38. The effect of an execution against the person is therefore to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above \$50.00. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applicability of § 23-29. — The provisions of § 23-29(2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of § 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of this section. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Duty of Clerk. — It is the duty of the clerk of the court, upon the application of the plaintiff, to issue the execution against the person of the defendant in proper cases. *Kinney v. Laughenour*, 97 N.C. 325, 2 S.E. 43 (1887).

Motion before Clerk and Appeal to Superior Court. — Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is

subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. *Turlington v. Aman*, 163 N.C. 555, 79 S.E. 1102 (1913).

Defendant's Privilege against Self-Incrimination Inapplicable where Plaintiff Relinquishes Remedy Under this Section. — In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of § 1-410 (1) and to issue an execution against their persons by virtue of the provisions of this section, defendants' claim of privilege against self-incrimination does not apply. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Liability in Damages for Malicious Prosecution. — Where a trial court of competent jurisdiction regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant was taken into custody under this section, the plaintiff in said action would not be liable in damages in defendant's subsequent action for malicious prosecution, even if the verdict and finding of the jury or finding for plaintiff in the former suit was thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921).

Cited in *Rouse v. Wheeler*, 17 N.C. App. 422, 194 S.E.2d 555 (1973).

§ 1-312. Rights against property of defendant dying in execution.

Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may after the death of the person so taken and dying in execution, have the same rights against the property of the person deceased, as they might have had if that person had never been in execution. (21 James I, s. 24; R.C., c. 45, s. 28; Code, s. 469; Rev., s. 626; C.S., s. 674.)

§ 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 if 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:

- (1) **Against Property — No Lien on Personal Property until Levy.** — If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.
- (2) **Against Property in Hands of Personal Representative.** — If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.
- (3) **Against the Person.** — If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is released or discharged according to law. The execution shall include a statement that if the defendant is an indigent person he is entitled to services of counsel, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer.
- (4) **For Delivery of Specific Property.** — If it is for the delivery of the possession of real 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.

- (5) **For Purchase Money of Land.** — If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (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.)

Cross References. — As to subscription and sealing of the execution by the clerk, see § 1-303.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Liens on Real Estate and Personality Distinguished. — A judgment creditor acquires a lien on the judgment debtor's real estate by docketing; but he acquires no lien on the personality until there has been a valid levy. *Community Credit Co. v. Norwood*, 257 N.C. 87, 125 S.E.2d 369 (1962).

To make a valid levy, the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order. *Community Credit Co. v. Norwood*, 257 N.C. 87, 125 S.E.2d 369 (1962).

Date of Lien against Personality. — Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. *Weinsenfield v. McLean*, 96 N.C. 248, 2 S.E. 56 (1887).

Duty to Report Levy on Automobile. — When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department (now Division) of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate. *Community Credit Co. v. Norwood*, 257 N.C. 87, 125 S.E.2d 369 (1962).

Waiver of Right to Have Personality Taken First. — The judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the sheriff is about to make a levy. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Refusal to Produce Personality Warrants Sale of Realty. — The provision requiring that the officer satisfy the judgment first out of the personality is solely for the debtor's benefit, and if the debtor refuses to produce his personality, his lands may be sold. *McCoy v. Beard*, 9 N.C. 377 (1823).

Presumption as to Levy on Realty. — Where it was not made to appear that the judgment debtor possessed personality, attack on a sale on the ground that the sheriff failed to satisfy the judgment out of the personality was untenable, since it would be presumed that the sheriff levied on realty because he could not find any personality. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Sale of Realty without Levy. — A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate

under execution is that the requirements of the law be observed and that it be made fully known at the sale what property is being sold. *Farrior v. Houston*, 100 N.C. 369, 6 S.E. 72 (1888).

Who may Object if Sheriff Sells Land First. — The provisions that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor, and nobody else can object if the sheriff levies on and sells land without first exhausting the judgment debtor's personalty. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Form of Execution against the Person. — An execution against the person is irregular if it does not run in the name of the State and convey its authority to the officers to arrest the defendant. *H.M. Houston & Co. v. Walsh*, 79 N.C. 35 (1878).

Execution against the person issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he should pay the judgment or be discharged according to law. *Kinney v. Laughenour*, 97 N.C. 325, 2 S.E. 43 (1887), decided prior to the 1977 amendment to subdivision (3).

Recital in Judgment as to Purpose of Debt Conclusive. — If the judgment of the court recites the fact that debt was contracted for the purchase of land, such recital is conclusive as between the parties to the record. *Durham v. Wilson*, 104 N.C. 595, 10 S.E. 683 (1889).

Reason for Recital as to Purpose of Debt. — The homestead interest of a

defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. Hence, the requirement that it shall be set forth in the judgment and execution that the debt sued on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. *Toms v. Fite*, 93 N.C. 274 (1885).

Validity of Execution Sale Absent Record Evidence of Purpose of Debt.

— Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. *Durham v. Bostick*, 72 N.C. 353 (1875).

Action by Bankrupts Not Necessary. — An action by debtors to quiet whatever liability might arise from creditors' judgments under § 1-234 which might survive their discharge in bankruptcy and eventually impair any exemptable interests in real property they might acquire in the future is not necessary, as the comprehensive relief afforded by a Chapter 7 discharge protects the debtors' interests in property they acquire after bankruptcy and assures them a "fresh start" in their financial affairs. *Clowney v. North Carolina Nat'l Bank*, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Stated in *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

Cited in *Southern Dairies, Inc. v. Banks*, 92 F.2d 282 (4th Cir. 1937).

OPINIONS OF ATTORNEY GENERAL

As to manner of execution, see opinion of Attorney General to Mr. C.E. Drum, Jr., 42 N.C.A.G. 312 (1973).

§ 1-314. Variance between judgment and execution.

When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (1848, c. 53; R.C., c. 44, s. 13; Code, s. 1347; Rev., s. 628; C.S., s. 676.)

CASE NOTES

This section is to be liberally construed. *Wilson v. Taylor*, 98 N.C. 275, 3 S.E. 492 (1887).

Execution for Less Amount than Judgment. — The fact that an execution varied from the judgment in being for a less amount is expressly cured by this section. *Maynard v. Moore*, 76 N.C. 158 (1877).

Execution for Larger Amount than Judgment. — Where the docket showed a judgment in favor of Hinton against Roach for \$28.00, while the execution recited other judgments also and called for a larger sum than \$28.00, the irreg-

ularity was cured by this section. *Hinton v. Roach*, 95 N.C. 106 (1886).

Variance Held Technical and Immaterial. — Where a judgment was rendered against H for \$182.20 and against other defendants, separately mentioned, for various amounts, and an execution was issued reciting only the judgment against H for \$182.20, commanding the sheriff to satisfy it out of H's property, it was held that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. *Marshburn v. Lashlie*, 122 N.C. 237, 29 S.E. 371 (1898).

§ 1-315. Property liable to sale under execution; bill of sale.

(a) The following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution:

- (1) Goods, chattels, and real property belonging to him.
- (2) Leasehold estates of three years duration or more owned by him.
- (3) Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him, or transferred to a trustee for security by him.
- (4) Real property or goods and chattels of which any person is seized or possessed in trust for him.
- (5) Choses in action represented by instruments which are indispensable to the chose in action.
- (6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property.
- (7) Interests as vendee under conditional sales contracts of personal property.

(b) Upon the sale under execution of any property or interest for which no provision is otherwise made under this article for the furnishing of a deed or other instrument of title, the officer holding the sale shall execute and deliver to the purchaser a bill of sale.

(c) No execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P.R.; 1812, c. 830, ss. 1, 2, P.R.; 1822, c. 1172, P.R.; 1844, c. 35; R.C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C.S., s. 677; 1961, c. 81.)

Legal Periodicals. — For article on installment land contracts in North

Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

History. — As to the historical development of the legislation by which the lands of debtors became subject to execution, thus changing the common-law rule, see *Jones v. Edmonds*, 7 N.C. 43 (1819).

As to the common law, see *Payne v. Hubbard*, 4 N.C. 195 (1815); *Rowland Hdwe. & Supply Co. v. Lewis*, 173 N.C. 290, 92 S.E. 13 (1917).

Only property of the judgment debtor may be levied on and sold under execution. A levy made on property of a person other than the judgment debtor constitutes a trespass. *Mica Indus., Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

Property held for necessary public uses and purposes, such as courthouses, jails, schoolhouses, etc., cannot be sold under execution. *Gooch v. Gregory*, 65 N.C. 142 (1871); *Vaughan v. Commissioners of Forsyth County*, 118 N.C. 636, 24 S.E. 425 (1896); *Morganton Hdwe. Co. v. Morganton Graded Schools*, 151 N.C. 507, 66 S.E. 583 (1909).

An equitable estate but not a mere right is subject to execution under this section. *Nelson v. Hughes*, 55 N.C. 33 (1854). But see, *Deaton v. Gaines*, 4 N.C. 424 (1816).

A "right" to have one declared a trustee is not subject to execution. *Nelson v. Hughes*, 55 N.C. 33 (1854).

This section was not intended to change the nature of trusts, the relation between the trustee and the cestui que trust, or the rights of the latter against the former. Its sole purpose was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases, by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. *Rowland Hdwe. & Supply Co. v. Lewis*, 173 N.C. 290, 92 S.E. 13 (1917).

Nature of Trustee's Interest as Affecting Salability under Execution. — When land is conveyed to a trustee upon a declaration of trust, and there is no clause of defeasance in the deed, to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, then the interest, estate or right of the

judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905).

Where the trust is passive, the property is subject to sale under execution against the judgment debtor. *Fishel & Taylor v. Grafton United Methodist Church*, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

But Not Where Trust Is Active. — The provisions of subsection (a)(4) of this section and § 1-316 do not apply to an active trust. *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

Under this section an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. *Patrick v. Beatty*, 202 N.C. 454, 163 S.E. 572 (1932).

This section does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid, but only where the naked title is outstanding, with the right of the cestui que trust to demand it as a matter of right under the Statute of Uses. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as a mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. *Rowland Hdwe. & Supply Co. v. Lewis*, 173 N.C. 290, 92 S.E. 13 (1917).

Residue of Property Conveyed in Trust for Payment of Debts. — Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. *Harrison v. Battle*, 16 N.C. 537 (1830); *Pool v. Glover*, 24 N.C. 129 (1841).

Supplemental Pleading to Bring in Trustee. — The common-law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a

passive trust, but even so, the trustee must be brought in by supplemental proceeding under § 1-360 et seq. *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

Liability of Equity of Redemption to Sale under Execution. — An equity of redemption, whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution. *Whitesides v. Williams*, 22 N.C. 153 (1838); *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905).

A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the section. *Camp v. Coxe*, 18 N.C. 52 (1834); *McPeters v. English*, 141 N.C. 491, 54 S.E. 417 (1906).

The interest of a vendee who holds a bond for the title to land cannot be subjected to sale under execution upon a judgment rendered for the purchase money. *McPeters v. English*, 141 N.C. 491, 54 S.E. 417 (1906).

Vested Remainders. — The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. *Ellwood v. Plummer*, 78 N.C. 392 (1878); *Bristol v. Hallyburton*, 93 N.C. 384 (1885).

Contingent Remainders. — Contingent remainders are not subject to execution while they remain contingent. *Watson v. Dodd*, 68 N.C. 528 (1873), aff'd

on rehearing, 72 N.C. 240 (1875). See also, *Watson v. Watson*, 56 N.C. 400 (1857); *Bristol v. Hallyburton*, 93 N.C. 384 (1885).

Life Estate Held in Trust. — Where a life estate was devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt, it was held that the condition upon which the title was to be held in trust was void and his title as tenant for life would continue for the duration of his life, and under this section could be sold under execution on a judgment against him. *Mizell v. Bazemore*, 194 N.C. 324, 139 S.E. 453 (1927).

Reversions. — A reversion in fee is liable to be taken and sold under execution. *Murrell v. Roberts*, 33 N.C. 424 (1850).

Standing matured crops are subject to execution. *Shannon v. Jones*, 34 N.C. 206 (1851).

Prior to 1884 and at common law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. *Kesler v. Cornelison*, 98 N.C. 383, 3 S.E. 839 (1887).

Applied in *Grabenhofer v. Garrett*, 260 N.C. 118, 131 S.E.2d 675 (1963).

Stated in *Walker Mfg. Co. v. Dickerson, Inc.*, 510 F. Supp. 329 (W.D.N.C. 1980).

Cited in *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966).

§ 1-316. Sale of trust estates; purchaser's title.

Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (1812, c. 830, P.R.; R.C., c. 45, s. 4; Code, s. 452; Rev., s. 630; C.S., s. 678.)

CASE NOTES

Application to Certain Trusts Only. — This section, as has been repeatedly decided, comprehends only those cases in which the whole beneficial estate is in the debtor and nothing remains in the trustee but a naked legal estate. *Deaver*

v. Parker, 37 N.C. 40 (1841). See also, *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905); *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936); *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-317. Sheriff's deed on sale of equity of redemption.

The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (1812, c. 830, s. 2, P.R.; 1822, c. 1172, P.R.; R.C., c. 45, s. 5; Code, s. 451; Rev., s. 631; C.S., s. 679.)

CASE NOTES

The provisions of this section are not mandatory. *Mayo v. Staton*, 137 N.C. 670, 50 S.E. 331 (1905).

§ 1-318. Forthcoming bond for personal property.

If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim. (1807, c. 731, s. 3, P.R.; 1828, c. 12, s. 2; R.C., c. 45, s. 21; Code, s. 463; Rev., s. 633; C.S., s. 680.)

CASE NOTES

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. *Gray v. Bowls*, 18 N.C. 437 (1836).

Duty of Obligors. — Where a forthcoming bond is given for the deliv-

ery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified; otherwise their bond will be forfeited. *Poteet v. Bryson*, 29 N.C. 337 (1847).

§ 1-319. Procedure on giving bond; subsequent levies.

When the forthcoming bond is taken the officer must specify therein the property levied upon and furnished to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (1844, c. 34; 1846, c. 50; R.C., c. 45, s. 22; Code, s. 464; Rev., s. 634; C.S., s. 682.)

§ 1-320. Summary remedy on forthcoming bond.

If the condition of such bond be broken, the sheriff or other officer, on giving 10 days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before the district court, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court. (1822, c. 1141, P.R.; R.C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C.S., s. 681; 1971, c. 268, s. 14.)

§ 1-321. Entry of returns on judgment docket; penalty.

When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last-mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars (\$100.00) nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding session of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C.S., s. 683; 1971, c. 381, s. 12.)

CASE NOTES

Returned Execution Becomes Part of Record. — An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and

becomes a part of the record in the case. *Walters v. Moore*, 90 N.C. 41 (1884).

Applied in *Board of Educ. v. Gallop*, 227 N.C. 599, 44 S.E.2d 44 (1947).

§ 1-322. Cost of keeping livestock; officer's account.

The court shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain

the allowance. (1807, c. 731, P.R.; R.C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C.S., s. 684; 1971, c. 268, s. 15.)

§ 1-323. Purchaser of defective title; remedy against defendant.

Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser. (1807, c. 723, P.R.; R.C., c. 45, s. 27; Code, s. 468; Rev., s. 639; C.S., s. 685.)

CASE NOTES

This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. *Holliday v. McMillan*, 83 N.C. 270 (1880).

Nature of Purchaser's Claim. — The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. *Laws v. Thompson*, 49 N.C. 104 (1856).

When Remedy under this Section Is Available. — The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, even if it is bare legal title, the equitable title being in some other person, or a defective

title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. *Lewis v. McDowell*, 88 N.C. 261 (1883).

Remedy of Judgment Creditor after Purchase at Execution Sale. — The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own true owner, is nonetheless satisfied, and the remedy of the creditor is under this section, not upon the judgment, but against the judgment debtor for reimbursement. *Halcombe v. Loudermilk*, 48 N.C. 491 (1856); *Wall v. Fairley*, 77 N.C. 105 (1877).

As to substitution or subrogation to the rights of the execution creditor, see *Laws v. Thompson*, 49 N.C. 104 (1856); *Pemberton v. McRae*, 75 N.C. 497 (1876).

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-324.1. Judgment against corporation; property subject to execution.

If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions

may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66; Rev., s. 1212; C.S., s. 1201; 1955, c. 1371, s. 2.)

Editor's Note. — This section was its present position by Session Laws formerly § 55-140. It was transferred to 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.2. Agent must furnish information as to corporate officers and property.

Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C.S., s. 1202; 1955, c. 1371, s. 2.)

Editor's Note. — This section was its present position by Session Laws formerly § 55-141. It was transferred to 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.3. Shares subject to execution; agent must furnish information.

Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C.S., s. 1203; 1955, c. 1371, s. 2.)

Editor's Note. — This section was its present position by Session Laws formerly § 55-142. It was transferred to 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.

If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation, and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor and such delivery, with a transfer to the officer in writing, for the use of the creditor and notice to the debtor, shall be a valid assignment thereof, and the creditor may sue for and collect the same in the name of the corporation,

subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and G.S. 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C.S., s. 1204; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly § 55-143. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

CASE NOTES

The term "debts" is used in this section in a restricted sense. Any agent or person having custody must deliver any evidence of such debt to the officer with a transfer to the officer in writing, and notice to the creditor shall be a valid assignment thereof. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. *Caldlaw, Inc. v. Caldwell*, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

And Does Not Include Unliquidated Claim for Damages for Breach of Trust. — A judgment creditor of a corporation whose judgment is

unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation for the satisfaction of his claim. An unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises *ex delicto* and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. *Caldlaw, Inc. v. Caldwell*, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

Stated in *Walker Mfg. Co. v. Dickerson, Inc.*, 510 F. Supp. 329 (W.D.N.C. 1980).

§ 1-324.5. Violations of three preceding sections misdemeanor.

If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C.S., s. 1205; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly § 55-144. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.6. Proceedings when custodian of corporate books is a nonresident.

When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant, and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C.S., s. 1206; 1955, c. 1371, s. 2.)

Editor's Note. — This section was its present position by Session Laws formerly § 55-145. It was transferred to 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.7. Duty and liability of nonresident custodian.

The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in G.S. 1-324.6, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation, and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him, but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218; C.S., s. 1207; 1955, c. 1371, s. 2.)

Editor's Note. — This section was its present position by Session Laws formerly § 55-146. It was transferred to 1955, c. 1371, s. 2, effective July 1, 1957.

ARTICLE 29.

Execution and Judicial Sales.

§§ 1-325 to 1-328: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-329: Transferred to § 1-339.72 by Session Laws 1949, c. 719, s. 3.

§ 1-330: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-331: Transferred to § 1-339.73 by Session Laws 1949, c. 719, s. 3.

§ 1-332: Transferred to § 1-339.74 by Session Laws 1949, c. 719, s. 3.

§§ 1-333, 1-334: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-335: Transferred to § 1-339.75 by Session Laws 1949, c. 719, s. 3.

§ 1-336: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-337: Transferred to § 1-339.49 by Session Laws 1949, c. 719, s. 2.

§ 1-338: Transferred to § 1-339.50 by Session Laws 1949, c. 719, s. 2.

§ 1-339: Repealed by Session Laws 1949, c. 719, s. 2.

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 4 of Chapter 35 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.
- (b) As hereafter used in this Article, "sale" means a judicial sale. (1949, c. 719, s. 1; 1971, c. 268, s. 16.)

Cross References. — As to execution sales, see §§ 1-339.41 through 1-339.71. As to sales under power of sale, see §§ 45-21.1 through 45-21.33.

Legal Periodicals. — For a brief discussion of this Article, see 27 N.C.L. Rev. 479.

For comment, "Attacking the 'Forfeiture as Liquidated Damages'

Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Cited in *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965); *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 1-339.2. Application of Part 1.

The provisions of Part 1 of this Article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.

(a) The procedure prescribed by this Article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this Article applies to all sales ordered by a judge of the superior or district court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property, and not inconsistently with G.S. 1-339.27(a) and G.S. 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1; 1971, c. 268, ss. 17, 18.)

CASE NOTES

No Power to Refuse to File Order of Confirmation. — The clerk is not authorized under this section or any other statute to refuse to file and maintain in her

records a valid order of confirmation. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

§ 1-339.3A. Judge or clerk may order public or private sale.

The judge or clerk of court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74; 1971, c. 268, s. 18.)

§ 1-339.4. Who may hold sale.

An order of sale may authorize the persons designated below to hold the sale:

- (1) In any proceeding, a commissioner specially appointed therefor; or
- (2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;
- (3) In a proceeding to sell property of a minor, the guardian of such minor's estate;
- (4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;
- (5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;
- (6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;
- (7) In a receivership proceeding, the receiver. (1949, c. 719, s. 1.)

CASE NOTES

Sale as Official Act. — When an officer of the court, designated either by his official or individual name in the order, is commissioned to make a sale of real or personal estate, he acts in his official

capacity, and his sureties undertake for the fidelity of his conduct. *Kerr v. Brandon*, 84 N.C. 128 (1881), decided under former statute relating to partition.

§ 1-339.5. Days on which sale may be held.

A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. Place of public sale.

(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. For the purposes of this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the State designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.

The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G.S. 1-339.13(c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.

(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior or district court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G.S. 1-339.27.

(b) The report of sale with respect to all sales of separate tracts situated in different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) The sale, and each subsequent resale, of each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of confirmation to be recorded in the office of the register of

deeds of the county where such property is situated, and it shall not be necessary for the clerk of court to probate said certified copy of the order of confirmation. (1949, c. 719, s. 1; 1965, c. 805; 1971, c. 268, ss. 18, 19.)

§ 1-339.9. Sale as a whole or in parts.

(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of court having jurisdiction may direct specifically

(1) That it be sold as a whole, or

(2) That it be sold in designated parts, or

(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.10. Bond of person holding sale.

(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and

(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bonds shall be payable to the State of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.11. Compensation of person holding sale.

(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.

Whenever any person fails to file any report or account, as provided by this Article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

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

§ 1-339.13. Public sale; order of sale.

- (a) Whenever a public sale is ordered, the order of sale shall
- (1) Designate the person authorized to hold the sale;
 - (2) Direct that the property be sold at public auction to the highest bidder;
 - (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
 - (4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;
 - (5) Designate, consistently with G.S. 1-339.6, the county and the place therein at which the sale is to be held; and
 - (6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale.
- (b) The order of public sale may also, but is not required to
- (1) State the method by which the property shall be sold, pursuant to G.S. 1-339.9;
 - (2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous.
- (c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.

An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G.S. 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

CASE NOTES

Cited in *In re Green*, 27 N.C. App. 555,
219 S.E.2d 552 (1975).

§ 1-339.15. Public sale; contents of notice of sale.

The notice of public sale shall

- (1) Refer to the order authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;
- (5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and
- (6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1.)

§ 1-339.16. Public sale; time for beginning advertisement.

An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.

(a) The notice of public sale of real property shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,
- (2) And in addition thereto,
 - a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but
 - b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

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

- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and
- (2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

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

(d) In addition to the foregoing, the notice of public sale shall be otherwise posted or the sale shall be otherwise advertised as may be required by the judge or clerk pursuant to the provisions of G.S. 1-339.13(b)(2). (1949, c. 719, s. 1; 1965, c. 41; 1967, c. 979, s. 1.)

Editor's Note. — Session Laws 1967, c. 979, which substituted "be not more than 10" for "not be more than seven" in subdivision (b)(2), provides in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein

included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

As to the mandatory or directory character of advertising requirements, see *Hogan v. Utter*, 175 N.C. 332, 95 S.E. 565 (1918), decided under former provision relating to advertisement of judicial and execution sales.

Person Interested in Notices Is Invitee. — A person interested in notices

posted in the courthouse pursuant to this section is not a mere licensee but an invitee when on the courthouse premises. *Walker v. County of Randolph*, 251 N.C. 805, 112 S.E.2d 551 (1960).

Cited in *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

§ 1-339.18. Public sale; posting notice of sale of personal property.

(a) The notice of public sale of personal property, except in the case of perishable property as provided by G.S. 1-339.19, shall be posted, at the courthouse door, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of court pursuant to the provisions of G.S. 1-339.13(b)(2). (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.19. Public sale; exception; perishable property.

If personal property to be sold at public sale is determined by the judge or clerk of court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.20. Public sale; postponement of sale.

(a) A person authorized to hold a public sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and

impracticable, in his judgment, to hold the sale on that day,
or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of public sale the person authorized to hold the sale shall personally, or through his agent or attorney

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof posted at the courthouse door, as provided in G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.21. Public sale; time of sale.

(a) A public sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No public sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than 5000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1.)

§ 1-339.22. Public sale; continuance of uncompleted sale.

A public sale commenced but not completed within the time allowed by G.S. 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.

(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sales of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G.S. 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of court having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.

(a) The person holding a public sale shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the person making the sale acted;
- (3) The date, hour and place of the sale;
- (4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and
- (5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (6) The names of the purchasers;
- (7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
- (8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G.S. 1-339.31 or G.S. 1-339.32, whichever is

applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G.S. 1-339.31 or G.S. 1-339.32, the final report required by those sections shall be subsequently filed. (1949, c. 719, s. 1.)

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

(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first \$1000 thereof plus five percent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require a person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1; 1963, c. 858; 1967, c. 979, s. 1.)

Editor's Note. — Session Laws 1967, c. 979, which inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence of subsection (a), provides in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The appli-

cation of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

Upset Bid to Be in Amount Specified. — An upset bid in a private sale of real property shall be submitted to the court within 10 days after the filing of the report of sale, and shall be in an amount specified by this section. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Advance Bid Held Not to Meet Requirements of Section. — An advance bid entered by the owners of a minority interest in the land, and not supported by a cash deposit or bond, but only by the interest of the advance bidders in the land, which interests were subject to deeds of trust, judgments and tax liens in an undisclosed amount, did not meet, at least technically, the requirements of this section for an advance bid. *Galloway v. Hester*, 249 N.C. 275, 106 S.E.2d 241 (1958).

Discretion of Court to Accept Cash Bid. — Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion. *Galloway v. Hester*, 249 N.C. 275, 106 S.E.2d 241 (1958).

Refusal of court to order another

sale upon an upset bid of owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land, which was subject to liens in an undisclosed amount, would be affirmed as a proper exercise of judicial discretion by the court. *Galloway v. Hester*, 249 N.C. 275, 106 S.E.2d 241 (1958).

After the time provided by this section for the placing of an upset bid has expired and after the order of confirmation has been signed by the clerk and approved by a superior court judge, the clerk has no authority to accept an upset bid, and in the absence of findings of fraud, mistake or collusion a superior court judge has no authority to set aside the order of confirmation and to order a resale of the property. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Applied in *Masters v. Cole*, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Quoted in *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.

When real property is sold at public sale in parts, as provided by G.S. 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.

(a) When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered.

(b) In any case in which a judge has jurisdiction of the original sale, he may provide by order that jurisdiction is retained for resale purposes, and in such case when an upset bid is submitted, the judge having jurisdiction shall make the order of resale. In all cases where the judge does not retain jurisdiction of a sale for resale purposes, and in all cases where a sale is originally ordered by a clerk, the clerk shall make the order of resale and shall have jurisdiction of the proceeding for resale purposes. Whenever the original order of sale

is made by the judge, the terms of any resale ordered by the clerk shall be consistent with terms of the original order, and the final order of confirmation shall be made by the judge having jurisdiction of the proceeding.

(c) Notice of any resale to be held because of an upset bid shall

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

(2) And in addition thereto,

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

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(d) When the notice of resale is published in a newspaper,

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

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

(e) When the real property to be resold is situated in more than one county, the provisions of subsection (c) of this section shall be complied with in each county in which any part of the property is situated.

(f) The person making a resale shall report the resale in the same manner as required by G.S. 1-339.24.

(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this Article.

(h) Resales may be had as often as upset bids are submitted in compliance with this Article.

(i) Except as otherwise provided in this section, all the provisions of this Article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

CASE NOTES

Upon the filing of an upset bid under § 1-339.36(a), this section applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered; a notice of the resale shall be posted at the courthouse door for 15 days immediately preceding the sale and published in a newspaper once a

week for two successive weeks. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

As to authority of court to order resale under former law relating to partition sales, see *Ex parte Post*, 56 N.C. 482 (1857); *Tayloe v. Carrow*, 156 N.C. 6, 72 S.E. 76 (1911); *Thompson v. Rospigliosi*, 162 N.C. 145, 77 S.E. 113 (1913).

Quoted in *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

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

(a) No public sale of real property may be consummated until confirmed as follows:

- (1) If a public sale is ordered by a judge of the Superior Court Division, it may thereafter be confirmed by a resident superior court judge of the district or a superior court judge regularly holding the courts of the district.
- (2) If a public sale is ordered by a judge of the District Court Division, it may thereafter be confirmed by the judge so ordering, the chief district judge, or any district judge authorized by the chief judge to hear motions and enter interlocutory orders.
- (3) If a public sale is ordered by a clerk of court, it may thereafter be confirmed by the clerk of court so ordering.

(b) No public sale of real property of a minor or incompetent originally ordered by a clerk may be consummated until confirmed both by the clerk and by the resident judge of the district or the judge regularly holding the courts of the district.

(c) No public sale of real property may be confirmed until the time for submitting an upset bid, pursuant to G.S. 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G.S. 1-339.23(a), or when the order of sale provides for such confirmation. (1949, c. 719, s. 1; 1971, c. 268, s. 20.)

CASE NOTES

Power of Court to Reject Bid. — The court in exercising its sound discretion may reject a bid at any time before confirmation. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Before confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the approval of the court. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Upon confirmation, the sale becomes final, and the vested interest of the purchaser is not lightly to be put aside. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

When Sale May Be Set Aside after Confirmation. — After confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale may then be set aside only for mistake, fraud or collusion. *In re Green*, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The power of a guardian to make disposition of his ward's estate is

very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

When a guardian of an incompetent person sells real property under order of court, he is merely an agent of the court, and the sale is not consummated until it is confirmed by the resident judge or the judge regularly holding courts in the district. When the sale is originally ordered by the clerk, his confirmation is also required. This confirmation represents the consent of the court and is granted or refused in the discretion of the court. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

As to confirmation under former statutes, see *Thompson v. Cox*, 53 N.C. 311 (1860); *Evans v. Singletary*, 63 N.C. 205 (1869); *Shearin v. Hunter*, 72 N.C. 493 (1875); *Foushee v. Durham*, 84 N.C. 56 (1881); *Trull v. Rice*, 92 N.C. 572 (1885); *McLaurin v. McLaurin*, 106 N.C. 331, 10 S.E. 1056 (1890); *Coffin v. Cook*,

106 N.C. 376, 11 S.E. 371 (1890); *Smith v. Gray*, 116 N.C. 311, 21 S.E. 200 (1895); *Joyner v. Futrell*, 136 N.C. 301, 48 S.E. 649 (1904); *Harrell v. Blythe*, 140 N.C. 415, 53 S.E. 232 (1906); *Hargrove v. Wilson*, 148 N.C. 439, 62 S.E. 520 (1908); *Glisson v. Glisson*, 153 N.C. 185, 69 S.E. 55 (1910); *Patillo v. Lytle*, 158 N.C. 92, 73 S.E. 200 (1911); *Upchurch v.*

Upchurch, 173 N.C. 88, 91 S.E. 702 (1917); *Ex parte Garrett*, 174 N.C. 343, 93 S.E. 838 (1917); *McCormick v. Patterson*, 194 N.C. 216, 139 S.E. 225 (1927).

Stated in *North Carolina State Hwy. Comm'n v. Moore*, 3 N.C. App. 207, 164 S.E.2d 385 (1968).

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

(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

- (1) The authority for making the sale,
- (2) The title of the action or proceeding in which the sale was had,
- (3) The name of the person authorized to make the sale,
- (4) The fact that the sale was duly advertised,
- (5) The date of the sale,
- (6) The name of the highest bidder and the price bid,
- (7) That the sale has been confirmed,
- (8) That the terms of the sale have been complied with, and
- (9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

CASE NOTES

For cases decided under former statutes relating to partition sales and sales of lands of decedents' estates, see *Latta v. Vickers*, 82 N.C. 501 (1880); *Coffin v. Cook*, 106 N.C. 376, 11 S.E. 371 (1890); *Marcom v. Wyatt*, 117 N.C. 129, 23 S.E. 169 (1895); *Herbin v. Wagoner*, 118 N.C. 656, 24 S.E. 490 (1896); *Hargrove v. Wilson*, 148 N.C. 439, 62

S.E. 520 (1908); *In re Wilson*, 161 N.C. 211, 75 S.E. 1086 (1912); *Jordan v. Faulkner*, 168 N.C. 466, 84 S.E. 764 (1915); *Holley v. White*, 172 N.C. 77, 89 S.E. 1061 (1916); *Crocker v. Vann*, 192 N.C. 422, 135 S.E. 127 (1926).

Cited in *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.

(a) If an order of public sale requires the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this Article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within ten days after notice given by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale is the same in every respect as is provided by this Article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale of real property is the same in every respect as is provided by this Article in the case of an original public sale of real property except that the provisions of G.S. 1-339.27 (c), (d) and (e) apply with respect to the posting and publishing of the notice of such resale.

(e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

CASE NOTES

The doctrine of caveat emptor applies to a judicial sale, and while the court has equity jurisdiction to protect a purchaser from imposition because of fraud or mistake, where the evidence disclosed that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser could not seek relief from his bid on the ground of shortage in acreage or lack of access to the property. *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967).

The commissioner is required by this section to tender a deed for the property or to make a bona fide attempt to tender such deed. *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967).

Tender Held Sufficient. — Where the highest bidder was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that the highest bidder comply with the terms of sale, this indicated that the commissioner, who was under order of court to convey upon receipt of the purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when the

bidder failed to comply, since the law does not require the doing of a vain thing. *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967).

Order Held Not a Void Conditional Judgment. — Order issued in a judicial sale proceeding, to the effect that upon refusal of the last and highest bidder to comply with his bid the land would be resold and that the defaulting bidder would be held liable for the costs and for any difference between the final sale price and his bid, was not a void conditional judgment, since it was unequivocal and the determination of the liability was a simple matter of

arithmetic and an administrative duty; such order was a final judgment deciding the matter on its merits without need for further direction of the court. *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967).

For cases decided under former statutes relating to partition sales and sales of lands of decedents' estates, see *Burgin v. Burgin*, 82 N.C. 196 (1880); *Hudson v. Coble*, 97 N.C. 260, 1 S.E. 688 (1887); *Wooten v. Cunningham*, 171 N.C. 123, 88 S.E. 1 (1916); *Lyman v. Southern Coal Co.*, 183 N.C. 581, 112 S.E. 242 (1922).

§ 1-339.31. Public sale; report of commissioner or trustee in deed of trust.

(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G.S. 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this Article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

- (1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;
- (2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;
- (3) When the commissioner or trustee is required to collect deferred payments,
 - a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and
 - b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall file an annual report of his receipts and disbursements, and
 - c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

CASE NOTES

As to effect of failure of commissioner to file a report under former statute relating to partition sales, see

Peal v. Martin, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.

An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this Article unless so directed by the judge or clerk of court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.

Whenever a private sale is ordered, the order of sale shall

- (1) Designate the person authorized to make the sale;
- (2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
- (3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
- (4) Prescribe such terms of sale as the judge or clerk of court ordering the sale deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

CASE NOTES

This section does not specify conditions under which a private sale may be ordered. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Court May Lay Down Guidelines and Give Directions. — There is nothing in this section which restricts the court in laying down guidelines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Discretion of Court where Minors are Interested. — Under the former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian ad litem, either at public or private sale.

The court has similar discretion under this section. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Private Sale of Timber. — In the sale of large bodies of timber, a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects, without being restricted by the formal requirements of a public sale. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

As to discretion of court under former statute governing partition sales, see *Thompson v. Rospigliosi*, 162 N.C. 145, 77 S.E. 113 (1913); *Wooten v. Cunningham*, 171 N.C. 123, 88 S.E. 1 (1916); *Ryder v. Oates*, 173 N.C. 569, 92 S.E. 508 (1917).

§ 1-339.34. Private sale; exception; certain personal property.

(a) Notwithstanding any provisions of this Article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

- (1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or
- (2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or
- (3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ 1-339.35. Private sale; report of sale.

(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the person making the sale acted;
- (3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (5) The name or names of the person or persons to whom the property was sold;
- (6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and
- (7) The date of the report. (1947, c. 719, s. 1.)

CASE NOTES

Purpose for Report of Sale of Incompetent's Property. — The report of sale of an incompetent's property required by this section was intended not

just to give record notice of the fact of sale but also to operate with §§ 1-339.25 and 1-339.36 to ensure that the price received should be greater by facilitating

the practice of upset bidding by providing a clear-cut starting point for the time period during which upset bids might be filed. *Masters v. Cole*, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Legal Test in Determining if Guardian's Letter Was Report of Sale. — In determining whether a guardian's letter to the clerk of court constituted a report of sale of an incompetent's property within the meaning of this section, even though it did not comply with all the technical requirements thereof, the proper legal test was whether its partial compliance had fully attained the objec-

tive of the statute. *Masters v. Cole*, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Guardian's Letter Held Insufficient. — A guardian's letter to the clerk of court did not constitute a valid report of sale of an incompetent's property where it failed to set out the title of the action and failed to specify the terms of sale as required by subdivisions (b)(1) and (b)(6) of this section, since a potential upset bidder could not look at the letter and know with certainty whether it was a report of sale. *Masters v. Cole*, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.36. Private sale; upset bid; subsequent procedure.

(a) Every private sale of real or personal property, except a sale of personal property as provided by G.S. 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G.S. 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid has been submitted, except that the notice of resale of personal property need not be published in a newspaper, but shall be posted as provided by G.S. 1-339.17. (1949, c. 719, s. 1.)

CASE NOTES

Every Private Sale Is Subject to Upset Bids. — Every private sale of real property under order of the court is subject to upset bids. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applicability of § 1-339.25. — An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by § 1-339.25. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applicability of § 1-339.27. — Upon the filing of an upset bid under subsection (a) of this section, § 1-339.27 (a)

applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered, a notice of which resale shall be posted at the courthouse door for 15 days immediately preceding the sale and published in a newspaper once a week for two successive weeks. *Wadsworth v. Wadsworth*, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applied in *Masters v. Cole*, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.37. Private sale; confirmation.

If no upset bid for property sold at private sale is submitted within ten days after the report of sale is filed, the sale may then be confirmed, and the provisions of G.S. 1-339.28(a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confir-

mation is required of any sale held as provided by G.S. 1-339.34. (1949, c. 719, s. 1.)

CASE NOTES

As to superior court's jurisdiction in a partition action under former statute to confirm a private sale, see McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906); Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913). **Applied in** Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.38. Private sale; real property; deed; order for possession.

(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale.

Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G.S. 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.40. Private sale; final report.

(a) A commissioner or a trustee in a deed of trust authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.31.

(b) Any other person authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.32. (1949, c. 719, s. 1.)

CASE NOTES

Stated in Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982).

ARTICLE 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Cross References. — As to judicial sales, see §§ 1-339.1 through 1-339.40. As to sales under power of sale, see §§ 45-21.1 through 45-21.33.

Legal Periodicals. — For a brief discussion of this article, see 27 N.C.L. Rev. 479.

CASE NOTES

Execution sale authorized by § 105-375 is analogous to an execution sale conducted under the authority of this section. *Henderson County v.*

Osteen, 28 N.C. App. 542, 221 S.E.2d 903, rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

§ 1-339.42. Clerk's authority to fix procedural details.

The clerk of the superior court who issues an execution has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.

A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

Cross References. — For validation of certain sales, see § 1-339.72 et seq.

CASE NOTES

As to validity under former statutes of sales not made at the time and place provided, see *Mordecai v. Speight*, 14 N.C. 428 (1832); *State v. Rives*, 27 N.C. 297 (1844); *Brooks v. Ratcliff*, 33 N.C. 321 (1850); *Wade v. Saunders*, 70 N.C. 270 (1874); *Mayers v. Carter*, 87 N.C. 146 (1882); *Bladen*

County v. Breece, 214 N.C. 544, 200 S.E. 13 (1938); *Caswell County v. Scott*, 215 N.C. 185, 1 S.E.2d 364 (1939).

As to validation of sale by assent of debtor under former statutes, see *Kader Biggs & Co. v. Brickell*, 68 N.C. 239 (1873); *Mayers v. Carter*, 87 N.C. 146 (1882).

§ 1-339.44. Place of sale.

(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.45. Presence of personal property at sale required.

A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. Sale as a whole or in parts.

When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. Sale to be made for cash.

Every sale shall be made for cash. (1949, c. 719, s. 1.)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

§ 1-339.48. Life of execution.

If an execution is issued on a judgment, within the time provided by G.S. 1-306, and a sale, by authority of that execution, is commenced within the time provided by G.S. 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G.S. 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G.S. 1-306. For the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G.S. 1-339.52, or first

posted in the case of personal property as required by G.S. 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.

A sheriff or other officer who makes any sale contrary to the true intent and meaning of this Article shall forfeit two hundred dollars to any person suing for it, one half for his own use and the other half to the use of the county where the offense is committed. (1820, c. 1066, s. 2, P.R.; 1822, c. 1153, s. 3, P.R.; R.C., c. 45, s. 18; Code, s. 461; Rev., s. 649; C.S., s. 696; 1949, c. 719, s. 2.)

Cross References. — As to liability on sheriff's bond, see §§ 162-8 and 162-18.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.

When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (1815, c. 887, P.R.; R.C., c. 45, s. 19; Code, s. 462; Rev., s. 650; C.S., s. 697; 1949, c. 719, s. 2.)

Cross References. — As to penalty for false return, see § 162-14.

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.

The notice of sale shall

- (1) Refer to the execution authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and
- (5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

CASE NOTES

Statutes Contemplate Sale at Fair Value. — The statutes regulating execution sales contemplate a sale at which

the thing sold will bring its fair value. *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E.2d 875 (1963).

§ 1-339.52. Posting and publishing notice of sale of real property.

(a) The notice of sale of real property shall

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

(2) And in addition thereto,

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

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

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

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

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which rewrote paragraph (a)(2)b and substituted "be not more than 10" for "not be more than seven" in subdivision (b)(2), provides in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of

statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

As to the directory nature of the requirements of the former statute, see *Mordecai v. Speight*, 14 N.C. 428 (1832); *McEntire v. Durham*, 29 N.C. 151 (1846).

As to setting aside sale where per-

son with notice of irregularity purchases, under former statutes, see *Burton v. Spiers*, 92 N.C. 503 (1885).

Cited in *Annas v. Davis*, 40 N.C. App. 51, 252 S.E.2d 28 (1979).

§ 1-339.53. Posting notice of sale of personal property.

The notice of sale of personal property, except in the case of perishable property as specified in G.S. 1-339.56, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the date of sale. (1949, c. 719, s. 1.)

CASE NOTES

Purchaser with Notice of Lack of Advertisement. — A purchaser at an execution sale of personalty, who had full knowledge of such irregularities as absence of advertisement, etc., as required by former § 1-336, was not an innocent purchaser, and the rule that a

purchaser at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, was not applicable, for the rule presupposes that the purchaser is a bona fide purchaser. *Phillips v. Hyatt*, 167 N.C. 570, 83 S.E. 804 (1914).

§ 1-339.54. Notice to judgment debtor of sale of real property.

In addition to complying with G.S. 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

- (1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or
- (2) If the judgment debtor is not found in the county,
 - a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
 - b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

CASE NOTES

Effect of Noncompliance with this Section. — A failure to comply with this section, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can such sale be assailed collaterally, but in such a case the defendant may, on motion or by direct proceeding, have the sale vacated. *Walston v. W.H. Applewhite & Co.*, 237 N.C. 419, 75 S.E.2d 138 (1953).

As to effect of noncompliance with former §§ 1-325 and 1-330, see *Williams v. Dunn*, 163 N.C. 206, 79 S.E. 512 (1913).

As to notice requirements for resale under former § 1-330, see *Bank of Pinehurst v. Gardner*, 218 N.C. 584, 11 S.E.2d 872 (1940).

As to liability of sheriff for failure to give notice under former § 1-330, see *Williams v. Johnson*, 112 N.C. 424, 17 S.E. 496 (1893).

Stated in *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

Cited in *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E.2d 160 (1979).

§ 1-339.55. Notification of Governor and Attorney General.

When the State is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the Governor and the Attorney General at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the State. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.

If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other nonperishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.

If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.

(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

(b) Upon postponement of a sale, the sheriff shall

- (1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
- (2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 1-339.52 in the case of real property or G.S. 1-339.53 in the case of personal property, a notice of the postponement.
- (c) The posted notice of postponement shall
 - (1) State that the sale is postponed,
 - (2) State the hour and date to which the sale is postponed,
 - (3) State the reason for the postponement, and
 - (4) Be signed by the sheriff.
- (d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable, but nothing herein contained shall be deemed to relieve the sheriff of liability for the nonperformance of his official duty. (1949, c. 719, s. 1.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.

(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1.)

§ 1-339.61. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes neces-

sary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.

A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.

(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the sheriff acted;
- (3) The date, hour and place of the sale;
- (4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (6) The name or names of the person or persons to whom the property was sold;
- (7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
- (8) The date of the report. (1949, c. 719, s. 1.)

CASE NOTES

Applied in North Carolina Nat'l Bank
v. Sharpe, 49 N.C. App. 687, 272 S.E.2d
368 (1980).

§ 1-339.64. Upset bid on real property; compliance bond.

(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first one thousand dollars (\$1000) thereof plus five percent (5%) of any excess above one thousand dollars (\$1000), but in any event with a minimum increase of twenty-five dollars (\$25.00), such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day

shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence in subsection (a) and added at the end of that sentence the language following the semicolon, provides in s. 4: "This act does not amend the Uniform Commercial

Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

§ 1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.

When real property is sold in parts, as provided by G.S. 1-339.46, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.66. Resale of real property; jurisdiction; procedure.

(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall

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

- (2) And in addition thereto,
- a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but
 - b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.
- (c) When the notice of resale is published in a newspaper,
- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and
 - (2) The date of the last publication shall not be more than seven days preceding the date of sale.
- (d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.
- (e) The sheriff shall report the resale in the same manner as required by G.S. 1-339.63.
- (f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.
- (g) Resales may be had as often as upset bids are submitted in compliance with this Article.
- (h) Except as otherwise provided in this section, all the provisions of this Article applicable to an original sale are applicable to resale. (1949, c. 719, s. 1.)

CASE NOTES

For case holding that successive orders for resale did not prolong the statutory life of the judgment lien, decided under former statute, see *Cheshire v. Drake*, 223 N.C. 577, 27 S.E.2d 627 (1943).

§ 1-339.67. Confirmation of sale of real property.

No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.64, has expired. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which substituted "G.S. 1-339.64" for "G.S. 1-339.65," provides in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

Application of Doctrine of Caveat Emptor. — While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of the court to prevent a manifest injustice not due to the fault or neglect of the purchaser. *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E.2d 875 (1963).

When Clerk May Decline to Confirm Sale. — If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. *Pittsburgh Plate Glass Co. v. Forbes*, 258

N.C. 426, 128 S.E.2d 875 (1963).

The high bidder acquires no right until his bid is accepted and the sale is confirmed. *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E.2d 875 (1963).

Applied in *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963); *North Carolina Nat'l Bank v. Sharpe*, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

Quoted in *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501 (1980).

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

(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held.

(c) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

- (1) The purchaser is entitled to possession, and
- (2) The purchase price has been paid, and
- (3) The sale or resale has been confirmed, and
- (4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
- (5) Application is made to such clerk by the purchaser of the property. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which added subsection (c), provides in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as

they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

What Rights and Estate May Be Sold. — A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E.2d 875 (1963).

Compelling Sheriff to Make Title. — A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. *Fox v. Kline*, 85 N.C. 173 (1881), decided under former statute relating to execution sales.

Effect of Recitals in Sheriff's Deed. — Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the fact that the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. *Miller v. Miller*, 89

N.C. 402 (1883), decided under former statute relating to execution sales.

The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. *Wainwright v. Bobbitt*, 127 N.C. 274, 37 S.E. 336 (1900), rehearing denied, 129 N.C. 46, 39 S.E. 725 (1901), decided under former statute relating to deeds in execution sales.

Necessity of Seal. — A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. *Fisher v. Owens*, 132 N.C. 686, 44 S.E. 369 (1903), decided under former statute relating to execution sales.

Applied in *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.69. Failure of bidder to comply with bid; resale.

(a) When the highest bidder at a sale of personal property fails to pay the amount of his bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this Article for an original sale.

(b) When the highest bidder at a sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 1-339.66(b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(c) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

CASE NOTES

An action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely

cancelled judgments against the property owner constituted an impermissible collateral attack upon the order of confirmation of the execution sale by the clerk

of court; plaintiffs' remedy was to proceed directly either by motion in the cause or appeal. *Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

When Action by Execution Debtor against Defaulting Bidder Is Not Authorized. — If the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor is not entitled to bring an action to enforce the bid against a defaulting bidder,

notwithstanding subsection (d) of this section, and the action is properly brought by the sheriff. *Daniels v. Yelverton*, 239 N.C. 54, 79 S.E.2d 311 (1953).

For case holding that the sheriff was not obliged to resell immediately, but might give the purchaser time in which to pay the purchase money, if neither party to the execution objected or complained, decided under former law, see *Maynard v. Moore*, 76 N.C. 158 (1877). See also, *McKee v. Lineberger*, 69 N.C. 217 (1873).

§ 1-339.70. Disposition of proceeds of sale.

(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. Special proceeding to determine ownership of surplus.

(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-374(q)(6), to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of \$200.00, or otherwise comply with the provisions of G.S. 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1; 1967, c. 705, s. 2; 1973, c. 1446, s. 19.)

ARTICLE 29C.

*Validating Sections.***§ 1-339.72. Validation of certain sales.**

All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where notice of the original sale was published for four successive weeks, and notice of any resale was published for two successive weeks, shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3; 1955, c. 1286; 1965, c. 786.)

Local Modification. — Nash: 1955, c. 1075.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.

All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; Code, s. 454; Rev., s. 643; C.S., s. 690; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3.)

§ 1-339.74. Sales on other days validated.

All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

§ 1-339.75. Certain sales validated.

All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such execu-

tions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (1901, c. 742; Rev., s. 646; C.S., s. 693; 1949, c. 719, s. 3.)

§ 1-339.76. Validation of sales when payment deferred more than two years.

All sales of land conducted prior to February 10, 1927, under authority of G.S. 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; C.S., s. 86; 1927, c. 16; 1949, c. 719, s. 3.)

Editor's Note. — Section 28-93, referred to in this section, was repealed by Session Laws 1973, c. 1329, s. 1.

§ 1-339.77. Validation of certain sales confirmed prior to time prescribed by law.

From and after June 1, 1953 no action shall be brought to contest the validity of a decree filed on or before December 31, 1950, confirming the sale of real or personal property in any special proceeding on the grounds that the decree of confirmation was entered prior to the expiration of the period of time as required by law following the report of sale. (1953, c. 1089.)

ARTICLE 30.

Betterments.

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

A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (1871-2, c. 147; Code, s. 473; Rev., s. 652; C.S., s. 699.)

Cross References. — As to registration of conveyances, contracts to convey, and leases of land, see § 47-18.

Legal Periodicals. — For article on trespass to land in North Carolina, see 47 N.C.L. Rev. 31 (1968).

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

CASE NOTES

Constitutionality. — This section contravenes no part of the organic law, federal or State. *Barker v. Owen*, 93 N.C. 198 (1885).

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice. *Searl v. School Dist. No. 2*, 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890).

Basis of Right to Betterments. — The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If the land was enhanced in value by improvements, made under the belief that one was the owner, the true owner ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. *Wharton v. Moore*, 84 N.C. 479 (1881); *Barker v. Owen*, 93 N.C. 198 (1885).

The right to betterments is based upon the obvious principle of justice that the owner of land has no just claim to anything but the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true owner should not take them without compensation. This section

undertakes to declare and establish the equities between them. *Sweeten v. King*, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Right to Compensation for Improvements. — One who, in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E.2d 167 (1943).

Under this section, one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. *Pritchard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919).

A defendant in possession of land under the belief that he has a good title has the right to show in evidence in an action to recover the land that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. *Merritt v. Scott*, 81 N.C. 385 (1879).

Plaintiff is not confined to a common-law action for improvements, if indeed such right may be enforced by independent action. *Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E.2d 316 (1944).

An action under this section is not the same as an action for unjust enrichment. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section creates no independent cause of action. It merely declares that the owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements made by another, under the belief that he was the owner, the true owner

ought not to take the increased value without some compensation to the other. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

The right under this section is a defensive right. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section does not create an independent cause of action. Rather, it embodies only a defensive right, declaring that an owner of land who seeks and obtains the aid of the court to enforce his right to possession has no just claim to anything but the land itself and a fair compensation for being kept out of possession. *Clontz v. Clontz*, 44 N.C. App. 573, 261 S.E.2d 695, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

It Accrues when Owner Seeks to Enforce Right to Possession. — The right under this section accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966).

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. The law awards to the owner the land and his rents and to the occupant the value of his improvements. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

Owner Must Have Obtained Judgment Entitling Him to Eject Occupant. — The wording of this section clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant, though the last sentence of this section would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

A claim for betterments, under this section, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. *Wood v. Tinsley*, 138 N.C. 507, 51 S.E. 59 (1905). See also, *Rumbough v. Young*, 119 N.C. 567, 26 S.E. 143 (1896); *Board of*

Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

No Claim against Remainderman until Falling in of Life Estate. — Where remainderman had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure was not affected, persons in possession under the tax foreclosure were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

What Claimant Must Show. — This section has been interpreted to impose on claimant the burden of establishing: (1) That he made permanent improvements; (2) Bona fide belief of good title when the improvements were made; and (3) Reasonable grounds for such belief. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E.2d 306 (1959).

To be entitled to compensation for betterments under this section, defendant must show that he made permanent improvements on the property under a bona fide, reasonable belief of good title. *Hackett v. Hackett*, 31 N.C. App. 217, 228 S.E.2d 758, cert. denied, 291 N.C. 448, 230 S.E.2d 765 (1976).

Necessity of Color of Title. — This section applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith, reasonably believed he had good title to the land. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966).

The good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy. *Sweeten v. King*, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Reasonable Belief in Validity of Title. — The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had reasonable grounds for such belief. *Pritchard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919); *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E.2d 167 (1943).

The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

There must be shown not only an honest and bona fide belief in petitioner's title, but he must satisfy the jury, also, that he had good reason for such belief; and it is for the jury to judge of the reasonableness of such belief, based upon the entire evidence. *Sweeten v. King*, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

What Notice Will Bar Compensation. — Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. *Carolina Cent. R.R. v. McCaskill*, 98 N.C. 526, 4 S.E. 468 (1887).

Constructive notice from the record of the existence of a paramount title or interest does not deprive an occupying claimant of the right to be reimbursed for his improvements on being ejected from the premises. *Sweeten v. King*, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Evidence Held Sufficient to Show "Permanent Improvements". — Evidence that the land in question was farmland which had been abandoned and had become a piece of wasteland, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, was sufficient to show "permanent improvements" within the purview of this section. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E.2d 306 (1959).

Liability of Vendor under Parol Contract for Value of Improvements. — A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. *Albea v. Griffin*, 22 N.C. 9 (1838); *Hedgepeth v. Rose*, 95 N.C. 41 (1886); *Luton v. Badham*, 127 N.C. 96, 37 S.E. 143 (1900).

The vendor in a parol contract to convey land will not be permitted to evict

a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Vann v. Newsom*, 110 N.C. 122, 14 S.E. 519 (1892).

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. *Hedgepeth v. Rose*, 95 N.C. 41 (1886).

Recovery after Rescission for Fraudulent Misrepresentations. — Where, by fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. *Hill v. Brower*, 76 N.C. 124 (1877).

One holding under a tenant for life, who makes substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. *Harriett v. Harriett*, 181 N.C. 75, 106 S.E. 221 (1921).

Where grantee knows that his grantor has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments as against a remainderman, since they were not made under the belief that his color of title to the interest of the remainderman was good. *Lovett v. Stone*, 239 N.C. 206, 79 S.E.2d 479 (1954).

Agreement to Hold in Trust and Reconvey. — Where defendant acquired the legal title to certain lands, originally belonging to plaintiff, at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, defendant was not entitled to the value of improvements placed upon the land by him while holding same upon such trust. *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E.2d 167 (1943).

An individual who purchased land at a sale by his own assignee in bankruptcy, with fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, was not a bona fide holder of

the premises under a color of title believed by him to be good, and was therefore not entitled to the value of improvements placed thereon by him. *Hallyburton v. Slagle*, 132 N.C. 957, 44 S.E. 659 (1903).

This section does not apply to tenants in common. *Pope v. Whitehead*, 68 N.C. 191 (1873).

Allotment of Improved Part to Cotenant on Partition. — While this and the following sections of this Article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of his cotenants; but this equitable principle does not apply as between mortgagor and mortgagee. *Layton v. Byrd*, 198 N.C. 466, 152 S.E. 161 (1930). See also, *Jenkins v. Strickland*, 214 N.C. 441, 199 S.E. 612 (1938).

Priority of Grantor's Judgment Creditors over Grantee under Unregistered Deed. — One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. *Eaton v. Dorib*, 190 N.C. 14, 128 S.E. 494 (1925).

Filing of Separate Claims by Each Group of Interveners. — This Article requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. *Board of Comm'rs v.*

Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Court Must Be Satisfied of Probable Truth. — The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required to impanel a jury to ascertain the value of the betterments. *Hallyburton v. Slagle*, 132 N.C. 957, 44 S.E. 659 (1903).

Either Party Entitled to Jury Assessment. — Either party is entitled to have the issue as to the value of betterments assessed by the jury, if he so desires. *Fortesque v. Crawford*, 105 N.C. 29, 10 S.E. 910 (1890).

Sheriff's Return of Writ as Execution of Judgment. — The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. *Boyer v. Garner*, 116 N.C. 125, 21 S.E. 180 (1895).

Writ of Ouster Not to Issue until Judgment for Betterments Is Satisfied. — The plaintiff who establishes a superior title is entitled to judgment for the land, but no writ of ouster should issue until defendant's judgment for betterments is satisfied. *Board of Comm'rs v. Bumpass*, 237 N.C. 143, 74 S.E.2d 436 (1953).

Cited in *Scott v. Battle*, 85 N.C. 184 (1881); *Justice v. Baxter*, 93 N.C. 405 (1885); *Greenleaf v. Bartlett*, 146 N.C. 495, 60 S.E. 419 (1908); *Gann v. Spencer*, 167 N.C. 429, 83 S.E. 620 (1914); *Harris v. Ashley*, 38 N.C. App. 494, 248 S.E.2d 393 (1978); *McCoy v. Peach*, 40 N.C. App. 6, 251 S.E.2d 881 (1979); *Etheridge v. Etheridge*, 41 N.C. App. 44, 255 S.E.2d 729 (1979).

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

The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (1871-2, c. 147, ss. 2-3; Code, ss. 474, 475; Rev., ss. 653, 654; C.S., s. 700.)

CASE NOTES

Generally the owner of the land at the time of its recovery also owns the rents, and as the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. *Harriett v. Harriett*, 181 N.C. 75, 106 S.E. 221 (1921).

When Remaindermen May Not Recover Rents. — When one holding under a tenant for life by deed apparently conveying the lands in fee after her death is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. *Harriett v. Harriett*, 181 N.C. 75, 106 S.E. 221 (1921).

Rents and rental values of the lands, which were obtained by defendants solely by reason of improvements put on the lands by themselves, could not be used to offset compensation to defendants for these improvements. *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943).

Where defendants disclaim all right and title to a part of the locus in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. *Hughes v. Oliver*, 228 N.C. 680, 47 S.E.2d 6 (1948).

When Three-Year Limitation Inapplicable. — Where one in possession of lands is entitled to recover against the true owner for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. *Whitfield v. Boyd*, 158 N.C. 451, 74 S.E. 452 (1912); *Pritchard v. Williams*, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919).

Erroneous Instruction. — Under this section, it is error for the court to give a charge which fails to instruct the jury that in making the assessment the use of the improvements made on the premises by the defendant should be excluded. *Edwards v. Edwards*, 235 N.C. 93, 68 S.E.2d 822 (1952).

Cited in *Anderson v. Moore*, 233 N.C. 299, 63 S.E.2d 641 (1951).

§ 1-342. Value of improvements estimated.

If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (1871-2, c. 147, s. 4; Code, s. 476; Rev., s. 655; C.S., s. 701.)

CASE NOTES

"Permanent" Defined. — The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the *Century Dictionary* as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like. *Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921).

Value of Property Permanently Enhanced as Sole Matter for Consideration. — The sole matter for consideration is embraced in one proposition: How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona

fide holder of the same? *Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921).

Measure of Value of Betterments.

— The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his business. *Carolina Cent. R.R. v. McCaskill*, 98 N.C. 526, 4 S.E. 468 (1887).

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that there was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. *Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921).

Question for the Jury. — It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. *Pritchard v. Williams*, 181 N.C. 46, 106 S.E. 144 (1921).

Recovery by Trustee in Bankruptcy. — The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments the value of the improvements to the land, but not a greater amount so expended. *Garland v. Arrowood*, 179 N.C. 697, 103 S.E. 2 (1920).

Cited in *Wetherell v. German*, 74 N.C. 603 (1876); *Daniel v. Crumpler*, 75 N.C. 184 (1876); *Barrett v. Williams*, 220 N.C. 32, 16 S.E.2d 405 (1941).

§ 1-343. Improvements to balance rents.

If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (1871-2, c. 147, s. 5; Code, s. 477; Rev., s. 656; C.S., s. 702.)

CASE NOTES

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to

balance the improvements, but no further. *Barker v. Owen*, 93 N.C. 198 (1885); *Whitfield v. Boyd*, 158 N.C. 451, 74 S.E. 452 (1912).

§ 1-344. Verdict, judgment, and lien.

After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (1871-2, c. 147, ss. 6, 7; Code, ss. 478, 479; Rev., ss. 657, 658; C.S., s. 703.)

CASE NOTES

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. *Barker v. Owen*, 93 N.C. 198 (1885).

In ejectment a writ of ouster should not issue until judgment for betterments has been paid. *Bond v. Wilson*, 129 N.C. 325, 40 S.E. 179 (1901).

Cited in *Edwards v. Edwards*, 235 N.C. 93, 68 S.E.2d 822 (1952).

§ 1-345. Life tenant recovers from remainderman.

If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (1871-2, c. 147, s. 8; Code, s. 480; Rev., s. 659; C.S., s. 704.)

CASE NOTES

It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. *Harriett v. Harriett*, 181 N.C. 75, 106 S.E. 221 (1921).

A devise of lands for life with limitation over does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. *Northcott v. Northcott*, 175 N.C. 148, 95 S.E. 104 (1918).

Mistaken Belief as to Rights under Contract. — The section did not apply to a situation where the tenant made improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor did the fact that the lessor silently acquiesced in the putting up of the improvements change the situation. *Dunn v. Bagby*, 88 N.C. 91 (1883).

§ 1-346. Value of premises without improvements.

When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (1871-2, c. 147, ss. 10-11; Code, ss. 482, 483; Rev., ss. 661, 662; C.S., s. 705.)

CASE NOTES

Betterments Ignored in Assessing Rents. — The rents should be assessed upon the basis of the property without the betterments. *Barker v. Owen*, 93

N.C. 198 (1885); *Whitfield v. Boyd*, 158 N.C. 451, 74 S.E. 452 (1912).

The sole question is: How much was the value of the property permanently

enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure

of the bona fide holder of the same. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

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

The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (1871-2, c. 147, s. 12; Code, s. 484; Rev., s. 663; C.S., s. 706.)

CASE NOTES

If the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an

election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. *Barker v. Owen*, 93 N.C. 198 (1885).

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

The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (1871-2, c. 147, s. 13; Code, s. 485; Rev., s. 664; C.S., s. 707.)

CASE NOTES

If payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due

the plaintiff taken, and the residue, if any, paid to defendant. *Barker v. Owen*, 93 N.C. 198 (1885).

§ 1-349. Procedure where plaintiff is under disability.

If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (1871-2, c. 147, s. 14; Code, s. 486; Rev., s. 665; C.S., s. 708.)

§ 1-350. Defendant evicted, may recover from plaintiff.

If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (1871-2, c. 147, s. 15; Code, s. 487; Rev., s. 666; C.S., s. 709.)

§ 1-351. Not applicable to suit by mortgagee.

Nothing in this Article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (1871-2, c. 147, s. 9; Code, s. 481; Rev., s. 660; C.S., s. 710.)

CASE NOTES

As to legislative intent, see Wharton v. Moore, 84 N.C. 479 (1881).

Where the relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's pos-

session under mesne conveyances from the mortgagor, this section does not apply. Metropolitan Life Ins. Co. v. Allen, 208 N.C. 13, 179 S.E. 15 (1935).

ARTICLE 31.

Supplemental Proceedings.

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

When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C.S., s. 711; 1971, c. 268, s. 21.)

Cross References. — As to execution against debts due corporate defendants, see § 55-143.

Legal Periodicals. — For note on

supplemental proceedings or creditor's bill in North Carolina, see 35 N.C.L. Rev. 414 (1957).

CASE NOTES

Supplemental Proceedings as Substitute for Creditor's Bill. — Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law. Such proceedings are held to be a substitute for the former creditor's bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. *Rand v. Rand*, 78 N.C. 12 (1878). See also, *Carson v. Oates*, 64 N.C. 116 (1870); *Dillard v. Walker*, 204 N.C. 67, 167 S.E. 632 (1933).

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. *Bronson v. Wilmington N.C. Life Ins. Co.*, 85 N.C. 411 (1881).

Supplemental proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. *Righton v. Pruden*, 73 N.C. 61 (1875).

Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. *Rand v. Rand*, 78 N.C. 12 (1878).

Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885); *Vegelahn v. Smith*, 95 N.C. 254 (1886).

The proceedings under this section are in the nature of equitable proceedings. *Johnson Cotton Co. v. Reaves*, 225 N.C. 436, 35 S.E.2d 408 (1945).

And Are in the Nature of a Final Process. — Supplemental proceedings under this section are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities

of an equitable fieri facias. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

Finality of Judgment. — A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. *Heggie v. People's Bldg. & Loan Ass'n*, 107 N.C. 581, 12 S.E. 275 (1890).

Supreme Court Not Empowered to Act. — The provisions respecting supplemental proceedings are not applicable to the Supreme Court, and no power has been given it to issue an attachment in such case. *Phillips v. Trezevant*, 70 N.C. 176 (1874).

When Proceedings Authorized. — To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise: (1) The want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied"; (2) The nonexistence of any equitable estates in land within the lien of the judgment; and (3) The existence of property, choses in action and things of value unaffected by any lien and incapable of levy. *A.A. McKeithan & Sons v. Walker*, 66 N.C. 95 (1872); *Hutchison v. Symons*, 67 N.C. 156 (1872); *Hinsdale v. Sinclair*, 83 N.C. 338 (1880).

Execution Must Have Been Issued within Past Three Years. — Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. *International Harvester Co. of Am. v. Brockwell*, 202 N.C. 805, 164 S.E. 322 (1932).

Where the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. *Vegelahn v. Smith*, 95 N.C. 254 (1886).

Personal Demand on Debtor Unnecessary. — A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental

proceedings. The prosecution of the suit to judgment and execution is a sufficient demand. *Weiller & Co. v. Lawrence*, 81 N.C. 65 (1879).

Who Are Entitled to Benefits. — Only those creditors who bring themselves within the provisions of the statute by instituting supplementary proceedings are entitled to the benefit thereof. *Righton v. Pruden*, 73 N.C. 61 (1875).

Interpleader Held Improper. — The owner of orders for the payment of shares of stock in a corporation could not be allowed to interplead in supplementary proceedings by plaintiff judgment creditor who had obtained his judgment. *Heggie v. People's Bldg. & Loan Ass'n*, 107 N.C. 581, 12 S.E. 275 (1890).

As to the availability of supplemental proceedings against mentally incompetent defendants, see *Blake v. Respass*, 77 N.C. 193 (1877).

Proceedings Lie against Private Corporations. — Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature and organized for the purposes of private gain for its shareholders. *La'Fountain v. Southern Underwriters' Ass'n*, 79 N.C. 514 (1878).

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. *Johnson Cotton Co. v. Reaves*, 225 N.C. 436, 35 S.E.2d 408 (1945).

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation, he should be required to produce them. *Johnson Cotton Co. v. Reaves*, 225 N.C. 436, 35 S.E.2d 408 (1945).

Accounting of Partnership Affairs. — In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. *Johnson Cotton Co. v. Reaves*, 225 N.C. 436, 35 S.E.2d 408 (1945).

Authority of Clerk. — This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, and the clerk was properly informed that a similar proceeding was then pending before the judge, the clerk should have refused to proceed, and when he failed to do so, the judge had the power to order that he desist from further action. *Ledford v. Emerson*, 143 N.C. 527, 55 S.E. 969 (1906).

Appeal from Clerk's Order. — From an order requiring the debtor to appear, made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. *Farmers Nat'l Bank v. Burns*, 107 N.C. 465, 12 S.E. 252 (1890).

Choses in Action. — In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of setoff when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. *McIntosh Grocery Co. v. Newman*, 184 N.C. 370, 114 S.E. 535 (1922).

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this State by supplemental proceedings under this section which are in the nature of an equitable fieri facias or creditor's bill. *Newberry v. Davison Chem. Co.*, 65 F.2d 724 (4th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 75, 78 L. Ed. 571 (1933).

Bank Deposits. — A bank may apply the deposits of its customer to the payment of his note after maturity, by way of setoff, unless some other creditor has in the meantime acquired a superior right thereof in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. *McIntosh Grocery Co. v. Newman*, 184 N.C. 370, 114 S.E. 535 (1922).

No Right to Attach Part of Judgment Owned by Person Other than Defendant. — Where at the time of the rendition of a judgment another person was the equitable owner of a stipulated

part thereof, defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant. *Armour Fertilizer Works v. Newbern*, 210 N.C. 9, 185 S.E. 471 (1936).

Property held by the entirety is not subject to execution to satisfy judgments against one spouse. *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

But Proceeds of Entirety Property May Be Applied against Debts of One Spouse. — Proceeds of entirety property were the property of the husband as against the wife, and such proceeds could be applied against debts of the husband alone. *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

The income from rental property held by the entirety was not protected from attachment to satisfy the debts of the husband merely because it was derived from entirety property. *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

Notice Required. — If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that no one's rights may be concluded by any proceeding until he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such

notice is required by some provision of the statute under which the garnishment suit is conducted. *Wright v. Railroad*, 141 N.C. 164, 53 S.E. 831 (1906).

Time and Place of Examination in Discretion of Court. — The requirement of 10 days' notice of motions generally has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. *Weiller & Co. v. Lawrence*, 81 N.C. 65 (1879).

Suit Held New and Independent. — Where a judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an accounting to ascertain the amount due upon unpaid stock, to pay the debt of the corporation, such suit was a new and independent action, and was not demurrable on the ground that his remedy was by proceeding supplementary to execution. *Bronson v. Wilmington N.C. Life Ins. Co.*, 85 N.C. 411 (1881).

Order Held Sufficient to Bring Board before Court. — Order of the court in the supplemental proceeding, directing the chairman of the board of trustees of the judgment-debtor church to appear and answer, was sufficient to being the board of trustees before the court and make the board of trustees subject to its jurisdiction. *Fishel & Taylor v. Grifton United Methodist Church*, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

Applied in *Underwood v. Stafford*, 270 N.C. 700, 155 S.E.2d 211 (1967).

Cited in *A.A. McKeithan & Sons v. Walker*, 66 N.C. 95 (1872); *Hutchison v. Symons*, 67 N.C. 156 (1872); *Rand v. Rand*, 78 N.C. 12 (1878); *Grabenhofer v. Garrett*, 260 N.C. 118, 131 S.E.2d 675 (1963); *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

§ 1-352.1. Interrogatories to discover assets.

As an additional method of discovering assets of a judgment debtor, the judgment creditor may prepare and serve on the judgment debtor written interrogatories concerning his property, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution. Such written interrogatories shall be fully answered under oath by the judgment debtor within 30 days of service on the judgment debtor, and the answer shall be filed by the judgment debtor with the clerk of the superior court wherein the

original judgment is docketed. Copy of said answer shall be served upon the party submitting said written interrogatories, in the manner provided by the Rules of Civil Procedure.

Interrogatories may relate to any matters which can be inquired into under G.S. 1-352, and the debtor may object to any interrogatories that are deemed improper, but the making of objections shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Upon failure of the judgment debtor to answer fully the written interrogatories, the judgment creditor may petition the court for an order requiring the judgment debtor to answer fully, which order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure, fixing the time within which the judgment debtor can answer the interrogatives. In addition, the order shall provide, as an alternative, that the judgment debtor may mail the judgment creditor, by certified mail, within five days of the date of service of the order, a specific request for a hearing before a court or judge to answer oral questions concerning his property rather than answering the written interrogatories. Upon timely receipt of this request, the judgment creditor shall request the court to calendar the hearing.

Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368. (1971, c. 529, s. 1; 1979, c. 648.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

§ 1-352.2. Additional method of discovering assets.

In addition to the other provisions of this Article and as an additional method of discovering assets of a judgment debtor the clerk of the court or a judge of the court in the county wherein the original judgment is docketed, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution, upon motion of the judgment creditor showing good cause therefor, may:

- (1) Order the judgment debtor, his agent or anyone having possession or control of property or records of or pertaining to the judgment debtor, to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, all tax records, letters, objects or tangible things, not privileged, constituting property, or being evidence of property, of the judgment debtor and which are in his possession and custody, or subject to his control; or
- (2) Order the judgment debtor or anyone acting for or on his behalf to permit entry upon designated land or other property, real or personal, in his possession or control or subject to his control for the purpose of inspecting, measuring, surveying, appraising, copying, or photographing the property of the judgment debtor.

- (3) Prior notice of the motion, together with a copy thereof, shall be served on the judgment debtor as provided by the Rules of Civil Procedure. Upon the hearing, the order entered shall specify the time, place, and manner for compliance therewith and may prescribe such terms and conditions as are just.
- (4) Any person who shall fail to comply with an order entered pursuant to this section may be punished as for a contempt under the provisions of G.S. 1-368. (1971, c. 711, s. 1.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

§ 1-353. Property withheld from execution; proceedings.

After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section [G.S. 1-352], although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 2; Rev., s. 688; C.S., s. 712.)

CASE NOTES

Affidavit Required. — Extraordinary proceedings will not be ordered unless necessity therefor is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action or things of value "which he unjustly refuses to apply to the satisfaction of the judgment." *Hutchison v. Symons*, 67 N.C. 156 (1872). See also, *First & Citizens Nat'l Bank v. Hinton*, 213 N.C. 162, 195 S.E. 359 (1938).

Affidavit Must Negative Existence of Property Liable to Execution. — An affidavit is insufficient to warrant examination of the judgment debtor if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amend-

ment at the hearing. *Weiller & Co. v. Lawrence*, 81 N.C. 65 (1879); *Hackney v. Arrington*, 99 N.C. 110, 5 S.E. 747 (1888).

Affidavit Held Sufficient. — An affidavit by a judgment creditor, his agent or attorney, that an execution had been issued upon his judgment, though it had not been returned, and that the defendant had not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution" which he unjustly refused to apply to its satisfaction, was sufficient to support an order for the examination of the debtor and persons alleged to be indebted to him. *Farmers & Mechanics Nat'l Bank v. Burns*, 109 N.C. 105, 13 S.E. 871 (1891).

Clerk's Finding of Fact Held Sufficient. — Where, upon the plaintiff's affidavit, the clerk found as a fact that

execution under the judgment had been issued, in proceedings supplementary to execution, this was sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of execution did not affect. *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

The fact that the sheriff has an alias execution in his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. *Vegetahn v. Smith*, 95 N.C. 254 (1886).

Sufficient Service of Order to Appear. — Leaving a copy of an order on a judgment debtor to appear and answer in supplemental proceedings with the debtor's wife was a sufficient notice. *Turner v. Holden*, 109 N.C. 182, 13 S.E. 731 (1891).

Court to Apply Property to Judgment. — The section intends that when the debtor refuses to apply property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. *Farmers & Mechanics Nat'l Bank v. Burns*, 109 N.C. 105, 13 S.E. 871 (1891).

Plaintiff need not proceed under this section before he can apply for a receiver under § 1-363. *Massey v. Cates*, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Applied in *Richard Couture, Inc. v. Rowe*, 263 N.C. 234, 139 S.E.2d 241 (1964).

Cited in *Farmers & Mechanics Nat'l Bank v. Burns*, 109 N.C. 105, 13 S.E. 871 (1891); *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

§ 1-354. Proceedings against joint debtors.

Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (C.C.P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 669; C.S., s. 713.)

CASE NOTES

Joint as well as single debtors may be examined after the issuance of an execution, and before its return. *Weiller & Co. v. Lawrence*, 81 N.C. 65 (1879).

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

Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on

oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (1868-9, c. 148, s. 4; c. 277, s. 8; Code, s. 488, subsec. 4; Rev., s. 671; C.S., s. 714.)

§ 1-356. Examination of parties and witnesses.

On examination under this Article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this Article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this Article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (C.C.P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; Code, ss. 488 [subsec. 2], 491, 492; Rev., ss. 670, 676; C.S., s. 715.)

CASE NOTES

Cross-examination. — Where the judgment debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

Evidence to Be Taken Down in Writing. — In supplemental proceedings the evidence should be taken down in

writing. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

Production of Documents. — Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.

No person, on examination pursuant to this Article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 5; Rev., s. 672; C.S., s. 716.)

CASE NOTES

Witness Must Answer Questions. — A witness must answer the questions, and he cannot shield himself behind his declaration that they involve self-incrimination. *LaFontaine v. Southern Underwriters Ass'n*, 83 N.C. 132 (1880).

When called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, a witness could not excuse himself on the ground that the evidence thus elicited might be used on the trial of indictments pending against him and others for conspiring to

cheat and defraud others in the management of the affairs of such corporation. *LaFontaine v. Southern Underwriters Ass'n*, 83 N.C. 132 (1880).

Facts Divulged Are Not Available for Criminal Proceedings. — Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. *State v. Mallett*, 125 N.C. 718, 34 S.E. 651 (1899), *aff'd*, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).

§ 1-358. Disposition of property forbidden.

The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, ss. 488 [subsec. 6], 494; Rev., s. 673; C.S., s. 717.)

CASE NOTES

What Property Is Covered by this Section. — When this section and § 1-360 are read either singly or as a component part of this Article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are Neither Property Nor Debt. — Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings

against the employer of the judgment debtor. *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948).

Only Parties May Be Restrained. — In supplemental proceedings, the court cannot restrain the transfer of property owned by one who is not a party to the action. *Farmers & Mechanics Nat'l Bank v. Burns*, 109 N.C. 105, 13 S.E. 871 (1891).

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party in some way to the proceeding. *Coates Bros. v. Wilkes*, 94 N.C. 174 (1886).

§ 1-359. Debtors of judgment debtor may satisfy execution.

After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (C.C.P., s. 265; Code, s. 489; Rev., s. 674; C.S., s. 718.)

CASE NOTES

Protection Furnished to Debtors of Judgment Debtor. — The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. *Parks v. Adams*, 113 N.C. 473, 18 S.E. 665 (1893).

Authority of Sheriff. — A sheriff is authorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in

satisfaction of another. *Smith v. McMillan*, 84 N.C. 593 (1881).

Payment by Bank of Amount in Debtor's Account. — Under this section, if it chooses, a bank may voluntarily pay to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor. *Faught v. Branch Banking & Trust Co.*, 53 N.C. App. 132, 280 S.E.2d 26 (1981).

§ 1-360. Debtors of judgment debtor, summoned.

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars (\$10.00), the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (C.C.P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 675; C.S., s. 719.)

CASE NOTES

Purpose of Supplemental Proceeding against Third Persons. — When this section and § 1-362 are read singly or as an integral part of this Article, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law. *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

Procedure When Third Person Claims Property. — The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, but not for the purpose of contesting any right of such persons having the same. If they

claim an interest in the property, or that the same belongs to them, they may properly suggest so. *Farmers & Mechanics Nat'l Bank v. Burns*, 109 N.C. 105, 13 S.E. 871 (1891); *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922); *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956).

Where one who is charged in supplemental proceedings as holding property belonging to a judgment debtor claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. *Carson v. Oates*, 64 N.C. 115 (1870).

To What Property and Debts Section Applies. — When this section and § 1-358 are read either singly or as a component part of this Article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person

at the time of the issuance and service of the order for the examination of the third person. *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are Neither Property Nor Debt. — Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948).

When Proceedings May Commence. — Proceedings under this section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. *A.A. McKeithan & Sons v. Walker*, 66 N.C. 95 (1872).

Purpose of Appearance and Answer. — The purpose of the

appearance and answer is to determine whether the sum alleged, or any part thereof, is due the judgment debtor. *Rice v. Jones*, 103 N.C. 226, 9 S.E. 571 (1889).

Assignee May Be Examined. — An order for examination may issue against the defendant's assignee. *Bruce v. Crabtree*, 116 N.C. 528, 21 S.E. 194 (1895).

Notice to Defendant. — Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. *City of Wilmington v. Sprunt*, 114 N.C. 310, 19 S.E. 348 (1894); *Wright v. Railroad*, 141 N.C. 164, 53 S.E. 831 (1906).

Applied in *Marx v. Maddrey*, 106 F. Supp. 535 (E.D.N.C. 1952).

Cited in *Grabenhofer v. Garrett*, 260 N.C. 118, 131 S.E.2d 675 (1963).

§ 1-361. Where proceedings instituted and defendant examined.

Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677; C.S., s. 720.)

CASE NOTES

History. — This section is a substantial enactment of the rule laid down in *Hasty v. Simpson*, 77 N.C. 69 (1877). In *Hutchinson v. Symons*, 67 N.C. 156 (1872), it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. *Hasty v. Simpson*, above, quoted and approved this holding, but in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence.

Property Subject to Sale. — The court may order any property of the judgment debtor that is not exempt from execution, in the hands either of the judgment debtor or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. *Rand v. Rand*, 78 N.C. 12 (1878).

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so much thereof as may be necessary, to be applied to the satisfaction of the judgment

against the judgment debtor. *Rice v. Jones*, 103 N.C. 226, 9 S.E. 571 (1889).

Gratuitous Services. — While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. *Osborne v. Wilkes*, 108 N.C. 651, 13 S.E. 285 (1891).

Salaries of Public Officers and Employees. — For reasons of public policy, the salaries of officers and the pay of employees of the State cannot be reached by creditors by proceedings supplementary to execution. *Swepson v. Turner*, 76 N.C. 115 (1877).

Sale Required. — Where it appeared from an examination under supplementary proceedings that the judgment debtor held a claim against a third party,

to be discharged by the delivery of corn at a stipulated price per bushel, it was error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order was to sell the corn and apply the proceeds to the debt. *In re Davis*, 81 N.C. 72 (1879).

Order for Condemnation of Debtor's Property. — In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. *Boseman v. McGill*, 184 N.C. 215, 114 S.E. 10 (1922).

When Final Order May Be Made. — No final order may be made appropriating to the creditor any property discovered under § 1-360 until the property previously levied on is exhausted, for until that is done it cannot

be known whether anything is still owing. *A.A. McKeithan & Sons v. Walker*, 66 N.C. 95 (1872).

Where supplemental proceedings were instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appeared that the husband was totally and permanently disabled and had no property upon which execution could be levied, but was receiving the sum of \$300.00 a month under disability insurance, the judgment debtor was entitled, under his personal property exemption, to the \$300.00 each month if such amount was necessary for the support of himself and his wife. *Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton*, 204 N.C. 441, 168 S.E. 505 (1933).

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

The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (C.C.P., s. 269; 1870-1, c. 245; Code, s. 493; Rev., s. 678; C.S., s. 721.)

Legal Periodicals. — For note on protection of debtor's rights, see 48 N.C.L. Rev. 164 (1969).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Construction of Section. — The language of this section is explicit and is to be given a liberal construction favorable to the exemption. *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

Applicability of Earnings Exemption. — The exemption of earnings for 60 days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and not for taxes due. *City of Wilmington v. Sprunt*, 114 N.C. 310, 19 S.E. 348 (1894).

The earnings of a nonresident for personal services for the 60 days next preceding are exempt from seizure in garnishment. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904); *Wierse v.*

Thomas, 145 N.C. 261, 59 S.E. 58 (1907).

As to garnishment of military retirement pay, see *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978). As to garnishment for enforcement of child support, see § 110-136.

Protection of Wage-earner's Second Family against Alimony Claims of First Family. — While it would seem reasonable to suppose that what the legislature of 1870-71 had in mind, in enacting this exemption, was to protect the wage-earner's family from want as against claims of his other creditors, and that it was not contemplated that the needs of a wage-earner's second family

should be supplied at the expense of the legitimate alimony claims of his first family, defendant's accumulated unpaid military retirement pay was exempt under this section from garnishment to enforce an alimony order where it plainly appeared from the defendant's affidavit that his retirement pay was necessary for the support of his second family, since this section is to be given a

liberal construction favorable to the exemption. *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978). As to garnishment to enforce child support, see § 110-136.

Quoted in *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E.2d 147 (1956); *Sturgill v. Sturgill*, 49 N.C. App. 578, 272 S.E.2d 423 (1980).

§ 1-363. Receiver appointed.

The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this Article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (C.C.P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 494; Rev., s. 679; C.S., s. 722.)

Cross References. — As to duties of receiver generally, see §§ 1-501 through 1-504.

CASE NOTES

Plaintiff need not proceed under § 1-353 before he can apply for a receiver under this section. *Massey v. Cates*, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

In a race of diligence between creditors under supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. *Parks v. Sprinkle*, 64 N.C. 637 (1870).

This section prescribes that there shall be only one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. *Corbin v. Berry & McGowan*, 83 N.C. 27 (1880).

Consolidation of Several Proceedings. — Where several supplemental proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is

the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. *Monroe Bros. v. Lewald*, 107 N.C. 655, 12 S.E. 287 (1890).

Motion pending Appeal. — The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

Supporting Evidence and Affidavits. — The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

Verified pleadings essentially operate as affidavits under this section and should be construed accordingly.

Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Grounds for Appointing Receiver.

— A receiver is appointed almost as a matter of course where it appears that the judgment debtor has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment. If there is evidence tending in a reasonable degree to show that he probably has such property, or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

It is sufficient for the appointment of a receiver if there is reasonable ground to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Judge's Action Subject to Review.

— The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Effect of Judge's Failure to Ascertain if other Proceedings Are Pending.

— While it is the duty of a judge appointing a receiver under this section to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin v. Berry & McGowan, 83 N.C. 27 (1880).

Appointment of Receiver Held Erroneous.

— Where supplemental proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. Ross v. Ross, 119 N.C. 109, 25 S.E. 792 (1896).

The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Cited in Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

§ 1-364. Filing and record of appointment; property vests in receiver.

When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript of judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C.C.P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C.S., s. 723; 1971, c. 268, s. 22.)

CASE NOTES

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

Authority of Receiver. — While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. *Weill v. First Nat'l Bank*, 106 N.C. 1, 11 S.E. 277 (1890).

A receiver may be appointed who is invested with all the property and effects of the debtor, and he may collect, preserve and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. *Rand v. Rand*, 78 N.C. 12 (1878).

A receiver, in supplemental proceedings, may bring actions to recover the judgment debtor's property, without special leave or direction of the court.

Weill v. First Nat'l Bank, 106 N.C. 1, 11 S.E. 277 (1890). See also, *Coates Bros. v. Wilkes*, 92 N.C. 376 (1885).

When Property Vests in Receiver. — The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. *Turner v. Holden*, 94 N.C. 70 (1886).

In proceedings supplementary to execution, if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. *Rankin v. Minor*, 72 N.C. 424 (1875).

Remedy of Debtor when Receiver Is Negligent. — If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty; but he cannot interfere with the receiver's collection and control of the property. *Turner v. Holden*, 94 N.C. 70 (1886).

§ 1-365. Where order of appointment recorded.

Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (C.C.P., s. 270; Code, s. 496; Rev., s. 681; C.S., s. 724.)

CASE NOTES

Death of Judgment Debtor before Order of Appointment Is Filed. — When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judgment cred-

itor has no lien on his property as against the administrator of the debtor. *Rankin v. Minor*, 72 N.C. 424 (1875).

Cited in *Nobles v. Roberson*, 212 N.C. 334, 193 S.E. 420 (1937).

§ 1-366. Receiver to sue debtors of judgment debtor.

If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction on such security as he directs. (C.C.P., s. 271; 1870-1, c. 245; Code, s. 497; Rev., s. 682; C.S., s. 725.)

Cross References. — As to execution against debts due corporate defendants, see § 55-143.

CASE NOTES

Court May Restrain Transfer of Property. — Under this section, when it is found that a third person, not a party to the action, claims an interest in the property or denies the debt which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. *Ross v. Ross*, 119 N.C. 109, 25 S.E. 792 (1896).

Notice of Order Restraining Transfer. — This section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest" may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. *Coates Bros. v. Wilkes*, 94 N.C. 174 (1886).

Interpleader by Claimants to Fund.

— Where in supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order was made that the fund should be paid into court, and afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought an action against the judgment debtor to try the question of title to the fund, it was held that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. *Wilson v. Chichester*, 107 N.C. 386, 12 S.E. 139 (1890).

Power of Receiver to Sue to Set Aside Fraudulent Transactions of Debtor. — A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. *Pender v. Mallett*, 123 N.C. 57, 31 S.E. 351 (1898).

§ 1-367. Reference.

The court or judge may, in his discretion, order a reference to the referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (C.C.P., s. 272; Code, s. 498; Rev., s. 683; C.S., s. 726.)

Cross References. — As to examination before referee, see § 1-356. As to disobedience of orders of referee, see § 1-368.

CASE NOTES

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse

rulings made in the progress of the inquiry which the evidence would tend to elucidate or explain. *Vestal v. Sloan*, 83 N.C. 555 (1880).

§ 1-368. Disobedience of orders punished as for contempt.

Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this Article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just. (C.C.P., s. 274; 1869-70, c. 79, s. 3; Code, s. 500; Rev., s. 684; C.S., s. 727.)

Cross References. — As to contempt generally, see Chapter 5A.

Legal Periodicals. — As to whether

the violation of a void order of a court constitutes contempt, see note in 12 N.C.L. Rev. 260.

CASE NOTES

Power of Court to Enforce Its Lawful Orders. — It is an essential attribute of a court to enforce by proper process its lawful orders; without this its essential functions would be paralyzed or destroyed. *Pain v. Pain*, 80 N.C. 322 (1879); *LaFontaine v. Southern Underwriters Ass'n*, 83 N.C. 132 (1880).

Duty of Judge to Pass on Inability to Comply. — Where a party to an action, having been directed to perform an order of the court or otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. *Childs v. Wiseman*, 119 N.C. 497, 26 S.E. 126 (1896).

Contempt of Witness Being Examined by Referee. — When, in the course

of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. *LaFontaine v. Southern Underwriters Ass'n*, 83 N.C. 133 (1880).

Paying Salary Accruing after Issuance of Order. — An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution.

§§ 1-369 to 1-392: Repealed by Session Laws 1981, c. 490, effective October 1 through October 8, 1981, and January 1, 1982.

Cross References. — As to exempt property, see now § 1C-1601 et seq.

Editor's Note. — These sections were repealed by Session Laws 1981, c. 490, which enacted Chapter 1C, Article 16, § 1C-1601 et seq., covering the same subject matter. The repeal and the new Article were originally made effective Oct. 1, 1981. Session Laws 1981, c. 1001, ratified Oct. 9, 1981, and effective on ratification, postponed the effective date of Session Laws 1981, c. 490, to Jan. 1, 1982. The repeal and the new Article were therefore in effect from Oct. 1, 1981, through Oct. 8, 1981, and became permanently effective Jan. 1, 1982.

Session Laws 1981, c. 1001, s. 1, provides in part: "G.S. 1-369 through G.S. 1-392, as repealed by Chapter 490 of the

1981 Session Laws, are revived effective upon ratification of this act. This act does not affect exemptions that have been set aside by a court order entered on and after October 1, 1981, but before the effective date of this act. This act does not affect bankruptcy petitions filed on and after October 1, 1981, but before the effective date of this act."

Session Laws 1981, c. 490, s. 3, as amended by Session Laws 1981, c. 1001, s. 1, provides: "Sec. 3. This act shall become effective January 1, 1982, and applies to all actions and proceedings initiated before and after that date. If a proceeding has been initiated prior to that date the court may enter appropriate transitional orders."

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

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

The Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C.S., s. 752; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

A judgment may be either interlocutory or final in a special proceeding as well as in a civil action. *Russ v. Woodard*, 232 N.C. 36, 59 S.E.2d 351 (1950).

Stated in *Seawell v. Purvis*, 232 N.C. 194, 59 S.E.2d 572 (1950).

Cited in *Nantahala Power & Light Co. v. Whiting Mfg. Co.*, 209 N.C. 560, 184 S.E. 48 (1936); *Collins v. North Carolina*

State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953); *Beal v. Dellinger*, 38 N.C. App. 732, 248 S.E.2d 775 (1978); *Macon v. Edinger*, 49 N.C. App. 620, 272 S.E.2d 411 (1980); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

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

Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4(a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within 30 days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C.S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3; 1971, c. 1093, s. 17.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Some form of action or special proceeding is essential to the rendition of a judgment and in this State it must always be commenced by summons or attachment. *Morris v. House*, 125 N.C. 550, 34 S.E. 712 (1899).

Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. *Simmons v. Norfolk & Baltimore Steamboat Co.*, 113 N.C. 147, 18 S.E. 117 (1893).

A judgment under a service of less than 10 days, although irregular, is

valid until reversed or vacated by a direct action, and cannot be collaterally attacked. *Nall v. McConnell*, 211 N.C. 258, 190 S.E. 210 (1937).

Allowance of Additional Time for Defendant to Appear. — When the time between service and return day of the summons is less than the time allowed by statute, the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. *Stafford v. Gallops*, 123 N.C. 19, 31 S.E. 265 (1898).

Quoted in *Housing Auth. v. Farabee*, 284 N.C. 242, 200 S.E.2d 12 (1973); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

Stated in *Boring v. Mitchell*, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

Cited in *Kinney v. Laughenour*, 97 N.C. 325, 2 S.E. 43 (1887); *Carolina & N.W.R.R. v. Pennearden Lumber & Mfg. Co.*, 132 N.C. 644, 44 S.E. 358 (1903); *Hartsfield v. Bryan*, 177 N.C. 166, 98

S.E. 379 (1919); *Green v. Chrismon*, 223 N.C. 723, 28 S.E.2d 215 (1943); *Burlington City Bd. of Educ. v. Allen*, 243 N.C. 520, 91 S.E.2d 180 (1956); *In re Spinks*, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 1-395. Return of summons.

The person to whom the summons is delivered for service shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (C.C.P., s. 75; Code, s. 280; Rev., s. 713; C.S., s. 754; 1967, c. 954, s. 3.)

CASE NOTES

Before Whom Summons Is Returnable. — The summons in special proceedings is returnable before the clerk. *Tate v. Powe*, 64 N.C. 644 (1870).

The failure of the clerk to note the summons the day it was received is irregular but does not render the summons void. *Strayhorn v. Blalock*, 92 N.C. 292 (1885).

Sheriff's Return Prima Facie Sufficient. — When the sheriff returns that he has "served" the summons, this is prima facie sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some

proper way. *Strayhorn v. Blalock*, 92 N.C. 292 (1885).

Failure of Sheriff to Make Return. — While a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered, this does not excuse him for failure to make a return of the process. A writ of summons is a mandate of the court and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. *Jones v. Gupton*, 65 N.C. 48 (1871); *Johnson v. Kenneday*, 70 N.C. 436 (1874).

§ 1-396. When complaint filed.

The complaint or petition of the plaintiff must be filed in the clerk's office at or before the time of the issuance of the summons, unless time for filing said complaint or petition is extended as provided by G.S. 1-398. (C.C.P., s. 76; 1876-7, c. 241, s. 4; Code, s. 281; Rev., s. 714; C.S., s. 755; 1943, c. 543.)

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398. Filing time enlarged.

The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than 10 additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (C.C.P., s. 79; Code, s. 283; Rev., s. 716; C.S., s. 757.)

CASE NOTES

Power of Clerk after Remand. — Where an application was filed to remove an administrator, and no answer having been filed, the clerk refused the motion, and on appeal the judge reversed the order and remanded the case, the clerk

had the power to allow an answer to be filed. *Patterson v. Wadsworth*, 94 N.C. 538 (1886).

Cited in *Pipkin v. Lassiter*, 37 N.C. App. 36, 245 S.E.2d 105 (1978).

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

In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during session upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (1903, c. 566; Rev., s. 717; C.S., s. 758; 1971, c. 381, s. 12.)

CASE NOTES

Clerk May Not Grant Affirmative Equitable Relief. — The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. *Vance v. Vance*, 118 N.C. 864, 24 S.E. 768 (1896).

Clerk Must Transfer Case where Equitable Defense Is Pleaded. — When a party pleads any equitable or other defense, or asks for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. *Little v. Duncan*, 149 N.C. 84, 62 S.E. 770 (1908).

Mutual Mistake. — For case holding that defendant could plead the equitable relief of mutual mistake and that when this plea was filed the clerk properly transferred the cause to the civil issue docket, see *Smith v. Johnson*, 209 N.C. 729, 184 S.E. 486 (1936).

How Questions of Fact Are Decided. — Questions of fact are first

determined by the clerk and on appeal they are subject to review by the judge. *Vanderbilt v. Roberts*, 162 N.C. 273, 78 S.E. 156 (1913).

Right to Jury Trial on Fact Issues. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury. *Chowan & S.R.R. v. Porter*, 105 N.C. 246, 11 S.E. 328 (1890).

Jury Trial in Proceeding for Alimony without Divorce. — When in special proceedings for alimony without divorce the pleadings raised the issues of the validity of the marriage, or whether the husband had abandoned the wife, or whether the husband was a drunkard or spendthrift, the right of trial by jury arose and the case should have been transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918).

Waiver of Right to Jury Trial. — When the parties fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury. *Chowan & S.R.R. v. Porter*, 105 N.C. 246, 11 S.E. 328 (1890).

Boundary Disputes. — Where in a special proceeding under Chapter 38 to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads 20 years' adverse possession under § 1-40 as a defense, the proceeding is assimilated to an action to quiet title as provided by § 41-10, and the clerk, as directed by this section, should transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings, in accordance with rules of practice applicable to such actions originally instituted in that court. *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet title as provided by § 41-10. When the question of title is raised, the clerk should transfer the proceeding to the superior court in term. *Bumgarner v. Corpening*, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where, in a special proceeding under § 38-1 to establish a boundary line, the defendant by his answer denies the petitioner's title and, as a defense, pleads seven years' adverse possession under color of title under § 1-38 or 20 years' adverse possession under § 1-40, the proceeding is assimilated to an action to quiet title. In such a case, as provided by this section, the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. *Lane v. Lane*, 255 N.C. 444, 121 S.E.2d 893 (1961).

Partition. — While the clerk has original jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of non tenent insimul or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. *Bailey v. Hayman*, 222 N.C. 58, 22 S.E.2d 6 (1942).

When tenancy in common is denied and there is a plea of sole seizin, non tenent insimul, the proceeding in legal

effect is converted into an action in ejectment and should be transferred, by virtue of this section, to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E.2d 554 (1939); *Murphy v. Smith*, 235 N.C. 455, 70 S.E.2d 697 (1952).

Effect of Judicial Admission Removing Defense as Issue. — Where defendants' answer to a petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants, but upon the hearing defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement, the judicial admission effectively removed the defense from the field of issuable matters, since the alleged agreement was void under the statute of frauds, and it was not required that the clerk transfer the issue to the civil docket. *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954).

As to power of superior court judge to allow amendments on appeal, see *Sudderth v. McCombs*, 67 N.C. 353 (1872).

Evidence Considered upon Appeal. — If there are issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper dispositions of the question presented. *Mills v. McDaniel*, 161 N.C. 112, 76 S.E. 551 (1912).

Applied in *Jernigan v. Jernigan*, 226 N.C. 204, 37 S.E.2d 493 (1946); *Wall v. Wall*, 24 N.C. App. 725, 212 S.E.2d 238 (1975).

Cited in *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939); *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955).

§ 1-400. Ex parte; commenced by petition.

If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (1868-9, c. 93; Code, s. 284; Rev., s. 718, C.S., s. 759.)

CASE NOTES

Judgment Creditors May Become Parties. — Where executor filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, desiring to contest one of the debts set out in the petition for fraud, if not made parties, could make themselves parties and proceed therein accordingly, the procedure being ex parte on the part of the executor, and an inde-

pendent action by them would not lie for fraud until after final judgment in the proceedings. *Wadford v. Davis*, 192 N.C. 484, 135 S.E. 353 (1926).

Petition Need Not Be Verified. — It is not necessary for a petition in an ex parte proceeding to be verified. *Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E.2d 38 (1960).

§ 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.

In cases under G.S. 1-400, if all persons to be affected by the decree or their attorney have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. All of the petitioners must sign the petition, or must sign written application to clerk of court to be made petitioners and file same with the clerk or must sign a written authorization to the attorney which authorization must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C.S., s. 760; 1953, c. 246.)

CASE NOTES

All Persons Affected Must Present Ex Parte Proceeding to Clerk. — This section applies only when all persons to be affected present an ex parte proceeding to the clerk and he acts summarily. In that event, all parties must sign the petition or must sign and file with the clerk a written application to be made petitioners or a written authorization to the attorney, before the clerk may make any order or decree prejudicing their rights. *In re Johnson*, 9 N.C. App. 102, 176 S.E.2d 31 (1970), *aff'd*, 277 N.C. 688, 178 S.E.2d 470 (1971).

Effect of Failure To Join All Interested Parties. — When, in a special proceeding under which certain timber interests were sold by a commissioner, it

appeared upon the face of the record that certain persons of age were not made parties or had not appeared as such in person or by attorney, and they had in no way waived their rights, they were not bound by a judgment rendered therein, and as to them the entire proceeding was void upon its face. *Moore v. Rowland Lumber Co.*, 150 N.C. 261, 63 S.E. 953 (1909).

Written Authorization Required Only when Attorney Signs for Petitioner. — This section only requires written authorization when the attorney signs for a petitioner in the original petition. It does not apply where the original petition is signed by the parties themselves. *In re Johnson*, 277 N.C. 688, 178 S.E.2d 470 (1971).

§ 1-402. Judge approves when petitioner is infant.

If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (C.C.P., s. 420; 1868-9, c. 93, s. 3; Code, s. 286; 1887, c. 61; Rev., s. 720; C.S., s. 761.)

CASE NOTES

In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. *Harris v. Brown*, 123 N.C. 419, 31 S.E. 877 (1897).

Administrator Acting as Guardian. — While it is irregular for the administrator to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. *Harris v. Brown*, 123 N.C. 419, 31 S.E. 877 (1898).

One who joins as infant in a petition is bound by the judgment, even though it is not approved by the judge of the court. *Lindsay v. Beaman*, 128 N.C. 189, 38 S.E. 811 (1901).

Court Presumed to Have Protected

Interests of Infants. — Where the lands of infants are sold under an order of the superior court upon an ex parte petition, and the infants have been represented by next friends, it will be presumed that the court protected their interests and was careful to see that they suffered no prejudice. *Tyson v. Belcher*, 102 N.C. 112, 9 S.E. 634 (1889).

Effect of Irregularities on Judgment. — A judgment rendered in an ex parte proceeding approving the compromise and settlement of claims for personal injuries suffered by an infant is not void but only voidable, regardless of how irregular the proceedings may have been. It is binding until set aside by motion in the cause and is not subject to collateral attack. *Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E.2d 38 (1960).

Cited in *Ward v. Agrillo*, 194 N.C. 321, 139 S.E. 451 (1927).

§ 1-403. Orders signed by judge.

Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of session, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C.S., s. 762; 1971, c. 381, s. 12.)

CASE NOTES

Effect of Judgment Not Signed by Judge. — There is a plain provision in North Carolina statute law requiring every judgment granted by a judge to be signed by him. But while this statute, apparently mandatory, should always be observed, still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part

of the judgment roll is a valid judgment, though not signed by the judge. *Rollins v. Henry*, 78 N.C. 342 (1878); *Matthews v. Joyce*, 85 N.C. 258 (1881); *Keener v. Goodson*, 89 N.C. 273 (1883); *Spencer v. Credle*, 102 N.C. 68, 8 S.E. 901 (1889); *Bond v. Wool*, 113 N.C. 20, 18 S.E. 77 (1893); *Wrought Iron Range Co. v. Carver*, 118 N.C. 328, 24 S.E. 352 (1896).

§ 1-404. Reports of commissioners and jurors.

Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within 20 days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within 10 days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (1893, c. 209; Rev., s. 723; C.S., s. 763; 1945, c. 778.)

CASE NOTES

The provisions of this section are not applicable to a condemnation proceeding, because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated. *Collins v. North Carolina State Hwy. & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953).

The notice provision of this section does not apply to the commissioners' report, but to the clerk's confirmation order, which should be confirmed as a matter of law if exceptions are not filed in apt time. *Macon v. Edinger*, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 274, 278 S.E.2d 256 (1981).

Confirmation Ordinarily Discretionary with Court. — The confirmation by the court, if no timely exception is filed to the report, lies within the discretion of the court. *Ex Parte Garrett*, 174 N.C. 343, 93 S.E. 838 (1917).

But in partition proceedings it is obligatory for the court to confirm the same. *Ex parte Garrett*, 174 N.C. 343, 93 S.E. 838 (1917).

Appealability of Proceedings to Sell Land to Pay Debts of Decedent.

— A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the

clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N.C. 445, 102 S.E. 772 (1920).

Jurisdiction of Judge on Appeal. —

The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person sold them several times under resales ordered by the clerk of the superior court, and that the clerk granted the purchaser's motion to confirm the sale after the lapse of more than 20 days from the last sale, without an advance bid until after the expiration of that time, did not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties required it. *Perry v. Perry*, 179 N.C. 445, 102 S.W. 772 (1920).

Power of Clerk. — The clerk has no power to confirm a sale reported by a commissioner until the expiration of 20 (now 10) days from the date on which the report was filed. *Vance v. Vance*, 203 N.C. 667, 166 S.E. 901 (1932).

Applied in *County of Buncombe v. Arbogast*, 205 N.C. 745, 172 S.E. 364 (1934).

§ 1-405. No report set aside for trivial defect.

No report or return made by an commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (1868-9, c. 93, s. 7; Code, s. 289; Rev., s. 724; C.S., s. 764.)

CASE NOTES

Report Conclusive until Set Aside.

— The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. *Norfolk S.R.R. v. Ely*, 101 N.C. 8, 7 S.E. 476 (1888).

Description of Land Unnecessary.

— A report of the commissioners is not invalid because it does not contain a description. *Hanes v. North Carolina R.R.*, 109 N.C. 490, 13 S.E. 896 (1891).

Nor is it mandatory that such report be under seal. *Hanes v. North*

Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

Partition Report Set Aside.

— Where commissioners' report in a partition proceeding failed to state affirmatively that the allotments in their opinion were equal in value, this omission affected the substantial rights of the parties, and the clerk or judge could set aside the report with directions, either that the commissioners make a reallocation or that others be appointed to do so. *Skinner v. Carter*, 108 N.C. 106, 12 S.E. 908 (1891).

§ 1-406. Commissioner of sale to account in sixty days.

In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within 60 days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceedings before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (1901, c. 614, ss. 1, 2; Rev., s. 725; C.S., s. 765; 1933, c. 98.)

CASE NOTES

Applied in *Peal v. Martin*, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.

Whenever in any cause of special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale, and the proceeds of such sale are held by a commissioner or other officer designated by the court to receive such money for purposes of reinvestment, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling and reinvestment of said funds and for the faithful and final accounting of the same to the parties interested. (1919, c. 259; C.S., s. 766; 1935, c. 45; 1957, c. 80.)

Local Modification. — Duplin: 1935, c. 45.

CASE NOTES

Where the court decrees a sale of trust property for reinvestment, the trustee should be required to give bond, or other legal provision should be made to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

Where an order is made for the sale of timber growing upon lands affected with contingent interests,

the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc.; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N.C. 423, 117 S.E. 386 (1923). See also, *Poole & Blue, Inc. v. Thompson*, 183 N.C. 588, 112 S.E. 323 (1922).

Applied in *Wachovia Bank & Trust Co. v. Johnson*, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 1-407.1. Bond required to protect interest of infant or incompetent.

In the case of any sale of real estate, the court may, in its discretion, require a good and sufficient bond to protect the interests of any infant or incompetent. (1957, c. 80.)

§ 1-407.2. When court may waive bond; premium paid from fund protected.

The court, in its discretion, may waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1957, c. 80.)

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree or judgment, which fee shall be taxed as part of the costs in such action or proceeding, and any dissatisfied party shall have the right to appeal to the judge, who shall hear the same de novo. (1923, c. 66; s. 1; C.S., s. 766(a).)

CASE NOTES

This section sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967).

In What Matters Commissioner or Receiver May Seek Redress. — A special commissioner in a chancery cause or a receiver of the court is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands. He cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties. But when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have. *Becker County Sand & Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E.2d 19 (1967).

Right of Commissioner to Review

of Order Fixing Compensation. —

Since the commissioner is an agent of the court and is accountable to it for his actions in connection with the discharge of his duties as commissioner, and since he is entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. *Welch v. Kearns*, 259 N.C. 367, 130 S.E.2d 634 (1963).

Effect of Former § 28-170. — Former § 28-170 did not divest the clerk of the superior court of the powers and duties expressly committed to him by this section with respect to the fees of commissioners appointed for the sale of land as provided therein. *Welch v. Kearns*, 259 N.C. 367, 130 S.E.2d 634 (1963).

Applied in *Welch v. Kearns*, 261 N.C. 171, 134 S.E.2d 155 (1964).

OPINIONS OF ATTORNEY GENERAL

As to allowance of commissioners' fee by clerk of superior court, see opinion of Attorney General to Mr. Jacob

C. Taylor, Clerk of Superior Court, Halifax, N.C., January 6, 1970.

§ 1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.

In all civil actions and special proceedings instituted in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if, in his opinion, all parties to the action or proceedings

will benefit thereby, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for his services, which fee, along with other costs of the survey, shall be taxed as a part of the costs in such action or proceedings. Any dissatisfied party shall have the right to appeal to the judge, who shall hear the same de novo. (1955, c. 373.)

CASE NOTES

Definition of Boundaries in Judicial Sale of Land. — The commissioner appointed by the court to conduct a judicial sale is empowered only to sell the land and distribute the proceeds and has only such powers as may be necessary to execute the decree of the court. He

therefore is not under a duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under this section. *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.

No person may be arrested in a civil action except as prescribed by this Article, but this provision shall not apply to proceedings for contempt. (C.C.P., s. 148; Code, s. 290; Rev., s. 726; C.S., s. 767.)

Cross References. — For constitutional provision prohibiting imprisonment for debt, except in cases of fraud, see N.C. Const., Article I, § 28. As to execution against the person, see

§ 1-311. As to arrest in criminal actions, see § 15A-401 et seq. As to persons taken in arrest and bail proceedings being entitled to insolvent debtor's oath, see § 23-29.

CASE NOTES

The constitutional provision prohibiting imprisonment for debt in this State except for fraud (see now N.C. Const., Art. I, § 28) has no application to actions of tort but is confined to actions arising ex contractu. *Long v. McLean*, 88 N.C. 3 (1883).

The words "except in cases of fraud" are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but also fraud in making the contract, such as false representations, and fraud in increasing the liabilities, such as when an administrator applies the funds of the estate of his own use, paying his own debts, and the like. *Powers v. Davenport*, 101 N.C. 286, 7

S.E. 747 (1888). See also, *Melvin v. Melvin*, 72 N.C. 384 (1875).

Purpose of Section. — In order to avoid a violation of the section of the Constitution prohibiting imprisonment for debt except for fraud (see now N.C. Const., Art. I, § 28) and at the same time to protect debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This was done in this and the following sections. *Preiss v. Cohen*, 117 N.C. 54, 23 S.E. 162 (1895).

Applicability of § 23-13. — Parties arrested and in custody pursuant to the provisions contained in this and the

following sections, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in § 23-13. *Wingo v. Watson*, 98 N.C. 482, 4 S.E. 463 (1887); *Preiss v. Cohen*, 117 N.C. 54, 23 S.E. 162 (1895).

Where a partnership has terminated and all debts have been paid and the partnership affairs have been otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one partner against the other, and if the facts bring the claim within the provisions of this Article on arrest and bail, the plaintiff is entitled to this ancillary remedy. *Ledford v. Emerson*, 140 N.C. 288, 52 S.E. 641 (1905).

Renewal of Motion where Judgment of Nonsuit Reversed. — Where there was a motion for an order of arrest and bail under this section, and a judgment of nonsuit was reversed, the motion could be renewed. *Hensley v. Helvenston*, 189 N.C. 636, 127 S.E. 625 (1925).

For definition of arrest, see *Journey v. Sharpe*, 49 N.C. 165 (1856); *State ex rel. Lawrence v. Buxton*, 102 N.C. 129, 8 S.E. 774 (1889); *Hadley v. Tinnin*, 170 N.C. 84, 86 S.E. 1017 (1915).

Cited in *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937); *Brannon v. Wood*, 239 N.C. 112, 79 S.E.2d 256 (1953); *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E.2d 835 (1963); *Earnhardt v. Earnhardt*, 9 N.C. App. 213, 175 S.E.2d 744 (1970); *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

Cited in *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937); *Brannon v. Wood*, 239 N.C. 112, 79 S.E.2d 256 (1953); *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E.2d 835 (1963); *Earnhardt v. Earnhardt*, 9 N.C. App. 213, 175 S.E.2d 744 (1970); *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 1-410. In what cases arrest allowed.

The defendant may be arrested, as hereinafter prescribed, in the following cases:

- (1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for willful, wanton, or malicious injury to person or character or for willfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.
- (2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.
- (3) In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.
- (4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.
- (5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P.R.; R.C., c. 31, s. 54; C.C.P., s. 149; 1869-70, c. 79;

Code, s. 291; 1891, c. 541; Rev., s. 737; C.S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1153, s. 6; c. 1153, s. 4.)

Cross References. — For constitutional provision prohibiting imprisonment for debt, except in cases of fraud, see N.C. Const., Article I, § 28. As to execution against the person, see

§ 1-311.

Legal Periodicals. — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Purpose of Section. — This section is plain and very comprehensive in its terms and purpose. It is intended to embrace all cases where the relation of trust and confidence in respect to money received by or personal property in the possession of one party for the benefit of another is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. *Chemical Co. v. Johnson*, 98 N.C. 123, 3 S.E. 723 (1887); *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888); *Travers v. Deaton*, 107 N.C. 500, 12 S.E. 373 (1890); *Boykin, Carmer & Co. v. W.J. Maddrey & Son*, 114 N.C. 89, 19 S.E. 106 (1894).

Remedy of Arrest and Bail. — The section gives to a plaintiff whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty the remedy of arrest and bail, so that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness. And it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. *Boykin, Carmer & Co. v. W.J. Maddrey & Son*, 114 N.C. 89, 19 S.E. 106 (1894).

Effect on Right to Execution against Person. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under this section, the complaint or affidavit must allege such facts as would have justified an order for such arrest. *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967).

Execution against Person for Cause Specified in Subdivision (1).

— Where a judgment is rendered against a defendant for a cause of action specified in subdivision (1) of this section, § 1-311 authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applicability of § 23-29. — The provisions of § 23-29(2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of this section, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of § 1-311. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Punitive Damages. — For acts under subdivision (1) of this section when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

When Actual Intent Unnecessary for Arrest for "Willful Injury". — For the arrest of a woman under the provisions of this section for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. *Weathers v. Baldwin*, 183 N.C. 276, 111 S.E. 183 (1922).

Mere Negligence Insufficient to Authorize Execution against Person.

— A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and § 1-311, the injury must have

been intentionally or maliciously inflicted, i.e., with some element of violence, fraud or criminality. *Oakley v. Lasater*, 172 N.C. 96, 89 S.E. 1063 (1916).

Necessity of Allegation of Actual Malice in Malpractice Action. — In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N.C. 340, 1 S.E.2d 870 (1939).

Fraud Necessary for Arrest under This Section. — A defendant cannot be arrested under this section unless he has been guilty of fraud in contracting the debt for which the action is brought. *McNeely v. Haynes*, 76 N.C. 122 (1877).

Application of Section to Subsequent Fraud. — A person may be arrested and held to bail for a fraud committed after the contracting of the debt, e.g., by concealing property or other devices for the purpose of defeating his creditor. *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

Act Held to Constitute Fraud. — A party's activities in adding "payment in full" language to a check after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of subdivision (4) of this section and within N.C. Const. Art. I, § 28, the North Carolina constitutional exception permitting imprisonment in case of fraud. *Koury v. Meyer*, 44 N.C. App. 392, 261 S.E.2d 217, cert. denied, 299 N.C. 736, 267 S.E.2d 662 (1980).

Allegation in Complaint of Facts Necessary to Support Provisional Remedy. — In an action for assault and battery, in which the provisional remedy of arrest and bail was invoked, it was appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 230 N.C. 535, 53 S.E.2d 661 (1949).

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. *Durham Fertilizer Co. v. L.M. Little & Co.*, 118 N.C. 808, 24 S.E. 664 (1896).

An agent in an action for money received or property fraudulently misapplied, may be arrested under the provisions of this section. *Gossler v. Wood*, 120 N.C. 69, 27 S.E. 33 (1897).

Wrongful Conversion by Cotenant.

— Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. *Doyle v. Bush*, 171 N.C. 10, 86 S.E. 165 (1915).

Fraudulent Misapplication of Funds. — An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. *Carroll v. Montgomery*, 128 N.C. 278, 38 S.E. 874 (1901).

Where a firm of merchants gave to manufacturers of fertilizer its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof or the notes of farmers given therefor in trust for the manufacturers, a fiduciary relation was established, and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin, Carmer & Co. v. W.J. Maddrey & Son*, 114 N.C. 89, 18 S.E. 106 (1894).

One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. *Durham Fertilizer Co. v. L.M. Little & Co.*, 118 N.C. 808, 24 S.E. 664 (1896).

Libel. — An arrest in an action for libel is not within the provisions of the Constitution prohibiting imprisonment for debt. *Moore v. Green*, 73 N.C. 394 (1875).

Seduction. — The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. *Hoover v. Palmer*, 80 N.C. 313 (1879). See also, *Kinney v. Laughenour*, 97 N.C. 325, 2 S.E. 43 (1887); *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892).

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892).

Alienation of Affections. — This section applies to arrest for alienating the affections of a wife. *Edwards v. Sorrell*, 150 N.C. 712, 64 S.E. 898 (1909).

Liability for Acts of Partner. — Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner

with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts for all the purposes of arrest and bail. *Boykin, Carmer & Co. v. W.J. Maddrey & Son*, 114 N.C. 89, 19 S.E. 106 (1894).

One partner cannot be arrested for the fraud of his copartner of which he had no knowledge and in which he is nowise connived. *McNeely v. Haynes*, 76 N.C. 122 (1877); *Boykin, Carmer & Co. v. W.J. Maddrey & Son*, 114 N.C. 89, 19 S.E. 106 (1894).

Fraud Committed in Another State. — The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest under this section. *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

Liability of Nonresident. — A nonresident of this State may be arrested and held to bail for fraud under this section. *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

As to applicability to real estate of the words "removed, or disposed of," see *Durham Fertilizer Co. v. L.M. Little & Co.*, 118 N.C. 808, 24 S.E. 664 (1896).

Arrest Held Impermissible Where No Action Was Pending. — Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause, and it was removed from the docket, no order of arrest was permissible under this section, since there was no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could

authorize a warrant of arrest. *Stewart v. Bryant*, 121 N.C. 46, 28 S.E. 18 (1897).

Nature of Contract Action Not Affected. — Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. *Copeland v. Fowler*, 151 N.C. 353, 66 S.E. 215 (1909).

Arrest on Sunday. — For case holding that there can be no arrest on Sunday, see *White v. Morris*, 107 N.C. 92, 12 S.E. 80 (1890).

Privilege against Self-Incrimination Inapplicable where Remedy under this Section Is Relinquished. — In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of subdivision (1) of this section and to issue an execution against their persons by virtue of the provisions of § 1-311, defendants' claim of privilege against self-incrimination does not apply. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applied in *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E.2d 410 (1958); *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702 (1975).

Cited in *Sneeden v. Harris*, 109 N.C. 349, 13 S.E. 920 (1891); *Howie v. Spittle*, 156 N.C. 180, 72 S.E. 207 (1911); *Michael v. Leach*, 166 N.C. 223, 81 S.E. 760 (1914); *In re Holt*, 1 N.C. App. 108, 160 S.E.2d 90 (1968); *Rouse v. Wheeler*, 17 N.C. App. 422, 194 S.E.2d 555 (1973); *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

§ 1-411. Order and affidavit.

An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this Article. (C.C.P., ss. 150, 151; Code, ss. 292, 293; Rev., ss. 728, 729; C.S., s. 769.)

CASE NOTES

An order of arrest under this section is a judicial and not ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. *Bryan v. Stewart*, 123 N.C. 92, 31 S.E. 286 (1898).

From what Court Order of Arrest Must Proceed. The order of arrest must proceed from the court in which the action is brought or from a judge thereof. *H.M. Houston & Co. v. Walsh*, 79 N.C. 35 (1878).

An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. *Tucker v. Davis*, 77 N.C. 330 (1877).

The grounds for arrest are usually set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in § 1-410. *Roulhac v. Brown*, 87 N.C. 1 (1882).

But the cause of arrest may be stated in the complaint; however, the statement must be as explicit as if set forth in an affidavit and properly verified. *Peebles v. Foote*, 83 N.C. 102 (1880).

Positive Statement of Facts Desirable. — The affidavit should state the facts positively, when this can be done. *Peebles v. Foote*, 83 N.C. 102 (1880); *Harriss v. Sneed*, 101 N.C. 273, 7 S.E. 801 (1888).

Grounds of Belief Should Be Stated. — If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. *Peebles v. Foote*, 83 N.C. 102 (1880).

General Rumor Not Enough. — Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce

a reasonable man to believe that the facts existed upon which he based his application. *Tucker v. Wilkins*, 105 N.C. 272, 11 S.E. 575 (1890).

Court Must Be Convinced. — It is not sufficient that the cause of action may exist; this must not be left to conjecture or bare probability. The court must be satisfied from the evidence before it that a cause does exist. *Harriss v. Sneed*, 101 N.C. 273, 7 S.E. 801 (1888).

Sufficiency of Affidavit as Question of Law. — The question of the sufficiency of the affidavit is one of law, addressed to the court alone. *Wood v. Harrell*, 74 N.C. 338 (1876).

Affidavit Held Sufficient. — In an action for arrest and bail, where the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and, upon information and belief, that they had fraudulently removed and disposed of their property, this was sufficient to justify the order of arrest. *Paige v. Price*, 78 N.C. 10 (1878).

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors," this was held to be sufficient. *Hughes v. Person*, 63 N.C. 548 (1869).

Insufficient Affidavit. — An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. *Melvin v. Melvin*, 72 N.C. 384 (1875).

Refusal to allow a second affidavit to be filed is an exercise of discretion, which cannot be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. *Wilson v. Barnhill*, 64 N.C. 121 (1870).

§ 1-412. Undertaking before order.

Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars (\$100.00), with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (C.C.P., s. 152; 1868-9, c. 277, s. 7; Code, s. 294; Rev., s. 730; C.S., s. 770.)

Cross References. — As to giving the bond of a surety company as surety, see § 109-17.

CASE NOTES

Application to Suits in Forma Pauperis. — A plaintiff who is allowed to sue in forma pauperis has no right to an order of arrest, without first filing the undertaking required by this section. *Rowark v. Homesley*, 68 N.C. 91 (1873).

Power to Increase or Diminish Bond. — The trial court has the power to increase or diminish the bond, and an order increasing the bond cannot be questioned unless an abuse of discretion

is shown. *Fayetteville Light & Power Co. v. Lessem Co.*, 174 N.C. 358, 93 S.E. 836 (1917).

Amount of Bond Not Subject to Review. — The discretion of the court in fixing the amount of the bond is not subject to review. *Fayetteville Light & Power Co. v. Lessem Co.*, 174 N.C. 358, 93 S.E. 836 (1917).

Cited in *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E.2d 410 (1958).

§ 1-413. Issuance and form of order.

The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. The order shall include a statement that if the person arrested is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and preliminary release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. (C.C.P., s. 153; Code, s. 295; Rev., s. 731; C.S., s. 771; 1977, c. 649, s. 3.)

Cross References. — As to execution against the person of a debtor after judgment, see § 1-311.

Legal Periodicals. — For survey of 1977 law on civil procedures, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

The words "before judgment," as used in this section, mean "final judgment" upon the matters put in issue by the pleadings. Hence, the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. *H.M. Houston & Co. v. Walsh*, 79 N.C. 35 (1878); *Preiss v. Cohen*, 117 N.C. 54, 23 S.E. 162 (1895).

Exemption of Suitor Attending Court. — The principle of the common

law that a suitor, while going to, remaining at and returning home from court, is exempted from arrest is in force in this State. *Hammerskold v. Rose*, 52 N.C. 629 (1860).

Exemption of Nonresident Attending as Witness. — A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. *Ballinger v. Elliott*, 72 N.C. 596 (1875).

No Exemption of Defendant under Criminal Process. — A defendant who has been brought into court on criminal

process and discharged from arrest under the same on bail is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the courtroom. *Moore v. Green*, 73 N.C. 394 (1875).

The exemption of witnesses and jurors from civil arrest and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy, does not apply to parties arrested in criminal proceeding. *White v. Underwood*, 125 N.C. 25, 34 S.E. 104 (1899).

Service of Process on Prisoner in

Jail. — The sheriff can serve process anywhere in his county. The jail possesses no "privilege of sanctuary" and service of process under a prisoner there is valid. *White v. Underwood*, 125 N.C. 25, 34 S.E. 104 (1899).

Written Warrant Necessary. — For the benefit of the citizen, that he may at all times be able to call upon the officers to produce authority, and to see precisely what it was, the law established the necessity of a written warrant. *Lutterloh v. Powell*, 2 N.C. 395 (1796).

Cited in *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

§ 1-414. Copies of affidavit and order to defendant.

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (C.C.P., s. 154; Code, s. 296; Rev., s. 732; C.S., s. 772.)

§ 1-415. Execution of order.

The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (C.C.P., s. 155; Code, s. 297; Rev., s. 733; C.S., s. 773.)

§ 1-416. Vacation of order for failure to serve.

The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (C.C.P., s. 153; Code, s. 295; Rev., s. 734; C.S., s. 774.)

CASE NOTES

An order of arrest issued after final judgment is illegal and void. *H.M.* *Houston & Co. v. Walsh*, 79 N.C. 35 (1878).

§ 1-417. Motion to vacate order; jury trial.

A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (C.C.P., s. 174; Code, s. 316; 1889, c. 497; Rev., s. 735; C.S., s. 775.)

CASE NOTES

Construction of Section Together.

— This section and §§ 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in § 23-29 et seq. are in addition to those given in this section and § 1-419. *Edward v. Sorrell*, 150 N.C. 712, 64 S.E. 898 (1909).

Surety on bail has no standing to object to the arrest or summary judgment against the defendant. *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Motion to Vacate Must Be Made before Judgment. — A motion to vacate the order of arrest can only be made before judgment. And where such a motion has been once refused, and no appeal is taken, the matter is res adjudicata and a similar motion will not be entertained. *Roulhac v. Brown*, 87 N.C. 1 (1882).

Where Motion May Be Heard. — A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893). See also, *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

Clerk May Hear Motion. — It is perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge. *Roulhac v. Brown*, 87 N.C. 1 (1882).

But Party May Elect to Apply to Judge. — As the clerk might be dilatory in acting, the party has his election to proceed more summarily by applying in the first instance to the judge. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893).

New Matter Not to Be Considered. — The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding was instituted, and not upon new matter which may have afterwards transpired. *Wm. Devries & Co. v. Summit*, 86 N.C. 126 (1882).

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised. *Wingo v.*

Watson, 98 N.C. 482, 4 S.E. 463 (1887).

Remand for Jury Trial. — If the defendant demanded the jury trial permitted by this section, the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893).

Irregular or False Order Will Be Vacated. — An order of arrest will be vacated by a judge without any undertaking by the defendant if on its face it appears to have been issued irregularly or for a cause insufficient in law or false in fact. *Bear v. Cohen*, 65 N.C. 511 (1871).

Vacation of Order Held Erroneous. — Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental affidavit was filed by the plaintiff, which was duly verified, it was held that the judge below erred in vacating the order. *Benedict, Hall & Co. v. Hall*, 76 N.C. 113 (1877).

Rendition of judgment prior to hearing is not reversible error. *Allison v. Maddrey*, 114 N.C. 421, 19 S.E. 646 (1894).

Effect of Prior Acquittal in Another State. — It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

Right to Appeal Order Vacating Order of Arrest. — An order vacating an order of arrest "affect a substantial right claimed," and hence an appeal from such order lies. *Raisin Fertilizer Co. v. Grubbs*, 114 N.C. 470, 19 S.E. 597 (1894).

Effect of Pending Appeal on Order of Arrest. — An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. *Patton v. Gash*, 99 N.C. 280, 6 S.E. 193 (1888).

Finality of Lower Court's Findings of Fact. — In arrest and bail proceedings, where a motion is made by the defendant to vacate the order of arrest and the court finds that the facts are sufficient to sustain the order, the

findings of fact by the court below are final, and will not be reviewed unless it is objected properly that there was no evidence to support them. *Harriss v. Sneed*, 101 N.C. 273, 7 S.E. 801 (1888); *Travers v. Deaton*, 197 N.C. 500, 12 S.E. 373 (1890); *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893).

Where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and cannot be reviewed. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893).

Procuring Reduction of Bail Held to Constitute General Appearance. —

When a consent order authorizing the reduction of bail, as authorized in this section, was signed, defendants invoked the power of the court in their behalf and for their benefit, which constituted a general appearance and waived any defect in connection with the service of process. *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E.2d 835 (1963).

§ 1-418. Counter affidavits by plaintiff.

If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (C.C.P., s. 175; Code, s. 317; Rev., s. 736; C.S., s. 776.)

CASE NOTES

Simple Denial Insufficient. — If the order was properly granted, it ought not to be vacated upon simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. *Harriss v. Sneed*, 101 N.C. 273, 7 S.E. 801 (1888).

Facts Must Be Fully Controverted. — When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should

do so fully and clearly; otherwise, the order of arrest will be continued. *Powers v. Davenport*, 101 N.C. 286, 7 S.E. 747 (1888).

Additional Evidence. — Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs, the plaintiff may produce further evidence. *Harriss v. Sneed*, 101 N.C. 273, 7 S.E. 801 (1888).

§ 1-419. How defendant discharged.

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (C.C.P., s. 156; Code, s. 298; Rev., s. 737; C.S., s. 777.)

CASE NOTES

Applicability of §§ 23-29 through 23-42 to Nonresidents. — Where nonresidents are arrested under the provisions of this Article, they are entitled to the benefit of §§ 23-29 through 23-42,

relating to insolvent debtors, in securing their discharge. *Burgwyn v. Hall*, 108 N.C. 489, 13 S.E. 222 (1891).

Applied in *Fryar v. Gauldin*, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-420. Defendant's undertaking.

The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 157; Code, s. 299; Rev., s. 738; C.S., s. 778.)

Editor's Note. — The reference in this section to "the Article entitled Claim and Delivery" was apparently meant to refer

to Article 36 of this Chapter. See § 1-472 et seq.

CASE NOTES

The word "amenable," as used in this section, means "answerable" or "responsive" to the process of the court having jurisdiction; hence, when execution is issued against the person of the debtor, it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. *Pickelsimer v. Glazener*, 173 N.C. 630, 92 S.E. 700 (1917).

Voluntary Appearance. — The condition of the undertaking that the

defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. *Stepp v. Robinson*, 203 N.C. 803, 167 S.E. 147 (1933).

Applied in *Fryar v. Gauldin*, 259 N.C. 391, 130 S.E.2d 689 (1963).

Cited in *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968).

§ 1-421. Defendant's undertaking delivered to clerk; exception.

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within 10 days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (C.C.P., s. 162; Code, s. 304; Rev., s. 739; C.S., s. 779.)

§ 1-422. Notice of justification; new bail.

On the receipt of notice of exception to the bail, the sheriff or defendant may, within 10 days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court or judge, at a specified time and place; the time to be not less than five nor more than 10 days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C.C.P., s. 163; Code, s. 305; Rev., s. 741; C.S., s. 780; 1971, c. 268, s. 26.)

§ 1-423. Qualifications of bail.

The qualifications of bail must be as follows:

- (1) Each of them must be a resident and freeholder within the State
- (2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (C.C.P., s. 164; Code, s. 306; Rev., s. 740; C.S., s. 781.)

CASE NOTES

Establishment of Facts. — A bail within the State, or his justification bond should show on its face that the should establish these facts. *Howell v. Jones*, 113 N.C. 429, 18 S.E. 672 (1893).
surety is a resident and freeholder

§ 1-424. Justification of bail.

For the purpose of justification, each of the bail shall attend before the court or judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, or judge, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C.C.P., s. 165; Code, s. 307; Rev., s. 742; C.S., s. 782; 1971, c. 268, s. 27.)

§ 1-425. Allowance of bail.

If the court or judge finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C.C.P., s. 166; Code, s. 308; Rev., s. 743; C.S., s. 783; 1971, c. 268, s. 28.)

CASE NOTES

Purpose of Bail. — The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court, and for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. *Pickelsimer v. Glazener*, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-426. Deposit in lieu of bail.

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (C.C.P., s. 167; Code, s. 309; Rev., s. 744; C.S., s. 784.)

§ 1-427. Deposit paid into court; liability on sheriff's bond.

Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (C.C.P., s. 168; Code, s. 310; Rev., s. 745; C.S., s. 785.)

Cross References. — As to payment by sheriff of money collected on execution, see § 162-18.

§ 1-428. Bail substituted for deposit.

If money is deposited, as provided in G.S. 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the court or judge shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C.C.P., s. 169; Code, s. 311; Rev., s. 746; C.S., s. 786; 1971, c. 268, s. 29.)

§ 1-429. Deposit applied to plaintiff's judgment.

When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (C.C.P., s. 170; Code, s. 312; Rev., s. 747; C.S., s. 787.)

§ 1-430. Defendant in jail, sheriff may take bail.

If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R.C., c. 11; s. 8; Code, s. 318; Rev., s. 748; C.S., s. 788.)

§ 1-431. When sheriff liable as bail.

If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (C.C.P., s. 171; Code, s. 313; Rev., s. 749; C.S., s. 789.)

CASE NOTES

Liability of Sheriff as Special Bail.

— A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. *Howell v. Jones*, 113 N.C. 429, 18 S.E. 672 (1893).

Liability for Escape of Prisoner. —

A sheriff who permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to the liability as bail. *Winborne & Bro. v. Mitchell*, 111 N.C. 13, 15 S.E. 882 (1892).

Defendant's Insolvency Imma-

terial. — When the sheriff is sued as bail, he cannot give in evidence, in mitigation of damages, the defendant's insolvency. *Winborne & Bro. v. Mitchell*, 111 N.C. 13, 15 S.E. 882 (1892).

Defective Bond Does Not Satisfy Section. — A paper intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. *Adams v. Jones*, 60 N.C. 198 (1864).

No Right to Rearrest on Finding Bail Insufficient. — After once taking the bail, the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and the defendant in such a case is justified in resisting the arrest. *State v. Brittain*, 25 N.C. 17 (1842); *State v. Queen*, 66 N.C. 615 (1872).

Notice and Exceptions Unnecessary. — If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. *Adams v. Jones*, 60 N.C. 198 (1864).

§ 1-432. Action on sheriff's bond.

If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (C.C.P., s. 172; Code, s. 314; Rev., s. 750; C.S., s. 790.)

§ 1-433. Bail exonerated.

At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (C.C.P., s. 161; Code, s. 303; Rev., s. 751; C.S., s. 791.)

CASE NOTES

Defendant may be legally discharged in several ways, including an order under § 1-417 to vacate the arrest or a decision on the merits, and such discharge exonerates the bail. *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Meaning of "State Prison". — The term "State prison," as used in this section, applies to either the penitentiary or the county jail. *Sedberry v. Carver*, 77

N.C. 319 (1877).

Where the imprisonment of a defendant under this section expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking, such imprisonment did not exonerate the bail. *Adrian v. Scanlin*, 77 N.C. 317 (1877); *Sedberry v. Carver*, 77 N.C. 319 (1877).

As to exoneration of bail during defendant's detention on other

charges, see *State v. Eller*, 218 N.C. 365, 11 S.E.2d 295 (1940). See also, *State v. Welborn*, 205 N.C. 601, 172 S.E. 174 (1934).

Exoneration by Surrender of Principal. — The obligors on the bond, at any time before final judgment against them,

may be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. *Pickelsimer v. Glazener*, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-434. Surrender of defendant.

At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

- (1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.
- (2) Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 158; Code, s. 300; Rev., s. 752; C.S., s. 792.)

Cross References. — As to surrender of defendant when he appears upon motion against the surety, see § 1-436.

As to claim and delivery, see §§ 1-472 through 1-484.

CASE NOTES

Cited in *Pickelsimer v. Glazener*, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-435. Bail may arrest defendant.

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over 21 years of age to do so. (C.C.P., s. 159; Code, s. 301; Rev., s. 753; C.S., s. 793.)

CASE NOTES

Right of Sureties to Arrest Principal. — Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties

under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in per-

son or by agent in this or another state, upon the Sabbath or otherwise, and if necessary, they may break and enter his house for that purpose. *Pickelsimer v.*

Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Stated in *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950).

§ 1-436. Proceedings against bail by motion.

In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on 10 days' notice to them. (C.C.P., s. 160; Code, s. 302; Rev., s. 754; C.S., s. 794.)

CASE NOTES

The surety is liable for any breach of bail bond obligations. *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Grounds for Defense by Surety on Bail. — Surety on bail has no right other than to defend an action on the bond on grounds of legal discharge, death, surrender or imprisonment of the principal. *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Insolvency of the principal is no defense to an action against the bail. *Winborne & Bro. v. Mitchell*, 111 N.C. 13, 15 S.E. 882 (1892).

When Action against Bail Lies. — Where the debtor is released upon bail, the creditor may proceed to judgment and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; and should the latter writ be returned "non est inventus," the plaintiff may move on 10 days' notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error.

Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Motion Must Be Brought within Three Years. — Proceedings against bail, in civil actions, are barred unless commenced within three years after judgment against the principal, notwithstanding the fact that the principal may have left the State in the meantime. *Albemarle Steam Nav. Co. v. Williams*, 111 N.C. 35, 15 S.E. 877 (1892).

Where the defendant appeared in open court in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail for failure to surrender him. *Stepp v. Robinson*, 203 N.C. 803, 167 S.E. 147 (1933).

Surety on bail has no standing to object to arrest or summary judgment against defendant. *Smith v. McClure*, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Applied in *Fryar v. Gauldin*, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-437. Liability of bail to sheriff.

The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (C.C.P., s. 173; Code, s. 315; Rev., s. 755; C.S., s. 795.)

§ 1-438. When bail to pay costs.

When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all

costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (R.C., c. 11, s. 10; Code, s. 319; Rev., s. 756; C.S., s. 796.)

CASE NOTES

Certain Costs Not Allowed. — The costs allowed against bail, notwithstanding a surrender, etc., do not include such as are incurred on account of an improper and ineffectual appeal. *Clark v. Latham*, 53 N.C. 1 (1860).

§ 1-439. Bail not discharged by amendment.

No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (R.C., c. 11, s. 11; Code, s. 320; Rev., s. 757; C.S., s. 797.)

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440: Superseded by Session Laws 1947, c. 693, codified as § 1-440.1 et seq.

§ 1-440.1. Nature of attachment.

(a) 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 property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless personal jurisdiction has been acquired as provided in G.S. 1-75.3.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in G.S. 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Cross References. — As to affidavit for attachment, see § 1-440.11.

Legal Periodicals. — For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Purpose of Article. — This Article protects legitimate interests of creditors in narrowly defined situations where the absence of such a remedy would have substantial, deleterious effects on the creditor himself and the commercial credit system as a whole. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

This Article affords the debtor the most extensive safeguards possible and minimizes both the possibility of a wrongful or arbitrary deprivation of the debtor's property interest and the harm to the debtor as a result of the ex parte issuance of the writ of attachment. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Narrow nature of attachment statute ensures that the creditor's interests advanced or protected by this procedure are legitimate. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Origin of Writ. — Attachment, other than the common-law writ which issued out of the common pleas upon the nonappearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. *Grocery Co. v. Bag Co.*, 142 N.C. 174, 55 S.E. 90 (1906). See also, *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Nature of Writ. — An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. *Marsh v. Williams*, 63 N.C. 371 (1869); *Toms v. Warson*, 66 N.C. 417 (1872).

Function of Writ. — The function of the writ of attachment is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. *Ditmore v. Goins*, 128 N.C. 325, 39 S.E. 61 (1901). See also,

Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Due Process Protection. — Attachment of real property is a substantial deprivation of a significant property interest subject to the protection of the due process clause. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

The writ of attachment differs from the ordinary writ in that the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, all the material facts must be set out in an affidavit, which is made the groundwork of the proceeding. *Webb v. Bowler*, 50 N.C. 362 (1858).

Strict Construction. — Attachment is a statutory remedy which must be strictly construed. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

A party seeking the benefit of the attachment statutes must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intendment. *President & Dirs. v. Hinton*, 12 N.C. 397 (1828); *Skinner v. Moore*, 19 N.C. 138 (1836); *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).

The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms. *President & Dirs. v. Hinton*, 12 N.C. 397 (1828); *Skinner v. Moore*, 19 N.C. 138 (1836); *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).

"There is no law in the Code which more imperiously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect. *President & Dirs. v. Hinton*, 12 N.C. 397 (1828); *Leak v. Moorman*, 61 N.C. 168 (1867).

The provisions of the Code, authorizing the attachment of the property of a nonresident defendant upon constructive service of a summons by publication is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the

United States, and cannot be recognized in a case commenced in a federal court. Even in a state court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. *Lackett v. Rumbaugh*, 45 F. 23 (W.D.N.C. 1891).

Substantial Compliance. — While attachment is a statutory remedy which must be strictly construed, substantial compliance with the statutory requirements will suffice. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. *Grant v. Burgwyn*, 79 N.C. 513 (1878); *Best v. British & Am. Co.*, 128 N.C. 351, 38 S.E. 923 (1901); *Page v. McDonald*, 159 N.C. 38, 74 S.E. 642 (1912).

Proceeding Is Quasi in Rem. — Attachment of the property of nonresident defendants in this State is a

proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the State court for determining the controversy in the action brought against him, when properly constituted. *Mohn v. Cressey*, 193 N.C. 568, 137 S.E. 718 (1927).

Absence of conflicting interests in the attached property does not automatically mandate notice and hearing prior to attachment. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Applied in *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948); *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966); *Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973).

Quoted in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

Cited in *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964); *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978); *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

OPINIONS OF ATTORNEY GENERAL

Notice and Opportunity for Hearing. — *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, rehearing denied, 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 (1972) does not require that a defendant be given notice

and the opportunity for a hearing prior to the issuance by the clerk or judge of an order of attachment pursuant to this section and §§ 1-440.2 and 1-440.14. See opinion of Attorney General to Mr. Clarence Kluttz, 43 N.C.A.G. 168 (1973).

§ 1-440.2. Actions in which attachment may be had.

Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action. (1947, c. 693, s. 1; 1967, c. 1152, s. 4; c. 1153, s. 3.)

Legal Periodicals. — For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Legislative Intent. — The history of legislation as to attachments shows a

legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam. *Tisdale v. Eubanks*, 180 N.C. 153, 104

S.E. 339 (1920); *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921).

As to the history of this section, see *Price v. Cox*, 83 N.C. 261 (1880); *Wilson v. Louis Cook Mfg. Co.*, 88 N.C. 5 (1883); *Mullen v. Norfolk & Carolina Canal Co.*, 114 N.C. 8, 19 S.E. 106, rehearing denied, 115 N.C. 15, 20 S.E. 167 (1894); *Worth v. Knickerbocker Trust Co.*, 151 N.C. 191, 65 S.E. 918 (1909).

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. *Alexander v. Taylor*, 62 N.C. 36 (1866).

Slander. — The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and would sustain a proceeding for an attachment within the intent and meaning of

former § 1-440, as an "injury to the person by wrongful act." *Tisdale v. Eubanks*, 180 N.C. 153, 104 S.E. 339 (1920).

Death by Wrongful Act. — The former attachment statute was sufficiently comprehensive to include the action for causing the death of another by wrongful act, neglect or default of another. *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921).

Applied in *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Quoted in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

Cited in *In re Holt*, 1 N.C. App. 108, 160 S.E.2d 90 (1968); *Koob v. Koob*, 16 N.C. App. 326, 192 S.E.2d 40 (1972); *Elmwood v. Elmwood*, 34 N.C. App. 652, 241 S.E.2d 693 (1977); *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

§ 1-440.3. Grounds for attachment.

In those actions in which attachment may be had under the provisions of G.S. 1-440.2, an order of attachment may be issued when the defendant is

- (1) A nonresident, or
- (2) A foreign corporation, or
- (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
- (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
 - a. Has departed, or is about to depart, from the State, or
 - b. Keeps himself concealed therein, or
- (5) A person or domestic corporation which, with intent to defraud his or its creditors,
 - a. Has removed, or is about to remove, property from this State, or
 - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Cross References. — As to attachment of goods covered by a negotiable document, see § 25-7-602.

Legal Periodicals. — For comment on jurisdiction based upon attachment, see 16 *Wake Forest L. Rev.* 377 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Impact of this section and § 1-440.11 is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State

court or (2) bring property within the custody of the court which would otherwise be unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Section 1-440.11(a)(2)b, in conjunction

with this section, manifests a statutory procedure in which a prejudgment writ will be issued only in exceptional circumstances on a rigorous showing that such circumstances exist. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Postponement of Notice and Hearing. — Circumstances contemplated in subdivisions (1) through (4) are extraordinary situations, justifying postponement of notice and hearing. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

This section and § 1-440.11 in stating when and under what conditions an order of attachment may be issued manifest a definite procedure for granting the writ, a procedure which does not entail opportunity for prior notice and hearing. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Confinement of remedy is certainly an important, initial step in ensuring against wrongful or abusive use of the process by a creditor. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Subdivision (5) of this section is restricted to circumstances in which creditor is in immediate danger that the debtor will destroy or alienate the property sought to be attached. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Grounds upon which an ancillary writ of attachment is issued must be made to appear by affidavit. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Fraudulent Disposition of Property. — The statute authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of and not to the manner in which the property is acquired. *Howland v. Marshall*, 127 N.C. 427, 37 S.E. 462 (1900).

Fraudulent Intent Unnecessary for Attachment against Nonresident. — An attachment is now made a provisional remedy in the progress of a cause

and can be sued out whenever the defendant is a nonresident, regardless of intent. *Wheeler v. Cobb*, 75 N.C. 21 (1876).

When One Is a Nonresident. — Where a person voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such person is a nonresident of this State for the purpose of an attachment although he may occasionally visit this State, and have the intent to return at some uncertain future time. *Wheeler v. Cobb*, 75 N.C. 21 (1876).

The fact that a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. *Mahoney v. Tyler*, 136 N.C. 40, 48 S.E. 549 (1904).

A person who leaves State for an indefinite time, becomes a nonresident even though such person may intend to return at some time in the future, and his motion made by special appearance to vacate an attachment on the ground of residence will be denied. *Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927).

Domicile is not determinative of the question whether one is a nonresident. — Nor is the cause of the absence, such as severe illness, material if such absence prevents personal service of summons upon him during an indefinite period of time. *Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927).

If upon the levy of an attachment on his property a person promptly returns to this State, and thereby subjects himself to personal service of process, his motion to vacate an attachment on the ground that he is not a nonresident would seem generally to be well sustained. *Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927).

Applied in *Tyndall v. Tyndall*, 270 N.C. 106, 153 S.E.2d 819 (1967); *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199 (4th Cir. 1967); *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E.2d 593 (1965); *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

§ 1-440.4. Property subject to attachment.

All of a defendant's property within this State which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this Article. (1947, c. 693, s. 1.)

Cross References. — As to exemption of earnings, see § 1-362.

Legal Periodicals. — As to attach-

ment of stock in a foreign corporation, see 3 N.C.L. Rev. 103.

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

As to the meaning of "property," see *Worth v. Knickerbocker Trust Co.*, 151 N.C. 191, 65 S.E. 918 (1909).

What Property Is Subject to Attachment. — All property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of the attachment statute, is liable to attachment. *Newberry v. Meadows Fertilizer Co.*, 203 N.C. 330, 166 S.E. 79 (1949).

Only property which is subject to execution is attachable. *Willis v. Anderson*, 188 N.C. 479, 124 S.E. 834 (1924); *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. *Willis v. Anderson*, 188 N.C. 479, 124 S.E. 834 (1924); *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

For case holding that interest in land under a spendthrift trust was not subject to attachment, see *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936).

Defendant's property or choses in action in the hands of third persons may be attached. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

As to liability of cash deposited as security in lieu of bond to attachment, see *White v. Ordille*, 229 N.C. 490, 50 S.E.2d 499 (1948).

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, cannot be subjected

to the payment of the husband's debts in this State by means of an attachment in equity. *McLean v. McPhaul*, 59 N.C. 15 (1860).

As to attachment of stock in foreign and domestic corporations under former statutes, see *Parks-Cramer Co. v. Southern Express Co.*, 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924).

Property Absorbed by Nonresident Corporation. — Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company, the one continuing to do business here was subject to attachment under the provisions of former law, where the cause of action arose here; and, the fact that the certificates of stock were not physically in the jurisdiction of the courts of this State was immaterial. *Parks-Cramer Co. v. Southern Express Co.*, 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924).

Any interest an agent may have by reason of the possession of his principal's property is not subject to attachment. *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

The bare interest of a creditor in his chattel security is not subject to attachment. *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Tax Books of Sheriff Not Liable to Attachment. — Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the

debts thus due him, cannot be attached by a creditor to whom he is indebted. *Davie v. Blackburn*, 117 N.C. 383, 23 S.E. 321 (1895).

Quoted in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.

- (a) An order of attachment may be issued by
 - (1) The clerk of the court in which the action has been, or is being, commenced, or by
 - (2) A judge of the appropriate trial division, as authorized in subsection (b) of this section.
- (b) An order of attachment issued by a judge may be issued as follows:
 - (1) If the action has been or is being commenced in the Superior Court Division, a resident superior court judge of the district, or a judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, in session or in vacation, and within or without the district. Any other judge holding a session of superior court in the county may issue the order in open court.
 - (2) If the action has been or is being commenced in the District Court Division, the presiding judge, the chief district judge, or any district judge authorized by the chief to hear motions and enter interlocutory orders may issue the order in open court or in chambers in session or in vacation.
- (c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by G.S. 1-440.10 and the affidavit required by G.S. 1-440.11 to be filed promptly with the clerk of the court of the county in which the action is pending. (1947, c. 693, s. 1; 1971, c. 268, s. 30.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Constitutionality. — This section complies with procedural due process as required by the federal constitution. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Issuance of attachment by clerk is consistent with due process. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

The issuance of the attachment order by the clerk is consistent with due process since the clerk is a judicial officer and not a mere administrative functionary. *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267, cert. denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

The clerk only acts ministerially in issuing the process for attachment. *Evans v. Etheridge*, 96 N.C. 42, 1 S.E. 633 (1887).

Power of Clerk to Issue Warrant when He Is Plaintiff. — A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Evans v. Etheridge*, 96 N.C. 42, 1 S.E. 633 (1887).

Issuance of Blank Forms Prohibited. — When an attachment form in blank, including a form for the affidavit, had been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give sufficient bond, the writ and the

levy thereunder were both void, though subsequently approved by the clerk. *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).

Appeal from Clerk's Decision. — From the decision of the clerk in

granting a warrant of attachment an appeal lies to the judge. *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889); *Howland v. Marshall*, 127 N.C. 427, 37 S.E. 462 (1900).

§ 1-440.6. Time of issuance with reference to summons or service by publication.

(a) The order of attachment may be issued at the time the summons is issued or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

§ 1-440.7. Time within which service of summons or service by publication must be had.

(a) When an order of attachment is issued before the summons is served.

(1) If personal service within the State is to be had, such personal service must be had within 30 days after the issuance of the order of attachment;

(2) If such personal service within the State is not to be had,
a. Service of the summons outside the State, in the manner provided by Rule 4(j)(9)a or b of the Rules of Civil Procedure, must be had within 30 days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4(j)(9)c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of G.S. 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1; 1967, c. 954, s. 3; 1971, c. 1093, ss. 14, 15.)

Editor's Note. — The references in this section to paragraphs of subdivision (j)(9) of Rule 4 of the Rules of Civil Procedure were intended to refer to Rule 4 as it read prior to more recent amendments. As to manner of service to exercise

personal jurisdiction, see now subdivision (j) of Rule 4. As to service by publication on a party that cannot otherwise be served, see subdivision (j1) of Rule 4. As to service in a foreign country, see subdivision (j3) of Rule 4.

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior similar provisions.

Main Action Commenced by Summons. — The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. *Lackett v. Rumbaugh*, 45 F. 23 (W.D.N.C. 1891).

Proceedings when Notice Not Duly Served. — Under the former statute it was held that if the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, because it was possible that the defect might be cured by amendments. *Branch v. Frank*, 81 N.C. 180 (1879); *Mills v. Hansel*, 168 N.C. 651, 85 S.E. 17 (1915).

The remedy was not to dismiss the attachment, but to order a republication, for, as the defendant was a nonresident, to dismiss the attachment might deprive the plaintiff of all remedy by the removal

of the property before a new proceeding and attachment could be had. *Price v. Cox*, 83 N.C. 261 (1880); *Penniman v. Daniel*, 90 N.C. 154 (1884); *Penniman v. Daniel*, 93 N.C. 332 (1885); *Mills v. Hansel*, 168 N.C. 651, 85 S.E. 17 (1915).

Failure to Commence Service by Publication within Thirty-One Days.

— A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within 31 days after the issuance of the order of attachment. *Accident Indem. Ins. Co. v. Johnson*, 261 N.C. 778, 136 S.E.2d 95 (1964).

The court has a right to extend the time for service by publication. *Finch v. Slater*, 152 N.C. 155, 67 S.E. 264 (1910); *Mills v. Hansel*, 168 N.C. 651, 85 S.E. 17 (1915); *Thrush v. Thrush*, 246 N.C. 114, 97 S.E.2d 472 (1957).

Applied in *S.D. Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E.2d 219 (1949); *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Cited in *Bright v. Williams*, 245 N.C. 648, 97 S.E.2d 247 (1957).

§ 1-440.8. General provisions relative to bonds.

(a) Any bond given pursuant to the provisions of this Article shall be executed by the party required to furnish the bond and by

- (1) A surety company authorized to do business in this State, as provided by G.S. 109-17, or by
- (2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the State and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this Article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this Article that

- (1) The court had no jurisdiction to require or accept bond, or
- (2) The order of attachment was improperly granted, or
- (3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

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

The court of proper jurisdiction, before which any matter is pending under the provisions of this Article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

CASE NOTES

Court Has Authority to Dissolve Attachment after Order Not Carried Out. — This Article does not specifically authorize the court to dissolve or dismiss an attachment when a plaintiff fails to carry out the court's order to increase the bond, but pursuant to the general authorization of this section to fix all procedural details not specified elsewhere,

and in aid of its own jurisdiction over the matter, the court has authority to dissolve an attachment after the court's lawful order has not been carried out. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Applied in *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

- (1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars (\$200.00);
- (2) The condition of the bond shall be that
 - a. If the order of attachment is dissolved, dismissed or set aside by the court, or
 - b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

Cross References. As to recovery on bond, see § 1-440.45.

Legal Periodicals. — For article

discussing the requirement of security as a pre-condition to provisional injunctive relief, see 52 N.C.L. Rev. 1091 (1974).

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior similar provisions.

A judge of the superior court has authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a second order when plaintiffs failed to post additional bond within the time fixed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Plaintiffs' Note Entitled to Jury Trial on Question of Increasing Bond. — Plaintiffs in attachment were

not entitled to a jury trial on the question of increasing the bond required by this section, the size of a plaintiff's bond not being within the "issues" envisioned by § 1-440.36(c). *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Effect of Mistake in Signing Undertaking. — Under the former attachment statute it was held that where, by mistake, the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, this was a valid and binding undertaking. *Boger v. Cedar Cove Lumber Co.*, 165 N.C. 557, 81 S.E. 784 (1914).

For case holding bond sufficient,
see *Bryan v. The Steamer Enter.*, 53 N.C.
260 (1860).

§ 1-440.11. Affidavit for attachment; amendment.

(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

- a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,
- b. The nature of such action, and
- c. The ground or grounds for attachment (one or more of those stated in G.S. 1-440.3); and

(2) In those cases described below, the additional facts indicated:

- a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;
- b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

Cross References. — As to order of attachment, see § 1-440.12.

CASE NOTES

- I. In General.
- II. Form and Sufficiency of Affidavit.
- III. Amendment.

I. IN GENERAL.

Editor's Note. — Most of the cases cited below were decided under prior similar provisions.

Impact of this section and § 1-440.3 is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State court or (2) bring property within the custody of the court which would otherwise be

unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Strict Construction. — The provisions of former § 1-441, relating to the same subject matter as this section, were to be strictly followed. *Leak v. Moorman*, 61 N.C. 168 (1867); *Spiers v. Halstead*, *Haines & Co.*, 71 N.C. 209 (1874); *Wheeler v. Cobb*, 75 N.C. 21 (1876).

Applied in *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in *Coor Farm Supply Serv., Inc. v. Thompson*, 35 N.C. App. 406, 241 S.E.2d 364 (1978).

II. FORM AND SUFFICIENCY OF AFFIDAVIT.

Affidavit Necessary. — In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance. *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).

The affidavit to procure an attachment must be specific and must set forth one of the grounds recited in the statute. *Bacon v. Johnson*, 110 N.C. 114, 14 S.E. 508 (1892); *Mullen v. Norfolk & Carolina Canal Co.*, 114 N.C. 8, 19 S.E. 106, rehearing denied, 115 N.C. 15, 20 S.E. 167 (1894).

Grounds of Belief Must Be Stated. — Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. *Penniman v. Daniel*, 90 N.C. 154 (1884).

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. *Hughes v. Person*, 63 N.C. 548 (1869); *Gashine, Emory & Co. v. Baer*, 64 N.C. 108 (1870); *Clark v. Clark*, 64 N.C. 150 (1870); *Penniman v. Daniel*, 90 N.C. 154 (1884); *Judd v. Crawford Gold Mining Co.*, 120 N.C. 397, 27 S.E. 81 (1897); *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

It is generally held that an affidavit made on belief as to the ground of attachment must give the sources of information and recite positive facts reasonably supporting the belief. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Attachment against resident defendants must be based on an affidavit setting forth the facts and circumstances supporting allegations that they have done or are about to do any act with intent to defraud their creditors. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

And if grounds are not stated the affidavit is fatally defective. First Nat'l Bank v. Tarboro Cotton Factory, 179 N.C. 203, 102 S.E. 195 (1920).

Failure to set forth supporting facts and circumstances in a definite and distinct manner causes the attachment affidavit to be fatally defective. *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Jurisdiction of Court Need Not Be Specifically Alleged. — Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. *Bacon v. Johnson*, 110 N.C. 114, 14 S.E. 508 (1892); *Page v. McDonald*, 159 N.C. 38, 74 S.E. 642 (1912); *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270 (1920); *County Sav. Bank v. Tolbert*, 192 N.C. 126, 133 S.E. 558 (1926).

Nor That Defendant Has Property in This State. — It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this state. *Branch v. Frank*, 81 N.C. 180 (1879); *Parks v. Adams*, 113 N.C. 473, 18 S.E. 665 (1893); *Foushee v. Owen*, 122 N.C. 360, 29 S.E. 770 (1898), overruling *Spiers v. Halstead, Haines & Co.*, 71 N.C. 209 (1874) and *Windley v. Bradway*, 77 N.C. 333 (1877).

An affidavit made by an agent need not state why it is not made by the principal. *Bruff, Faulkner & Co. v. Stern & Bro.*, 81 N.C. 183 (1879); *Sheldon v. Kivett*, 110 N.C. 408, 14 S.E. 970 (1892).

Examples of Sufficient Affidavits. — Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. *Page v. McDonald*, 159 N.C. 38, 74 S.E. 642 (1912).

An affidavit for an attachment was sufficient which stated that the defendant was a nonresident and had property in this State, or had removed, or was about to remove some of his property

from this State with intent to defraud his creditors. The statute put the modes in the alternative, and the plaintiff would succeed if he established either. *Penniman v. Daniel*, 90 N.C. 154 (1884).

In proceedings for attachment an affidavit is sufficient which sets out: (1) that the defendant is indebted; and (2) that the defendant has departed from this State with intent, as the affiant is informed and believes, to avoid the service of summons. *Hess, Rogers & Co. v. Brower*, 76 N.C. 428 (1877).

Examples of Defective Statement.

— An affidavit for a warrant of attachment, under former § 1-441, which stated "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," was fatally defective. *W.P. Love & Co. v. Young*, 69 N.C. 65 (1873).

The affidavit, upon which a warrant of attachment has been issued, which alleges that the defendant is about to assign, dispose of and secrete money or goods with intent to defraud creditors, without setting forth the grounds upon which this belief is based, is fatally defective. *First Nat'l Bank v. Tarboro Cotton Factory*, 179 N.C. 203, 102 S.E. 195 (1920).

Remedy When Affidavit Defective.

— A plea in abatement was held to be the proper mode of taking advantage of a defect in the affidavit for an attachment. *Leak v. Moorman*, 61 N.C. 168 (1867).

III. AMENDMENT.

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. *Thrush v. Thrush*, 246 N.C. 114, 97 S.E.2d 472 (1957).

An affidavit can be amended by permission of the court, granted in its

discretion, even though the first affidavit was wholly insufficient. *Brown, Daniel & Co. v. Hawkins*, 65 N.C. 645 (1871); *Branch v. Frank*, 81 N.C. 180 (1879); *Bank of New Hanover v. Blossom*, 92 N.C. 695 (1885); *Penniman v. Daniel*, 93 N.C. 332 (1885); *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889); *Sheldon v. Kivett*, 110 N.C. 408, 14 S.E. 970 (1892).

A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. *Palmer v. Boshier*, 71 N.C. 291 (1874).

Findings of Court May Have Effect of Amendment. — An affidavit on attachment defective in failing to set forth the requisite facts may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, such findings have the effect of an amendment allowed by him. *Thornburg v. Burton*, 197 N.C. 193, 148 S.E. 28 (1929).

When Clerk Denies Amendment. — Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal. *Cushing v. Styron*, 104 N.C. 338, 10 S.E. 258 (1889).

Relation Back of Amendment. — An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. *Cook v. New York Corundum Co.*, 114 N.C. 617, 19 S.E. 664 (1894).

From the leave to amend the affidavit no appeal lies. *Lippard v. Roseman*, 72 N.C. 427 (1875); *Henry v. Cannon*, 86 N.C. 24 (1882); *Wiggins v. McCoy*, 87 N.C. 499 (1882); *Jarrett v. Gibbs*, 107 N.C. 303, 12 S.E. 272 (1890); *Sheldon v. Kivett*, 110 N.C. 408, 14 S.E. 970 (1892); *Cook v. New York Corundum Co.*, 114 N.C. 617, 19 S.E. 664 (1894).

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

(a) If the matters required by G.S. 1-440.11(a) are shown by affidavit to the satisfaction of the court and if the bond required by G.S. 1-440.10 is furnished, the court shall issue an order of attachment which shall

- (1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;
- (2) Run in the name of the State and be directed to the sheriff of a designated county;

- (3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;
 - (4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;
 - (5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;
 - (6) Show the date of issuance; and
 - (7) Be signed by clerk or the judge issuing the order.
- (b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by G.S. 1-440.16. (1947, c. 693, s. 1.)

Cross References. — As to bond for attachment, see § 1-440.10. As to affidavit for attachment, see § 1-440.11.

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under prior similar provisions.

As to whom warrant was to be issued under former statute, see *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).

An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. *Temple v. Eades Hay Co.*, 184 N.C. 239, 114 S.E. 162 (1922).

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, would not be dismissed for want of form because directed "to any constable or other lawful

officer to execute and return within 30 days (Sundays excepted)," when it appeared that it was executed by the sheriff. *Askew v. Stevenson*, 61 N.C. 288 (1867).

When Sheriff Is Defendant. — The words of former § 1-447, requiring that the warrant should direct the sheriff to attach "all the property of the defendant" did not, when the sheriff was the defendant, include his tax books showing debts due to him for taxes. *Davie v. Blackburn*, 117 N.C. 383, 23 S.E. 321 (1895).

A clerk's ex parte order of attachment was properly issued under this section if plaintiff's verified complaint and bond for attachment met the requirements of § 1-440.11 and § 1-440.10 respectively. *Armstrong v. Aetna Ins. Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959).

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

(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, at the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

§ 1-440.14. Notice of issuance of order of attachment when no personal service.

(a) When service of process by publication is made subsequent to the original order of attachment, the published and mailed notice of service of process shall include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after publication is begun, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within 30 days after the issuance of the order of attachment. Such notice shall show

- (1) The county and the court in which the action is pending,
- (2) The names of the parties,
- (3) The purpose of the action, and
- (4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

- (1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or
- (2) Shall be posted at the courthouse door in the county for 30 days. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Statement of Amount. — Under former § 1-448, which provided that when the summons in an attachment suit was to be served by publication, the publication should state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims were fatally defective. *Flint v. Coffin*, 176 F. 872 (4th Cir. 1910), cert. denied, 217 U.S. 602, 30 S. Ct. 693, 54 L. Ed. 898, 219 U.S. 589, 31 S. Ct. 472, 55 L. Ed. 2d 348 (1911).

In attachment the plaintiff cannot recover an amount in excess of that stated in the summons. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

Defendant's Bond as Waiver of Service of Summons. — Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by former § 1-457 was considered equivalent to a personal appearance on the action and a waiver of the requirement for further service of the summons. It amounted to a voluntary submission of the defendant's cause to the jurisdiction of the court. *Mitchell v. Elizabeth City Lumber Co.*, 169 N.C. 397, 86 S.E. 343 (1915).

Late Filing of Newspaper's Affidavit. — After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. *Ward v. Kolman Mfg.*

Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Omission of Notice in Order of Publication. — Where notice of the attachment was omitted from the order of publication, but in the published notice the defendant was informed that an attachment had been issued against his property, it was held under the

former statute that the court had power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Bank of New Hanover v. Blossom*, 92 N.C. 695 (1885).

Applied in *S.D. Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E.2d 219 (1949).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.

(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

- (1) The levy on real property shall be made as provided by G.S. 1-440.17;
- (2) The levy on stock in a corporation shall be made as provided by G.S. 1-440.19;
- (3) The levy on goods stored in a warehouse shall be made as provided by G.S. 1-440.20;
- (4) The levy on tangible personal property in the possession of the defendant shall, except as provided in G.S. 1-440.19, be made as provided by G.S. 1-440.18;
- (5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant, shall, except as provided by G.S. 1-440.19 and 1-440.20, be made as provided by G.S. 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by G.S. 1-440.25. (1947, c. 693, s. 1.)

CASE NOTES

Levy Made under Original Order 41 Days after Issuance Is Invalid. — Where the sheriff's levy was under the original order for attachment and was 41 days after its issuance, it was insufficient

to constitute a valid levy, and there was no error in the entry of the order to vacate it. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

§ 1-440.16. Sheriff's return.

(a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by G.S. 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within 10 days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

CASE NOTES

Levy under an order of attachment must be made within 10 days of the issuance of the order. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Late Filing of Return. — After the court acquires control of a debt by the garnishment order, objections that the

affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. *Ward v. Kolman Mfg. Co.*, 267 N.C. 131, 148 S.E.2d 27 (1966).

§ 1-440.17. Levy on real property.

(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

- (1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and
- (2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall docket the levy, as provided by G.S. 1-440.33. (1947, c. 693, s. 1.)

CASE NOTES

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. *Voehringer v.*

Pollock, 224 N.C. 409, 30 S.E.2d 374 (1944), decided under former law.

Sufficiency of Description. — A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. *Grier v. Rhyne*, 67 N.C. 338 (1872), decided under former law.

§ 1-440.18. Levy on tangible personal property in defendant's possession.

The sheriff shall levy on tangible personal property in the possession of the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.

(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

(1) When the certificate is in the possession of the defendant, and

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in G.S. 1-440.26,

(1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

a. Such certificate has been surrendered to the corporation which issued it, or

b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

CASE NOTES

As to attachment of stock owned by one foreign corporation in another foreign corporation under superseded § 1-459, see Parks-Cramer Co. v. South-

ern Express Co., 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924), decided under former law.

§ 1-440.20. Levy on goods in warehouses.

(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in G.S. 1-440.26,

(1) If a negotiable warehouse receipt has not been issued with respect thereto, or

(2) If a negotiable warehouse receipt has been issued with respect thereto, and

a. Such receipt is seized, or

b. Such receipt is surrendered to the warehouseman who issued it, or

c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

CASE NOTES

Applied in *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966).

§ 1-440.21. Nature of garnishment.

(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

(1) Tangible personal property belonging to the defendant but not in his possession, and

(2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by G.S. 1-440.23 is issued. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Constitutionality. — Former § 1-461 applied alike to residents and nonresidents, persons and corporations, and it would not be declared unconstitutional in an action instituted long subsequent to its enactment. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

Jurisdiction Necessary. — The court entertaining a garnishment must have some jurisdiction over the thing garnished. *Balk v. Harris*, 124 N.C. 467, 32 S.E. 799 (1899).

In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, three things should occur: (1) The corporation who is the garnishee must have such a residence and agency within the State as renders it amenable to the process of the court; (2) The principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (3) It must appear that the situs of the debt is in this State. *Ward v. Kolman Mfg. Co.*, 267 N.C. 131, 148 S.E.2d 27 (1966).

Findings Sufficient to Support Jurisdiction. — Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the

foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warranted the court in denying defendants' motion to dismiss for want of jurisdiction. *Ward v. Kolman Mfg. Co.*, 267 N.C. 131, 148 S.E.2d 27 (1966).

A garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, against the garnishee to recover the debt due to the plaintiff and apply it to the satisfaction of the plaintiff's demand. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

Proper Remedy to Reach Intangibles. — Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment. *Ward v. Kolman Mfg. Co.*, 267 N.C. 131, 148 S.E.2d 27 (1966).

Not Necessary to Bring Separate Action against Garnishee. — A judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. *Baker, Ginsberg & Co. v. Belvin*, 122 N.C. 190, 30 S.E. 337 (1898).

Money Not Yet Due. — Under former § 1-461, money due by a garnishee, or

goods in his hands at the time of appearance and answer, were held applicable to the debt, though not earned and due when he was summoned to answer. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

Exemption of Earnings for Personal Services Allowed. — Section 1-362 provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

But Exemption Must Be Claimed. — When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. *Pocomoke Guano Co. v. Colwell*, 177 N.C. 218, 98 S.E. 535 (1919).

Plaintiff Substituted to Rights of Defendant against Garnishee. — A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

Cross Action against Garnishee Not Permitted. — Defendant in an action on contract is not entitled to file a cross action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. *Kitchen Equip. Co. v. International Erectors, Inc.*, 268 N.C. 127, 150 S.E.2d 29 (1966).

Amounts Due Corporation from Unpaid Stock Subscriptions. — A corporation was held a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. *Cooper v. Adel Sec. Co.*, 122 N.C. 463, 30 S.E. 348 (1898).

Bank May Be Garnishee. — A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. *Markham-Stephens Co. v. E.L. Richmond Co.*, 177 N.C. 364, 99 S.E. 17 (1919).

Where Bank a Mere Stakeholder. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. *Temple v. Eades Hay Co.*, 184 N.C. 239, 114 S.E. 162 (1922).

Quoted in *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E.2d 1 (1974); *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

§ 1-440.22. Issuance of summons to garnishee.

(a) A summons to garnishee may be issued

- (1) At the time of the issuance of the original order of attachment, by the court making such order, or
- (2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

CASE NOTES

Quoted in *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.23. Form of summons to garnishee.

The summons to garnishee shall be substantially in the following form:

State of North Carolina
..... County
.....
Plaintiff,
vs.
.....
Defendant,
and
.....
Garnishee.

In the Superior Court

Summons to Garnishee

To, Garnishee:

You are hereby summoned, as a garnishee of the defendant, . . .
....., and required, within twenty days after the service of this
summons upon you, to file a verified answer in the Office of the
Clerk of the Superior Court of the above named county, at
....., North Carolina, showing —

(1) Whether, at the time of the service of this summons upon
you, or at any time since then until the date of your answer,
you were indebted to the defendant or had any property of
his in your possession and, if so, the amount and nature
thereof; and

(2) Whether, according to your knowledge, information or
belief, any other person is indebted to the defendant or has
any property of the defendant in his possession and, if so,
the name of each such person.

In case of your failure to file such answer a conditional judgment
will be rendered against you for the full amount for which the plain-
tiff has prayed judgment against the defendant, together with such
amount as will be sufficient to cover the plaintiff's costs.

This the day of, 19. ..

.....
(Here designate Clerk Superior
Court or Judge.)

(1947, c. 693, s. 1.)

CASE NOTES

Cited in Carolina Paper Co. v.
Bouchelle, 285 N.C. 56, 203 S.E.2d 1
(1974).

§ 1-440.24. Form of notice of levy in garnishment proceeding.

The notice of levy to be served on the garnishee shall be substan-
tially in the following form:

State of North Carolina

In the Superior Court

..... County

.....,

Plaintiff,

vs.

.....,

Defendant,

and

.....,

Garnishee.

} Notice of Levy

To, Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of County and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the defendant in your possession, and that if you surrender the possession of, or transfer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the day of, 19. ..

.....
Sheriff of County.

(1947, c. 693, s. 1.)

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

The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by G.S. 1-440.26, a copy of each of the following:

- (1) The order of attachment,
- (2) The summons to garnishee, and
- (3) The notice of levy. (1947, c. 693, s. 1.)

CASE NOTES

Implied Agent. — It is of no import that a servee was not expressly designated to be an agent for service of process and thus must be termed an implied agent. While there have been no cases under this section dealing with service of process upon an implied agent, an analogy can be made to § 1A-1, Rule 4(j)(6)a. *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 200 S.E.2d 203 (1973),

aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in this section and § 1-440.26(a), this does not preclude the classification of such an agent within one of the listed categories. *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.

(a) When the garnishee is a domestic corporation, the copies of the process listed in G.S. 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in G.S. 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the State, except that

(1) If the corporation has property within this State, or

(2) If the cause of action arose in this State, or

(3) If the plaintiff resides in this State,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

CASE NOTES

Cases Decided under Former § 1-97(1) Still Pertinent. — Because the language used in former § 1-97(1) was the same as now appears in subsection (a) of this section, cases decided under former § 1-97(1) are still pertinent. *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E.2d 1 (1974).

Purchasing Agent May Be "Managing Agent". — Although a purchasing agent does not conveniently fit, at least by nomenclature, into the listed categories of subsection (a) of this section, a careful analysis of such agent's background and responsibilities may manifest sufficient reason why he should be termed a "managing agent." *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 200 S.E.2d 203 (1973), *aff'd*, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in

§ 1-440.25 and subsection (a) of this section, this does not preclude the classification of such an agent within one of the listed categories. *Carolina Paper Co. v. Bouchelle*, 19 N.C. App. 697, 200 S.E.2d 203 (1973), *aff'd*, 285 N.C. 56, 203 S.E.2d 1 (1974).

Test of Agency. — Where defendant is not the president or the head of the corporation, nor is he secretary, cashier, treasurer, or director, the question then becomes: Is he such an agent, regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.27. Failure of garnishee to appear.

(a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than 10 days after the date of

service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

CASE NOTES

Quoted in *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E.2d 1 (1974).

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

(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavit filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) An amount equal to the value of the property in question, or

- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within 20 days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury. If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if it is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of setoff which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

CASE NOTES

Quoted in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).

§ 1-440.29. Denial of claim by garnishee; issues of fact.

(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

- (1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or
- (2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within 20 days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defen-

dant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) The amount specified in the jury's verdict, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

Where Principal Defendant Denies Ownership. — The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denied ownership of the attached property, could not be injured by the judgment, and hence, was held not entitled, under the former statute, to have an issue submitted as to the title to the property. *Foushee v. Owen*, 122 N.C. 360, 29 S.E. 770 (1898).

Jury Trial. — Under former § 1-463, relating to trial of issues in garnishment

proceedings, the plaintiff in garnishment proceedings, upon the suggestion that he wished to traverse the return of the garnishee, was entitled, without any formal or verified statement, to have the issue tried by a jury. *Brenizer v. Royal Arcanum*, 141 N.C. 409, 53 S.E. 835 (1906).

No Personal Judgment against Nonresident Defendant. — In garnishment proceedings under the former statute against a nonresident defendant, service being had by publication, no jurisdiction was acquired to support a personal judgment against the defendant. *Goodwin v. Claytor*, 137 N.C. 224, 49 S.E. 173 (1904).

§ 1-440.30. Time of jury trial.

All issues arising under G.S. 1-440.28 or G.S. 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ 1-440.31. Payment to defendant by garnishee.

Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ 1-440.32. Execution against garnishee.

(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by G.S. 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

Without Notice or Hearing. — Where judgment has been regularly entered against certain garnishees in proceedings under former § 1-440, the clerk of the superior court could issue execution on the judgment against the garnishees without notice or a hearing under former §§ 1-461 and 1-305. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

Execution may be issued against garnishees prior to final judgment

against defendant, and the property held subject to the orders of the court pending final judgment. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

There was no distinction between an execution on an ordinary judgment issued under § 1-305, and an execution on a judgment against a garnishee issued under former § 1-461. They were both judgments and sections to be construed in *pari materia*. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

Part 4. Relating to Attached Property.

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

(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the *lis pendens* docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by G.S. 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

(1) The lien attaches and relates back to the time of the filing of the notice of *lis pendens* if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the *lis pendens* docket of the county in which the land lies, as provided by subsection (a) of this section.

(2) The lien attaches only from the time of the docketing of the certificate of levy if no entry of the issuance of the order of attachment has been made prior to the levy on the *lis pendens* docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by G.S. 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a gar-

nishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which begin simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, § 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

Lien Enforceable against Subsequent Purchasers. — When the officer had complied with the provisions of former § 1-449, relating to execution, levy and lien of attachments, the plaintiffs had a lien on such property, which was enforceable against all subsequent purchasers from the defendant. *Newberry v. Meadows Fertilizer Co.*, 203 N.C. 330, 166 S.E. 79 (1932).

Debt Owed by City to Principal Defendants. — In attachment proceedings under a former statute an examination of the officials of a city alleged to be indebted to defendants operated as a lien on anything owing by the city to defendants, as of the day when the copy of the warrant of attachment

was delivered; and thereby prevented any alterations of the state of accounts between defendants and the city. *Carmer v. Evers*, 80 N.C. 56 (1879).

Property of Garnishee. — Under former § 1-461, it was held that no lien attached to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. *Newberry v. Meadows Fertilizer Co.*, 203 N.C. 330, 166 S.E. 79 (1932).

Homestead. — The lien of an attachment levied under the former statute upon land of a nonresident debtor was paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. *Watkins v. Overby*, 83 N.C. 165 (1880).

§ 1-440.34. Effect of defendant's death after levy.

(a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

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

The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property. The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

Part 5. Miscellaneous Procedure Pending Final Judgment.

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

(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Remedy in this Section Is Not Exclusive. — When the defendant contests the grounds on which the writ issued, this section provides a ready

means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Section Affords Hearing and Judicial Determination. — In combination with the § 1-440.11 requirement that the facts supporting the allegation of intent to defraud be stated in the affidavit, this section affords a meaningful hearing and judicial determination of the attachment at an early stage. *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Jurisdiction of Judge of Superior Court. — On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court to determine the matter; and consequently the judge is not limited to determining whether or not there was competent evidence to support the findings of the clerk but can consider the evidence de novo and hear evidence not before the clerk. *Hiscox v. Shea*, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

Where jury determined that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Clerk Has Jurisdiction. — The clerk of the superior court has jurisdiction to vacate an attachment. *Palmer v. Boshier*, 71 N.C. 291 (1874).

Motion May Be Made by Any One of Several Defendants. — Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. *Luff v. Levey*, 203 N.C. 783, 166 S.E. 922 (1932).

Failure of Defendant to Move to Vacate. — The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. *Page v. McDonald*, 159 N.C. 38, 74 S.E. 642 (1912).

Attachment Vacated when Defendant Bankrupt. — Bankruptcy of defendant was held to be sufficient ground for vacating an attachment levied upon his property. *Mixer, Whitman & Co. v. Excelsior Oil & Guano Co.*, 65 N.C. 552 (1871); *Ward v. Hargett*, 151 N.C. 365, 66 S.E. 340 (1909).

And Where It Appears from Pleadings That Action Must Fail. — The trial judge may vacate an attachment pending trial where it plainly

appears from the pleadings that the action of the plaintiff must fail. *Knight v. Hatfield*, 129 N.C. 191, 39 S.E. 807 (1901).

It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment. *Branch v. Frank*, 81 N.C. 180 (1879); *Price v. Cox*, 83 N.C. 261 (1880).

Validity of warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. *W.M. Devries & Co. v. Summit*, 86 N.C. 126 (1882).

Court May Find Facts. — In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Lineberger*, 90 N.C. 159 (1884).

An appeal lies from the refusal to dismiss an attachment. *Sheldon v. Kivett*, 110 N.C. 408, 14 S.E. 970 (1892); *Raisin Fertilizer Co. v. Grubbs*, 114 N.C. 470, 19 S.E. 597 (1894); *Judd v. Crawford Gold Mining Co.*, 120 N.C. 397, 27 S.E. 81 (1897).

Appeal Takes Case from Jurisdiction of Court Below. — Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. *Pasour v. Lineberger*, 90 N.C. 159 (1884).

When Facts Upon Which Vacation of Attachment Was Based Must Be Set Out. — The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. *Coharie Lumber Co. v. Buhmann*, 160 N.C. 385, 75 S.E. 1008 (1912).

When Findings of Fact Not Reviewable. — On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of rec-

ord; and any facts found by him, so appearing, are not reviewable. *Coharie Lumber Co. v. Buhmann*, 160 N.C. 385, 75 S.E. 1008 (1912).

The findings of fact of the clerk of the superior court, on a motion to vacate an attachment, supported by the evidence and approved by the judge, are not subject to review. *Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927).

Failure of Judge to Make Findings of Fact. — On appeal to the superior court from an order of the clerk dissolving an attachment, failure of the judge to make findings of fact in his order which vacated and overruled the clerk's order is erroneous. *Hiscox v. Shea*, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

Decision Is Res Judicata. — A decision on a motion to vacate an attachment is res judicata until reversed. *Roulhac v. Brown*, 87 N.C. 1 (1882); *Pasour v.*

Lineberger, 90 N.C. 159 (1884); *Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co.*, 177 N.C. 404, 99 S.E. 104 (1919).

Dissolution of Bond. — Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Applied in *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976); *Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

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

At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

CASE NOTES

Applied in *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

§ 1-440.38. Stay of order dissolving or modifying an order of attachment.

Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

§ 1-440.39. Discharge of attachment upon giving bond.

(a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

(1) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond.

(2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by G.S. 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

By giving bond in the manner provided by former § 1-457, the debtor could procure the release of the attachment. *Bizzell v. Mitchell*, 195 N.C. 484, 142 S.E. 706 (1928).

Bond in Lieu of Attachment Lien. — Where attachment had been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver was permitted by the court to continue operations, the giving of the bond was in lieu

of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by former §§ 1-456 and 1-457. *Martin v. McBryde*, 182 N.C. 175, 108 S.E. 739 (1921).

When Undertaking Unnecessary. — The undertaking required in former § 1-457 was not necessary when the warrant on its face appeared to have been issued irregularly, or for a cause insufficient in law or false in fact. *Bear v. Cohen*, 65 N.C. 511 (1871); *W.M. Devries & Co. v. Summit*, 86 N.C. 126 (1882).

When an attachment on the debtor's property had been vacated by the supe-

rior court judge, the defendant was not required to give the undertaking under former § 1-457 to regain possession of the property. *Coharie Lumber Co. v. Buhmann*, 160 N.C. 385, 75 S.E. 1008 (1912).

Effect of Undertaking as Waiver or Estoppel. — Giving the undertaking under former § 1-457 was equivalent to a general appearance in the action, and waived certain irregularities. It estopped the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment was based. Giving the undertaking did not waive the validity of the statutory ground of attachment. *Bizzell v. Mitchell*, 195 N.C. 484, 142 S.E. 706 (1928).

The filing of bond by a defendant to release his property from an attachment does not bar defendant from challenging the validity of the attachment. *Armstrong v. Aetna Ins. Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959).

Dissolution of Bond. — Defendants were not prevented from challenging the court's *ex parte* findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. *Davenport v. Ralph N. Peters & Co.*, 274 F. Supp. 99 (W.D.N.C. 1966), *rev'd on other grounds*, 386 F.2d 199 (4th Cir. 1967).

Restitution of Property. — Former § 1-456, providing for the restitution of property upon an order dissolving the attachment, did not apply to cases where there had been a sale or transfer of the

property by the defendant to the plaintiff after the levy of the attachment. *Jackson, Oglesby & Co. v. Burnett*, 119 N.C. 195, 25 S.E. 868 (1896).

Notwithstanding the dissolution of an attachment, the plaintiff, who claimed that the property has been transferred to him by the defendant after the levy of the warrant, was entitled to have submitted to the jury an issue as to the ownership of the property. *Jackson, Oglesby & Co. v. Burnett*, 119 N.C. 195, 25 S.E. 868 (1896).

Refusal of Sheriff to Deliver Property. — If the sheriff failed or refused to deliver the property after discharge of the attachment as provided in former § 1-456, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. *Mahoney v. Tyler*, 136 N.C. 40, 48 S.E. 549 (1904).

Discharge of Surety. — When the surety signed a bond under former § 1-457, it was held that he entered into the obligation with reference to the cause as it then stood, so when a new element of liability was introduced by an amendment, the surety was discharged. *Rushing v. Ashcraft*, 211 N.C. 627, 191 S.E. 332 (1937).

Applied in *Hutchison v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975); *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

§ 1-440.40. Defendant's objection to bond or surety.

(a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this Article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

CASE NOTES

A judge of the superior court has authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a special order when plaintiffs failed to post additional bond within the time fixed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

§ 1-440.41. Defendant's remedies not exclusive.

The exercise by the defendant of any one or more rights provided by G.S. 1-440.36 through 1-440.40 does not bar the defendant from exercising any other rights provided by those sections. (1947, c. 693, s. 1.)

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.

(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this Article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order of attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his possession by the sheriff shall be subject to all the provisions of this Article relating to attached property. (1947, c. 693, s. 1.)

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

Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

- (1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

- (2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

For remedies of claimant under prior law, whose property had been attached by a sheriff, under a warrant issued in an action to which he was not a party, see *Stein v. Cozart*, 122 N.C. 280, 30 S.E. 340 (1898); *Martin v. Buffaloe*, 128 N.C. 305, 38 S.E. 902 (1901); *Gay v. Mitchell*, 146 N.C. 509, 60 S.E. 426 (1908); *Tyler v. Mahoney*, 168 N.C. 237, 84 S.E. 362 (1915); *Tatham v. Dehart*, 183 N.C. 657, 112 S.E. 430 (1922); *Flowers v. Spears*, 190 N.C. 747, 130 S.E. 710 (1925).

Where Defendant Held Property as Agent. — Where the evidence tended to show that a defendant held property levied on as agent for another, such third person should be allowed to be made a party. *Farmers' Bank & Trust Co. v. Murphy*, 189 N.C. 479, 127 S.E. 527 (1925).

Separate Trials. — In attachment under the former statute a separate trial for the intervenor was discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

Burden of Proving Title. — In

attachment the burden was on the intervenor to establish title to the property. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

Objection to Irregularity of Attachment Proceedings. — Under the former statute it was held that parties who intervened in attachment proceedings could not be heard to object to the irregularity of the same, that being a matter between the parties to the main action. *Cook v. New York Corundum Co.*, 114 N.C. 617, 19 S.E. 664 (1894).

An intervenor in an action wherein attachment on the defendant's property had been issued, who claimed a prior lien by reason of a former order of court in another and independent proceeding, became party to the action and could not successfully attack the validity of the proceedings in attachment, and the question of priority was left to be determined in the action. *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921).

Under the former statute an intervenor had no right to interfere in the action between the original parties, since he was interested only as to the title to the property. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

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

(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

- (1) If the property is perishable, or
- (2) If the property is not perishable, but
 - a. Will materially deteriorate in value pending litigation, or
 - b. Will likely cost more than one fifth of its value to keep pending a final determination of the action, and
 - c. Is not discharged from the attachment lien in the manner provided by G.S. 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by G.S.

1-440.39, prior to such sale. The proceeds of such sale shall be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

Sale of Third Party's Goods. — Where an attachment was levied upon the goods of a third party which, being perishable, were sold by the sheriff, and the third party interpleaded in the action and recovered judgment, the costs and expenses of the attachment and sale were not properly chargeable against the

fund arising from such sale. *Haywood v. Hardie*, 76 N.C. 384 (1877).

An intervenor obtaining the possession of property attached by giving a replevy bond could not sell part of the property, such sale not being made as provided by superseded § 1-454, similar to this section, and claim the right to pay for the part sold and return the balance thereof. *Bulluck v. Haley*, 198 N.C. 355, 151 S.E. 731 (1930).

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.

(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by G.S. 1-440.7,

- (1) The defendant shall be entitled to have delivered to him
 - a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and
 - b. The proceeds of any sales and all money collected, and
 - c. All attached property remaining in the officer's hands, and

- (2) Any garnishee shall be entitled to have vacated any judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) Upon judgment in his favor in the principal action, the defendant may thereafter, by motion in the cause, recover on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1; 1951, c. 837, s. 8.)

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under prior similar provisions.

When Defendant Prevented from Recovering Garnished Wages. — Where an earlier order garnishing defendant's salary was stricken, defendant could not recover any funds on deposit with the clerk under this section since

first, defendant could not claim to have prevailed in the principal case, the order striking the garnishment order not resolving any action in defendant's favor; second, the order of attachment was not dissolved by the order striking garnishment; and third, defendant could not assert the lack of service upon him for the reason that he failed in his response

to motion for garnishment and counter-motion to raise the defense of lack of proper service. *Sturgill v. Sturgill*, 49 N.C. App. 580, 272 S.E.2d 423 (1980).

Prior to 1947, there was no provision in this Article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Claim on Bond May Not Be Heard at Original Hearing. — Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ of judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

Remedy Is by Motion after Judgment or Subsequent Independent Action. — Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).

When Limitations Begin to Run on Action on Bond. — In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations began to run from the rendition of the judgment and not from the time the property was replevied. The recovery of the judgment in the former action was the condition authorizing the suit, and a vacation of the attachment. *Smith v. American*

Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Misjoinder of Principal and Surety. — An action would not be dismissed for a misjoinder of parties where the plaintiff was suing, in the same action, the principal and surety on an attachment bond given under the former statute. The remedy was by motion to have the causes divided. *Smith v. American Bonding Co.*, 160 N.C. 574, 76 S.E. 481 (1912).

Creditor Not Liable on Bond for Sheriff's Failure. — An attaching creditor under the former statute was not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. *Mahoney v. Tyler*, 136 N.C. 40, 48 S.E. 549 (1904).

Recovery of Expenses Incurred by Defendant in Procuring Bond. — In an action to recover on an attachment bond given under the former statute for the wrongful levy therein, damages might be awarded for the reasonable expense that the plaintiff, who was the defendant in the attachment proceedings, had incurred in procuring the undertaking he had given to obtain the release of the property attached. *Smith v. American Bonding Co.*, 160 N.C. 574, 76 S.E. 481 (1912).

Traveling Expenses and Value of Time. — Damages could not be recovered in an action for a wrongful levy in attachment under the former statute for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. *Smith v. American Bonding Co.*, 160 N.C. 574, 76 S.E. 481 (1912).

Delivery of Property and Proceeds of Sales. — The sales of property mentioned in former § 1-468, requiring delivery of property or proceeds of sale to defendant upon his recovery, referred to those before the attachment was vacated, as for instance sales made under the order of the court when property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. *Mahoney v. Tyler*, 136 N.C. 40, 48 S.E. 549 (1904).

When Defendant May Proceed on Bond. — If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment defendant may, without the necessity of

showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, on the contractual obligations of the attachment plaintiff and his surety

embodied in the bond and the statute under which it is given. *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E.2d 645 (1954); *Godwin v. Vinson*, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.46. When plaintiff prevails in principal action.

If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

- (1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.
 - (2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.
 - (3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by subdivision (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.
 - (4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.
- (b) In order to secure the sale of the remaining debts and evidences of indebtedness as provided in subsection (a)(4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion
- (1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and
 - (2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the pur-

chaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein.

(e) When the judgment and all costs of the proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1; 1951, c. 837, s. 9.)

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under prior similar provisions.

Judgment against Defendant and Surety Proper. — Where the bond signed by the surety was for the benefit of the plaintiff, and the judgment did not exceed the amount of the bond, the trial judge correctly gave judgment against the defendant and the surety. *Beck Distrib. Corp. v. Imported Parts, Inc.*, 10 N.C. App. 737, 179 S.E.2d 793 (1971).

Property Held until Final Judgment. — The first paragraph of former § 1-466, which was similar to the first paragraph of this section, indicated that the property was held until final judgment and the sheriff could collect from a garnishee against whom judgment was entered. *Newberry v. Meadows Fertilizer Co.*, 206 N.C. 182, 173 S.E. 67 (1934).

Property in Possession of Third Party. — Where a person in possession of property was not a party to an attachment suit brought under the former statute, the plaintiff, in addition to a judgment for his debt, was not entitled to a judgment for such property, but must proceed under former § 1-466. *Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co.*, 128 N.C. 199, 38 S.E. 831 (1901).

Judgment against Nonresident. — No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. *Johnson v. Whilden*, 166 N.C. 104, 81 S.E. 1057 (1914), rehearing denied, 171 N.C. 153, 88 S.E. 223 (1916).

Power and Duty of Sheriff. — The attachment is simply a levy before judgment, and upon execution issuing on a judgment it is the duty of the sheriff to sell the attached property. *Gamble v. Rhyne*, 80 N.C. 183 (1879); *Farmers Mfg.*

Co. v. Steinmetz, 133 N.C. 192, 45 S.E. 552 (1903); *Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co.*, 177 N.C. 404, 99 S.E. 104 (1919).

Former § 1-466 gave an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invested him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. *Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co.*, 128 N.C. 199, 38 S.E. 831 (1901); *Chemical Co. v. Sloan*, 136 N.C. 122, 48 S.E. 577 (1904); *May v. Getty*, 140 N.C. 310, 53 S.E. 75 (1905); *Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co.*, 177 N.C. 404, 99 S.E. 104 (1919).

Sale Passes Only Right of Defendant. — A sale under an execution issuing upon a judgment on an attachment only passed the right of the defendant in attachment. *Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co.*, 128 N.C. 199, 38 S.E. 831 (1901).

Surety Concluded from Asserting Insufficiency of Bond. — Where judgment by default final had been rendered against the principal debtor and the surety on an attachment bond given in the action in the form required by former § 1-457 to secure whatever judgment might be rendered, and the property attached had accordingly been retained by the debtor, the surety was concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. *Thompson v. Dillingham*, 183 N.C. 566, 112 S.E. 321 (1922).

Cited in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

Part 7. Attachments in Justice of the Peace Courts.

§§ 1-440.47 to 1-440.56: Repealed by Session Laws 1971, c. 268, s. 34.

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57: Repealed by Session Laws 1971, c. 268, s. 34.

Part 9. Superseded Sections.

§§ 1-441 to 1-471: Superseded by Session Laws 1947, c. 693, codified as §§ 1-440.1 to 1-440.57.

ARTICLE 36.

Claim and Delivery.

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

The plaintiff in an action to recover the possession of personal property may claim the immediate delivery of the property as provided in this Article at any time before the judgment in the principal action. (C.C.P., s. 176; Code, s. 321; Rev., s. 790; C.S., s. 830; 1977, c. 753.)

CASE NOTES

This statutory remedy is adopted from the Code of New York. *Manix v. Howard*, 82 N.C. 125 (1880).

Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. *Jarman v. Ward*, 67 N.C. 32 (1872); *Allsbrook v. Shields*, 67 N.C. 333 (1872); *Hopper v. Miller*, 76 N.C. 402 (1877); *Wilson v. Hughes*, 94 N.C. 182 (1886).

Claim and Delivery Founded on Right to Possession. — Claim and delivery is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right,

and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. *Holmes v. Godwin*, 69 N.C. 467 (1873).

And is a Substitute for Common-Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff; if not, it is a substitute for the action of detinue or trover. *Jarman v. Ward*, 67 N.C. 32 (1872); *Hopper v. Miller*, 76 N.C. 402 (1877).

And is an Ancillary Remedy. — There is but one form of action in civil cases. In that, many ancillary remedies may be asked, i.e., arrest and bail, claim and delivery, injunction, attachment, and appointment of receivers. These need not be asked, even if the party is entitled to them and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. *Deloatch*

v. Coman, 90 N.C. 186 (1884); Morris v. O'Briant, 94 N.C. 72 (1886); Wilson v. Hughes, 94 N.C. 182 (1886); Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

Section Mandatory. — To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in this section and § 1-473. Hirsh v. J.D. Whitehead & Co., 65 N.C. 516 (1871).

Object of Action Is to Recover Specific Property. — The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property cannot be had. Hendley v. McIntyre, 132 N.C. 276, 43 S.E. 824 (1903).

Who May Bring the Action. — One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrongdoer who is depriving him of possession. Hopper v. Miller, 76 N.C. 402 (1877).

The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N.C. 74, 13 S.E. 728 (1891).

One tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners it being required that the claimant show sole ownership. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. State v. Copeland, 86 N.C. 691 (1882); Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889); Rich v. Hobson, 112 N.C. 79, 16 S.E. 931 (1893).

After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor has the right to redeem, until the property is sold, and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who has the possession of his property.

W.C. Kiser & Co. v. Blanton, 123 N.C. 400, 31 S.E. 878 (1898).

An action for the possession of property must be brought against the party in possession. Haughton v. Newberry, 69 N.C. 456 (1873); Webb v. Taylor, 80 N.C. 305 (1879); Moore v. Brady, 125 N.C. 35, 34 S.E. 72 (1899); GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. Webb v. Taylor, 80 N.C. 305 (1879), citing Jones v. Green, 20 N.C. 488 (1839); Charles v. Elliott, 20 N.C. 606 (1839); Slade v. Washburn, 24 N.C. 414 (1842); Foscue v. Eubank, 32 N.C. 424 (1849); Haughton v. Newberry, 69 N.C. 456 (1873).

Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. Pasterfield v. Sawyer, 132 N.C. 258, 43 S.E. 799 (1903).

And action is proper where the crops are removed from the land leased. Livingston v. Farish, 89 N.C. 140 (1883).

Effect of Alteration of Article Claimed. — If a person bestows his labor upon the property of another, thereby changing it into another species of article, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. Potter v. Mardre, 74 N.C. 36 (1876).

Statute of Limitations Applies. — The three-year statute of limitations in § 1-52 is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note no action of claim and delivery could be maintained. Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

Conflicting Evidence Presents Question For Jury. — Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Judgment. — Where claim and delivery is brought to get possession of property for the purpose of selling it,

according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. *Austin v. Secrest*, 91 N.C. 214 (1884).

In claim and delivery the judgment should be for the delivery of the property or its value. *Oil Co. v. Grocery Co.*, 136 N.C. 354, 48 S.E. 781 (1904).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention. — In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property

and damages for its detention. *Bowen v. King*, 146 N.C. 385, 59 S.E. 1044 (1907); *Mica Indus., Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

Action Will Lie against Officer Taking Property under Execution against Third Person. — An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person. *Jones v. Ward*, 77 N.C. 337 (1877); *Churchill v. Lee*, 77 N.C. 341 (1877); *Mitchell v. Sims*, 124 N.C. 411, 32 S.E. 735 (1899); *Mica Indus., Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

Cited in *Rawlings v. Neal*, 126 N.C. 271, 35 S.E. 597 (1900); *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928); *C.I.T. Corp. v. Watkins*, 208 N.C. 448, 181 S.E. 270 (1935).

§ 1-473. Affidavit and requisites.

Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or someone in his behalf, showing —

- (1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.
- (2) That the property is wrongfully detained by the defendant.
- (3) The alleged cause of the detention, according to his best knowledge, information and belief.
- (4) That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,
- (5) The actual value of the property. (C.C.P., s. 177; 1881, c. 134; Code, s. 322; Rev., s. 791; C.S., s. 831.)

CASE NOTES

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the required bond. *Jones v. Ward*, 77 N.C. 337 (1877).

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal

property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. *Mitchell v. Sims*, 124 N.C. 411, 32 S.E. 735 (1899).

Application of Section. — It is only in cases when the plaintiff seeks to have the property delivered to him immediately, and to have the possession pending

the action, as in the old action of replevin, that the affidavit and bond are required. *Jarman v. Ward*, 67 N.C. 32 (1872).

The affidavit required by this section is indispensable to maintain claim and delivery. *Griffith v. Richmond*, 126 N.C. 377, 35 S.E. 620 (1900).

And in making the affidavit this section must be strictly followed. *Hirsh v. J.D. Whitehead & Co.*, 65 N.C. 516 (1871).

And plaintiff should set forth his special interest in the property. *Cooper v. Evans*, 174 N.C. 412, 93 S.E. 897 (1917).

The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. *Jackson v. Buchanan*, 89 N.C. 74 (1883).

Burden of Proof. — In claim and

delivery proceedings the burden is on the plaintiff to establish a cause of action. *Smith v. Cook*, 196 N.C. 558, 146 S.E. 229 (1929).

Claimant Authorized to Take Possession of Property Upon Execution of Bond. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. *Mitchell v. Sims*, 124 N.C. 411, 32 S.E. 735 (1899).

Applied in *GMAC v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928); *Keith Tractor & Implement Co. v. McLamb*, 252 N.C. 760, 114 S.E.2d 668 (1960); *General Tire & Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960).

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

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. (C.C.P., s. 178; Code, s. 323; Rev., s. 792; C.S., s. 832; 1973, c. 472, s. 1.)

CASE NOTES

Summons Necessary to Invoke Jurisdiction. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. *Potter v. Mardre*, 74 N.C. 36 (1876).

Issuance of Order is Ministerial Act. — In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office. *Jackson v. Buchanan*, 89 N.C. 74 (1883).

Which may be Performed by Deputy Clerk. — The clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery, only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. *Jackson v. Buchanan*, 89 N.C. 74 (1883); *Evans v. Etheridge*, 96 N.C. 42, 1 S.E. 633 (1887).

Dismissal of Action by Plaintiff After Receipt of Property Prohibited.

— In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. *Manix v. Howard*, 82 N.C. 125 (1880).

Questions raised by defendants

involving substantial rights can be decided only when the case is heard on its merits. *Wachovia Bank & Trust Co., N.A. v. Smith*, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

Stated in *Hutchinson v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.

(a) The clerk of court, upon the request of the plaintiff, shall issue a notice to the defendant setting a time and place for a hearing before the clerk which shall not be less than 10 days from the date of service of said notice upon the defendant. The notice shall be served on the defendant in any manner provided by the Rules of Civil Procedure for the service of summons. Upon the request of the plaintiff the notice shall contain an order enjoining the defendant from willfully disposing of the property in any manner, from removing or permitting the removal of the property from the State of North Carolina, or from causing or permitting willful damage or destruction of the property. If in a trial on the merits it is determined that the plaintiff was entitled to the possession of the property, and the defendant after service of notice of the hearing shall have willfully disposed of the property, removed or permitted the removal of the property from the State of North Carolina, or caused or permitted its willful damage or destruction, the defendant may be found in contempt of court and may be fined or imprisoned by the court as provided by law.

(b) Waiver of the rights to notice and hearing shall not be permitted except as set forth herein. At any time subsequent to service of the notice of hearing provided in subsection (a), the clerk of court, upon the request of the plaintiff, shall mail to the defendant at his last known address a form by which the defendant may waive his right to the hearing. Upon the return of the form to the clerk of court, bearing the signature of the defendant and that of a witness to the defendant's signature (which witness shall not be a party to the action or an agent or employee of a party to the action), the clerk in his discretion may dispense with the necessity of a hearing and may proceed to issue the order of seizure prescribed by G.S. 1-474.

(c) In addition to any other forms substantially complying with the requirements of the preceding subsections, form (1) below may be used to give the notice provided for in subsection (a) above and form (2) below may be used to waive the hearing as provided in subsection (b) above:

(1) READ THIS NOTICE.

WARNING: DO NOT WILLFULLY DISPOSE OF, REMOVE OR PERMIT THE REMOVAL FROM THE STATE OF NORTH CAROLINA, OR CAUSE OR PERMIT WILLFUL DAMAGE OR DESTRUCTION OF THE PROPERTY DESCRIBED BELOW BECAUSE YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE FINED AND IMPRISONED.

To: (Defendant).

If you want to present reasons why you should not have the property described below taken from you, then you should appear at a hearing to be held before the undersigned clerk

of court at o'clock M. on the
 day of, 19. . . . , at the
 County Courthouse because
 (Plaintiff)
 has sworn that you wrongfully hold the following property
 and that he is entitled to it:

(Description of Property)

.

At the hearing the plaintiff will present evidence, and
 you are allowed to present evidence. You may bring an
 attorney to this hearing. Upon the basis of the evidence
 presented, the clerk will decide whether or not to issue an
 order directing the sheriff to take the property until a trial
 on the merits is held. You are hereby ORDERED:

- a. Not to willfully dispose of the property;
- b. Not to remove or permit its removal from the State of
 North Carolina; and
- c. Not to cause or permit its damage or destruction.

If you fail to comply with this order, and it is finally
 determined that the plaintiff is entitled to the possession of
 the property, you may be guilty of contempt of court and
 may be fined or imprisoned as provided by law.

If you have any questions about the hearing, you may
 contact an attorney or the clerk of court prior to the
 hearing.

(Certificate of Service)

(2) VOLUNTARY WAIVER OF HEARING.

To (Defendant).
 You have been served with a notice that a hearing will be
 held before the undersigned clerk of court at
 o'clock M. on the day of
, 19, at the
 County Courthouse to determine if
 (Plaintiff) is entitled to the possession
 of the following described property until a trial on the
 merits is held

(Description of Property)

.

If you do not wish to object to the plaintiff's right to the
 possession of this property until a trial on the merits is held,
 you may waive your right to the hearing by signing the
 statement below, having your signature witnessed by any
 person who is not a party or an agent or employee of a party

to this action and returning it to the undersigned clerk of court by mail or in person prior to the date set for the hearing.

.....
Clerk of Superior Court

I,, do hereby voluntarily waive and relinquish my right to the hearing described above.

.....
Defendant

Witness:
(Name)

.....
(Address)

.....
(1973, c. 472, s. 2.)

CASE NOTES

Cross References. — As to service of summons, see Rule 4 of the Rules of Civil Procedure (§ 1A-1).

§ 1-475. Plaintiff's undertaking.

The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 833.)

Legal Periodicals. — For article discussing security as a pre-condition to provisional injunctive relief, see 52 N.C.L. Rev. 1091 (1974).

CASE NOTES

Purpose of Undertaking. — The required undertaking is for the protection of defendants, so that a fund might be established from which recovery could be had were it shown that the plaintiff was not lawfully entitled to the property or that the property was damaged or diminished in value through plaintiff's fault while plaintiff held possession of it. *Marine Ecology Systems v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E.2d 613 (1979).

Judgment on Bond Should Be in Alternative. — A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. *Grubbs v. Stephenson*, 117 N.C. 66, 23 S.E. 97 (1895).

Value of Property Should be Ascertained. — For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should

also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N.C. 377, 35 S.E. 620 (1900).

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. *Barrington v. Skinner*, 117 N.C. 47, 23 S.E. 90 (1895).

Maximum Amount in Controversy Ordinarily Assigned as Value of Property. — Custom and prudence have established that plaintiffs will ordinarily assign to the property to be repossessed a value which represents the maximum amount in controversy over such property, where that figure is likely to be higher than the actual value of the property. This provides the maximum protection for the party from whom the property has been taken by the claim and delivery proceeding and is consistent with the notions of due process. *Marine Ecology Systems v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E.2d 613 (1979).

But Valuation in Undertaking Not Conclusive. — The valuation made in an affidavit or undertaking may be some evidence of value but is not conclusive. *Marine Ecology Systems v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E.2d 613 (1979).

And Plaintiff Not Prevented From Proving Actual Value at Trial. — The affidavit and undertaking in a claim and delivery action, intended as they are for the defendant's protection, are not made as conclusive declarations of value and, accordingly, defendant is not entitled to take those valuations and seek, by collat-

eral estoppel, to prevent plaintiff from proving at trial the actual value of the property, using market value or other applicable standards of valuation. *Marine Ecology Systems v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E.2d 613 (1979).

Measure of Damages Where Property Cannot Be Returned. — Where defendant recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant would be entitled to recover, if plaintiff's seizure of the property were wrongful. *C.I.T. Corp. v. Watkins*, 208 N.C. 448, 181 S.E. 270 (1935).

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. *Williams v. Perkins*, 192 N.C. 175, 134 S.E. 417 (1926).

Voluntary Nonsuit by Plaintiff. — Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. *Davis Bros. Co. v. Wallace*, 190 N.C. 543, 130 S.E. 176 (1925).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928); *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E.2d 176 (1952); *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460 (1958); *Tillis v. Calvin Cotton Mills, Inc.*, 251 N.C. 359, 111 S.E.2d 606 (1959); *Wachovia Bank & Trust Co., N.A. v. Smith*, 24 N.C. App. 133, 210 S.E.2d 212 (1974).

§ 1-476. Sheriff's duties.

Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 834.)

CASE NOTES

The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. *Williams v. Perkins*, 192 N.C. 175, 134 S.E. 417 (1926).

Independent Action May be Maintained against Sheriff. — Where the sheriff has wrongfully seized certain personal property of the defendant in

claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. *Williams v. Perkins*, 192 N.C. 175, 134 S.E. 417 (1926).

Quoted in *GMAC v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-477. Exceptions to undertaking; liability of sheriff.

The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section [G.S. 1-478]. (C.C.P., s. 180; Code, s. 325; Rev., s. 794; C.S., s. 835.)

CASE NOTES

Sheriff Liable as Surety. — In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon. *Wells v. Bourne*, 113 N.C. 82, 18 S.E. 106 (1893).

Measure of Damages. — The measure of liability is the delivery of the property to the plaintiff with the damages for its deterioration, or, failing delivery, the value of the property. *Wells v. Bourne*, 113 N.C. 82, 18 S.E. 106 (1893).

Proof. — Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him

at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and cannot recover, actual damage against such sheriff. *Wells v. Bourne*, 113 N.C. 82, 18 S.E. 106 (1893).

When Objection to Undertaking Must Be Made. — The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. *Spencer v. Bell*, 109 N.C. 39, 13 S.E. 704 (1891).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-478. Defendant's undertaking for replevy.

At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C.C.P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C.S., s. 836; 1961, c. 462.)

Cross References. — As to judgment in an action for the return of personal property, see § 1-230.

CASE NOTES

Liability of Surety. — The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property. *V. Wallace & Sons v. Robinson*, 185 N.C. 530, 117 S.E. 508 (1923).

The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. *Federal Fin. & Credit Co. v. Teeter*, 196 N.C. 232, 145 S.E. 8 (1928).

The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. *Hall v. Tillman*, 103 N.C. 276, 9 S.E. 194 (1889).

Liability Where Bond Voluntary. — Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action

if a judgment adverse to him is rendered in the action. However, when the bond is so conditioned it is not rendered void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. *Wright v. Nash*, 205 N.C. 221, 171 S.E. 48 (1933).

The recovery against the surety can in no event exceed the penalty of the bond. *Boyd v. Walters*, 201 N.C. 378, 160 S.E. 451 (1931).

Summary Judgment against Sureties. — Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section and § 1-230. *Hall v. Tillman*, 103 N.C. 276, 9 S.E. 194 (1889).

Form of Judgment against Surety. — Where the defendant in claim and

delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. *Boyd v. Walters*, 201 N.C. 378, 160 S.E. 451 (1931).

Sureties' Defenses. — The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by an act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. *Garner v. Quakenbush*, 188 N.C. 180, 124 S.E. 154 (1924).

The remedy of a surety on a replevin bond to contest his liability as such under

a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. *V. Wallace & Sons v. Robinson*, 185 N.C. 530, 117 S.E. 508 (1923).

Recovery of Costs. — The entire costs of prosecuting an action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. *Hall v. Tillman*, 110 N.C. 220, 14 S.E. 745 (1892).

Quoted in *GMAC v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928); *McCormick v. Crotts*, 198 N.C. 664, 153 S.E. 152 (1930); *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E.2d 176 (1952); *General Tire & Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 111 S.E.2d 614 (1959).

§ 1-479. Qualification and justification of defendant's sureties.

The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court or judge, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C.C.P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C.S., s. 837; 1971, c. 268, s. 30.1.)

Cross References. — As to see § 1-423. As to justification, see qualifications of bail in arrest and bail, § 1-424.

CASE NOTES

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928).

OPINIONS OF ATTORNEY GENERAL

Clerks of Court May Take Justification of Defendant's Sureties; Magistrates Have Not Succeeded to the Power of Justice of Peace to Take

Such Justification. — See opinion of Attorney General to Honorable Robert J. Pleasants, 41 N.C.A.G. 628 (1971).

§ 1-480. Property concealed in buildings.

If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (C.C.P., s. 184; Code, s. 329; Rev., s. 798; C.S., s. 838.)

§ 1-481. Care and delivery of seized property.

When the sheriff has taken property, as provided in this Article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (C.C.P., s. 185; Code, s. 330; Rev., s. 799; C.S., s. 839.)

CASE NOTES

Expenses of Seizing Included in Costs. — It is proper to allow in the bill of costs the expense of seizing and caring for the property. <i>Hendricks v. Ireland</i>,	162 N.C. 523, 7 S.E. 1011 (1913). Cited in <i>McKinney v. Sutphin</i>, 196 N.C. 318, 145 S.E. 621 (1928).
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§ 1-482. Property claimed by third person; proceedings.

When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least 10 days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. However, this section shall not be construed to prevent any such intervenor or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervenor or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; C.C.P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C.S., s. 840; 1933, c. 131; 1971, c. 268, s. 30.2.)

Cross References. — For requisites of affidavit, see § 1-473.

CASE NOTES

Purpose of Section. — It is the purpose of the section to allow one interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring. This seems to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. *Claywell v. McGimpsey*, 15 N.C. 89 (1833); *Churchill v. Lee*, 77 N.C. 341 (1877); *Hudson v. Wetherington*, 79 N.C. 3 (1878); *Wallace Bros. v. Robeson*, 100 N.C. 206 (1888).

The right of an outside claimant to intervene is well settled by precedent. *McKesson v. Mendenhall*, 64 N.C. 286 (1870); *Toms v. Warson*, 66 N.C. 417 (1872); *Clemmons v. Hampton*, 70 N.C. 534 (1874); *Bruff v. Stern*, 81 N.C. 183 (1879); *Sims v. Goettle Bros.*, 82 N.C. 268 (1880).

Intervener Restricted to Question of Title. — It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. *McLean v. Douglas*, 28 N.C. 233 (1846); *Dawson v. Thigpen*, 137 N.C. 462, 49 S.E. 959 (1905).

In a proceeding under this section the intervener is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener, has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901); *Maynard v. Insurance Co.*, 132 N.C. 711, 44 S.E. 405 (1903); *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921); *Hill v. Patillo*, 187 N.C. 531, 122 S.E. 306 (1924).

Intervener Must Prove Title. — In proceedings in attachment one who interpleads under this section is an actor

upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. *Wallace Bros. v. Robeson*, 100 N.C. 206 (1888); *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

Appearance Waives Objections. — A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervener, as not having been made in accordance with the requirements of § 1-473, by appearing at the taking of depositions in his behalf and cross-examining his witness. *Allen v. McMillan*, 191 N.C. 517, 132 S.E. 276 (1926).

Voluntary Recognition of Jurisdiction. — Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. *Allen v. McMillan*, 191 N.C. 517, 132 S.E. 276 (1926).

Separate Trial. — A separate trial for the intervener is discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N.C. 452, 40 S.E. 218 (1901).

Effect of Three Years' Delay by Intervener. — In an action for the possession of personal property, under this section, a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. *Clemmons v. Hampton*, 70 N.C. 534 (1874).

Where the defendant consents to a judgment against himself and sureties, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by this section. *McDonald v. McBryde*, 117 N.C. 125, 23 S.E. 103 (1895).

Nonsuit by Plaintiff. — In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a

nonsuit, but the action goes on for the interpleader. *Dawson v. Thigpen*, 137 N.C. 462, 49 S.E. 959 (1905).

Jurisdiction of Justice of the Peace. — A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds fifty dollars (\$50.00). *Grambling v. Dickey*, 118 N.C. 986, 24 S.E. 671 (1896).

When Garnishee Bank a Mere Stakeholder. — Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. *Temple v. Eades Hay Co.*, 184 N.C. 239, 114 S.E. 162 (1922).

The bond required of an intervener by this section, has no application in

attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. *Temple v. Eades Hay Co.*, 184 N.C. 239, 114 S.E. 162 (1922).

Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. *Unaka & City Nat'l Bank v. Lewis*, 201 N.C. 148, 159 S.E. 312 (1931).

Applied in *GMAC v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in *McKinney v. Sutphin*, 196 N.C. 318, 145 S.E. 621 (1928); *Francis v. Mortgage Sec. Corp.*, 198 N.C. 734, 153 S.E. 317 (1930).

§ 1-483. Delivery of property to intervener.

Upon the filing by the claimant of the undertaking set forth in G.S. 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; Code, s. 332; Rev., s. 801; C.S., s. 841.)

CASE NOTES

Purpose of Section. — This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to him. *Clemmons*

v. Hampton, 70 N.C. 534 (1874).

Sheriff Must Take Security. — Under this section the property is not to be delivered to the intervener by the sheriff until the security is given. *Bear v. Cohen*, 65 N.C. 511 (1871).

§ 1-484. Sheriff to return papers in 10 days.

The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within 10 days after taking the property mentioned therein. (C.C.P., s. 187; Code, s. 133; Rev., s. 802; C.S., s. 842.)

§ 1-484.1. Remedy not exclusive.

The provisions of this Article shall not be construed to preclude the use of attachment or any other ancillary remedy (upon the terms and subject to the conditions provided by law for the exercise thereof) simultaneously with the remedy of claim and delivery. (1973, c. 472, s. 2.1.)

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

A preliminary injunction may be issued by order in accordance with the provisions of this Article. The order may be made by any judge of the superior court or any judge of the district court authorized to hear in-chambers matters in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,
- (2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,
- (3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C.C.P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C.S., s. 843; 1967, c. 954, s. 3; 1973, c. 66, s. 1.)

CASE NOTES

- I. General Consideration.
- II. Nature of Injunction.
- III. Grounds of Relief.
 - A. Character of Relief in General.
 - B. Availability of Other Relief.
 - C. Application of Section.

I. GENERAL CONSIDERATION.

This section is constitutional. Jolliff v. Winsolw, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

This section is merely a statutory recognition of the abolition of the distinction between special and

common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claims for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N.C. 453, 70 S.E. 752 (1911).

Issuance of an injunction presupposes, as an essential requisite, the pendency of an action which is receiving or will receive a judicial determination. *Armstrong v. Kinsell*, 164 N.C. 125, 80 S.E. 235 (1913).

Restraint Sought Must Be Germane to Subject of Action. — This section does not permit injunction to issue when the restraint sought is not germane to the subject of the action. *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939).

Notice and Hearing Required. — A preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. *Jolliff v. Winslow*, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

Court May Consider Affidavits. — Both before and after the adoption of the new Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of this section does not prohibit this. *State ex rel. Morgan v. Dare to Be Great, Inc.*, 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of this section for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. *State ex rel. Morgan v. Dare to Be Great, Inc.*, 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Restraining Order and Injunction Distinguished. — This section in nowise abolishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts. A restraining order can be issued in any cause by any judge of the superior court anywhere in the State, and made returnable at any time within 20 days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893); *Kinston v. Wooten*, 150 N.C. 295, 63 S.E. 1061 (1909).

An injunction may be granted by a judge outside the county in which the

main cause is pending since this is an ancillary proceeding not involving the merits of the cause. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893); *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

Mandamus and Mandatory Injunction Distinguished. — In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. *Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co.*, 159 N.C. 9, 74 S.E. 636 (1912).

Good Faith and Reasonable Diligence Necessary. — Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action. *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

Increasing Bond. — Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. *Newberry v. Meadows Fertilizer Co.*, 203 N.C. 330, 166 S.E. 79 (1932).

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. *Board of Provincial Elders v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968).

Findings and Proceedings Are Not Binding at Trial on Merits. — The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962).

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an ex parte affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962).

The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order of a provisional injunction. *Heilig v. Stokes*, 63 N.C. 612 (1869).

Discretion of Court. — It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962).

It lies within the discretion of the court to determine whether a preliminary injunction will be granted upon pleadings and affidavits. In exercising its discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

Issuance of a preliminary injunction is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

Appeal. — On appeal the reviewing court is not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. Even so there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error. *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962); *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 284 S.E.2d 333 (1981).

In reviewing the denial of a preliminary injunction, the appellate court is

not bound by the findings of the lower court, but there is a presumption that the lower court decision was correct. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

A decision by the trial court to issue or deny an injunction will generally be upheld on appeal if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

On appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

Applied in *River Dev. Corp. v. Parker Tree Farms, Inc.*, 12 N.C. App. 1, 182 S.E.2d 211 (1971); *Smith's Cycles, Inc. v. American Honda Motor Co.*, 26 N.C. App. 76, 214 S.E.2d 785 (1975).

Cited in *Collins v. North Carolina State College*, 198 N.C. 337, 151 S.E. 646 (1930); *Hopkins v. Swain*, 206 N.C. 439, 174 S.E. 409 (1934); *Carpenter v. Boyles*, 213 N.C. 432, 196 S.E. 850 (1938); *Brown v. Williams*, 242 N.C. 648, 89 S.E.2d 260 (1955); *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E.2d 18 (1970).

II. NATURE OF INJUNCTION.

The remedy authorized by this section is an ancillary one afforded by the courts of equity for the purpose of preserving the status quo pending the action. It will issue to prevent an injury being committed or seriously threatened. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit. *Lynch v. Snapp*, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L.Ed.2d 880 (1974).

Where no complaint or summons has been filed, no action has been instituted

and therefore there is no pending action to which the injunction can be ancillary. *Lynch v. Snapp*, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L.Ed.2d 880 (1974).

A preliminary injunction is interlocutory in nature, issued after notice and hearing, and restrains a party pending final determination on the merits. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

It is the purpose of a temporary injunction to maintain as nearly as possible the status quo. *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962).

The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

Preliminary injunction serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began. *Jolliff v. Winslow*, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975); *Musten v. Musten*, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

Extraordinary and Provisional Remedy. — Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies, or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. *Chambers v. Penland*, 78 N.C. 53 (1878); *Fink v. Stewart*, 94 N.C. 484 (1886).

Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except insofar as it may come within some plain statutory provision. *Person v. Leary*, 127 N.C. 114, 37 S.E. 149 (1900).

This section enlarges the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject matter of the action. *John L. Roper Lumber Co. v.*

Wallace, 93 N.C. 22 (1885).

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

An injunction can only operate in personam and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the State, should be dismissed. *Warlick v. Reynolds*, 151 N.C. 606, 66 S.E. 657 (1910); *Armstrong v. Kinsell*, 164 N.C. 125, 80 S.E. 235 (1913).

The grant of a preliminary mandatory injunction is within the prerogative jurisdiction of courts of equity. Such preliminary injunctions are issued to preserve the status quo until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction May Be Issued for Protection of Easements and Proprietary Rights. — When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits and the defendant compelled to undo what he has done. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction Should Not Be Issued Except in Case of Apparent Necessity. — A preliminary mandatory injunction on ex parte application should not be granted, except in case of apparent necessity for the purpose of restoring the status quo pending the litigation. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

Injury Must Be Immediate, Pressing, Irreparable, and Clearly Established. — As a rule a mandatory order will not be made as a preliminary injunction, except where the injury is

immediate, pressing, irreparable, and clearly established. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

Injunctive relief is granted only when irreparable injury is real and immediate. This is especially true with reference to the issuance of a preliminary injunction. *Board of Provincial Elders v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968).

Mandatory Injunction Held Improvidently Granted. *Seaboard Air Line R.R. v. Atlantic Coast Line R.R.*, 237 N.C. 88, 74 S.E.2d 430 (1953).

B. Availability of Other Relief.

When proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. *Faison v. McIlwaine*, 72 N.C. 312 (1875).

An injunction ordinarily will not be granted where there is an adequate legal remedy which is as practical and efficient as is the equitable remedy. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

Irreparable Injury. — The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. *Hennessee*, 66 N.C. 473 (1872); *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281 (1890); *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 127 N.C. 130, 37 S.E. 152 (1900).

The injury threatened to plaintiff must be irreparable, real and immediate. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

The party moving for a preliminary injunction must offer particular facts supporting its claim of irreparable injury. *A.E.P. Indus., Inc. v. McClure*, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, — N.C. —, 302 S.E.2d 754 (1983).

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the

complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. *Bryan v. Hubbs*, 69 N.C. 423 (1873).

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. *Foard v. Alexander*, 64 N.C. 69 (1870).

C. Application of Section.

An injunction pendente lite should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. *Board of Provincial Elders v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968).

Injunction Subsidiary to Another Action or Special Proceeding. — A court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined. *Edmonds v. Hall*, 236 N.C. 153, 72 S.E.2d 221 (1952).

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective. *Edmonds v. Hall*, 236 N.C. 153, 72 S.E.2d 221 (1952).

When Temporary Injunction Granted Generally. — Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 123 S.E.2d 619 (1962); *Waff Bros. v. Bank of N.C., N.A.*, 289 N.C. 198, 221 S.E.2d 273 (1976); *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 284 S.E.2d 333 (1981).

A preliminary injunction will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. *Paul v. Washington*,

134 N.C. 363, 47 S.E. 793 (1904).

An injunction will not issue to restrain an act which has already been committed. *Yount v. Setzer*, 155 N.C. 213, 71 S.E. 209 (1911).

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. *State ex rel. Attorney Gen. v. Roanoke Nav. Co.*, 84 N.C. 705 (1881).

Obstruction of Easement. — A preliminary mandatory injunction may be issued when an easement into one's property has been obstructed. *Jolliff v. Winslow*, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

An injunction does not ordinarily lie in a suit to try the title to land. *Musten v. Musten*, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

This section applies equally as well whether the party litigants be public service or municipal corporations or individuals. *Merrick v. Intramontaine R.R.*, 118 N.C. 1081, 24 S.E. 667 (1896); *Griffin v. Goldsboro Water Co.*, 122 N.C. 206, 30 S.E. 319 (1898); *Woodley v. Carolina Tel. & Tel. Co.*, 163 N.C. 284, 79 S.E. 598 (1913).

§ 1-486. When solvent defendant restrained.

In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (1885, c. 401; Rev., s. 807; C.S., s. 844.)

Legal Periodicals. — For article on remedies for trespass to land in North

Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Where the injury being sustained or about to be sustained is irreparable so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. *Lewis v. John L. Roper Lumber Co.*, 99 N.C. 11, 5 S.E.

19 (1888); *Stewart v. Munger*, 174 N.C. 402, 93 S.E. 927 (1917).

Continuing Trespass. — Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should be issued. *Lodge v. Ijames*, 156 N.C. 159, 72 S.E. 204 (1911); *Sutton v. Sutton*, 161 N.C. 665, 77 S.E. 838 (1913); *Cobb v. Atlantic Coast Line R.R.*, 172 N.C. 58, 89 S.E. 807 (1916).

When relief is sought against on continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. *Young v. Pittman*, 224 N.C. 175, 29 S.E.2d 551 (1944).

Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. *McKay v. Chapin*, 120 N.C. 159, 26 S.E. 701 (1897).

When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. *Norfolk S.R.R. v. Rapid Transit Co.*, 195 N.C. 305, 141 S.E. 882 (1928).

Court Must Weigh Relative Conveniences and Inconveniences to Parties. — The hearing judge may issue an interlocutory injunction upon the application of the plaintiff in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. But the rule that the judge will consider and weigh the relative conveniences and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. *Huskins v. Yancey Hosp.*, 238 N.C. 357, 78 S.E.2d 116 (1953).

Effect of Section upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a bona fide contention as to the title to lands or timber trees thereon. *Stewart v. Munger*, 174 N.C. 402, 93 S.E. 927 (1917).

Applied in *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593 (1955).

§ 1-487. Timberlands, trial of title to.

In all actions to try title to timberlands, and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (1901, c. 666, s. 1; 1903, c. 642; Rev., s. 808; C.S., s. 845.)

Legal Periodicals. — For article on remedies for trespass to land in North

Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Constitutionality. — Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. *Charles S. Riley & Co. v. Carter*, 165 N.C. 334, 81 S.E. 414 (1914).

Purpose of Section. — The primary object of this section is to throw a greater safeguard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be

adjudicated. *Moore v. Fowle*, 139 N.C. 51, 51 S.E. 796 (1905).

Plaintiff Must Show a Bona Fide Claim. — The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence constituting a prima facie title. *Moore v. Fowle*, 139 N.C. 51, 51 S.E. 796 (1905).

Applied in *Chandler v. Cameron*, 227 N.C. 233, 41 S.E.2d 753 (1947).

Cited in *Lawhon v. McArthur*, 213 N.C. 260, 195 S.E. 786 (1938).

§ 1-488. When timber may be cut.

In any action specified in G.S. 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (1901, c. 666, ss. 2, 3; Rev., s. 809; C.S., s. 846.)

Legal Periodicals. — For article on remedies for trespass to land in North

Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Under this section the plaintiff must not only show that his claim is made in good faith and that he has a prima facie title thereto, but the court must be able to find, as a matter of fact, that the claim of the adverse party is not made in good faith. When relief is sought under this provision all these conditions must be complied with. *Johnson v. Duvall*, 135 N.C. 642, 47 S.E. 611 (1904). See also, *Chandler v. Cameron*, 227 N.C. 233, 41 S.E.2d 753 (1947).

Injunction Granted Where Contention Bona Fide. — This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a bona fide contention, then it should grant an injunction under §§ 1-486 and 1-487. *Kelly v. Enter. Lumber Co.*, 157 N.C. 175, 72 S.E. 957 (1911).

Cited in *Lawhon v. McArthur*, 213 N.C. 260, 195 S.E. 786 (1938).

§§ 1-489 to 1-492: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to injunctions and temporary restraining orders,

see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-493. What judges have jurisdiction.

All judges of the superior court and judges of the district court authorized to hear in-chambers matters have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings pending in their respective divisions. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C.S., s. 851; 1971, c. 381, s. 12; 1973, c. 66, s. 2.)

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review

of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Editor's Note. — The cases cited below were decided prior to the 1973 amendment to this section.

Jurisdiction. — The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the State. *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893).

For case holding that references to the superior court would be deemed to refer also to the district court, see *Boston v. Freeman*, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Perpetual Injunction. — A perpetual

injunction must be granted only in the county in which the cause is pending. *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893). See also, *Ledbetter v. Pinner*, 120 N.C. 455, 27 S.E. 123 (1897).

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action. *Massengill v. Lee*, 228 N.C. 35, 44 S.E.2d 356 (1947).

Cited in *Hopkins v. Swain*, 206 N.C. 439, 174 S.E. 409 (1934); *City of Reidsville v. Slade*, 224 N.C. 48, 29 S.E.2d 215 (1944); *Baker v. Varsar*, 239 N.C. 180, 79 S.E.2d 757 (1954).

§ 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 judge or a district judge authorized to hear in-chambers matters 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 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.)

CASE NOTES

Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon 10 days' notice to the parties. *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893).

Applied in *Herff Jones Co. v.*

Allegood, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

Cited in *Royal v. Thornton*, 150 N.C. 293, 63 S.E. 1040 (1909); *Ward v. Agrillo*, 194 N.C. 321, 139 S.E. 451 (1927); *Hopkins v. Swain*, 206 N.C. 439, 174 S.E. 409 (1934).

§ 1-495. Stipulation as to judge to hear.

By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge of the appropriate trial division designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued. (1883, c. 33; Code, s. 337; Rev., s. 816; C.S., s. 853; 1973, c. 66, s. 4.)

CASE NOTES

Stipulation of Parties Permitted. — Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893); *Crabtree v. Scheelky*, 119 N.C. 56, 25 S.E. 707 (1896).

Duty of Judge Designated by Stipulation. — When the parties have stipu-

lated as to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. *Cooper v. Cooper*, 127 N.C. 490, 37 S.E. 492 (1900).

Applied in *Forester v. Town of North Wilkesboro*, 206 N.C. 347, 174 S.E. 112 (1934).

§§ 1-496, 1-497: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed sections, see Rule 65 of the Rules of Civil Procedure (§ 1A-1).

§ 1-498. Application to extend, modify, or vacate; before whom heard.

Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the superior court division may be heard by the judge having jurisdiction if he is within the

district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district.

Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the district court division may be heard by the district judge who made the original order or by the chief district judge or by a district judge of the district authorized to hear in-chambers matters. (C.C.P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C.S., s. 856; 1967, c. 954, s. 3; 1973, c. 66, s. 5.)

CASE NOTES

Applied in *City of New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961).

§ 1-499: Repealed by Session Laws 1967, c. 954, s. 4.

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

Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in session, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C.S., s. 858(a); 1969, c. 44, s. 12; 1971, c. 381, s. 12.)

Cross References. — As to suspension, modification, restoration or grant of an injunction during the pendency of an

appeal, see Rule 62(c) of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

The dissolution of a restraining order is in the discretion of the trial judge. Such an order is not reviewable by the appellate division except in cases of abuse of discretion. *Currin v. Smith*, 270 N.C. 108, 153 S.E.2d 821 (1967).

Supplementary Order Held within Discretion of Court. — Where an appeal was taken from a judgment of the superior court judge vacating an order restraining county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal was within the sound discretion of the trial judge and was not reviewable. *Clark v. McQueen*, 195 N.C. 714, 143 S.E. 528 (1928).

Scope of Review. — In determining on appeal whether the lower court erred in ordering a temporary restraining order vacated prior to a hearing of the matter on the merits, the Supreme Court is not bound by the findings of fact or lack of such findings by the lower court, but may review the evidence and make its own findings of fact. *Waff Bros. v. Bank of N.C., N.A.*, 289 N.C. 198, 221 S.E.2d 273 (1976).

Matters to Be Considered upon Final Hearing. — Upon the final

hearing on the merits of a complaint seeking a temporary restraining order, neither the Supreme Court's findings of fact upon appeal of an order vacating a temporary restraining order nor the findings or conclusions of the Court of Appeals or of the trial judge at the hearing upon the order to show cause why the restraining order should not be continued are to be considered by the superior court. *Waff Bros. v. Bank of N.C., N.A.*, 289 N.C. 198, 221 S.E.2d 273 (1976).

Applied in *Treasure City of Fayetteville, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964); *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E.2d 364 (1964); *Frosty Ice Cream, Inc. v. Hord*, 263 N.C. 43, 138 S.E.2d 816 (1964); *High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 139 S.E.2d 892 (1965); *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

Cited in *Boyd v. Brooks*, 197 N.C. 644, 150 S.E. 178 (1929); *City of Reidsville v. Slade*, 224 N.C. 48, 29 S.E.2d 215 (1944); *GI Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962); *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E.2d 18 (1970); *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 217 S.E.2d 650 (1975).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions, except only a judge of the Superior Court Division has jurisdiction to appoint receivers of corporations. Any resident judge of the Superior Court Division or any nonresident judge of the Superior Court Division assigned to a district who appoints receivers pursuant to the authority granted hereby while holding court in that district may, in his discretion, retain jurisdiction and supervision of the original action, of the receivers appointed therefor and of any other civil actions pending in the same district involving the receivers, following his rotation out of the district. (C.C.P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C.S., s. 859; 1971, c. 268, s. 31; 1979, c. 525, s. 13.)

Cross References. — As to receiver in supplemental proceedings, see § 1-363 et seq. As to what judges have jurisdiction to grant restraining orders and injunctions, see § 1-493. As to receiver of ward's estate, see § 33-53.

Legal Periodicals. — For article

discussing installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

This section and § 1-485 invest the court with very large and comprehensive powers to protect rights and prevent the perpetration or the continuance of wrong in respect to the subject matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified or to grant perpetual injunctions in proper cases and like relief. *John L. Roper Lumber Co. v. Wallace*, 93 N.C. 22 (1885).

Inherent Power of Courts to Appoint Receivers. — The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. *Skinner v. Maxwell*, 66 N.C. 45 (1872).

The clerk cannot appoint a receiver as that power is reserved to the judge alone. *Parks v. Sprinkle*, 64 N.C. 637 (1870).

Appointment of Receivers in Discretion of Judge. — The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. *Whitehead v. Hale*, 118 N.C. 601, 24 S.E. 360 (1896).

What Plaintiff Must Show. — Where the appointment of a receiver is sought as an ancillary remedy, the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid of their main relief. *Witz, Biedler & Co. v. Gray*, 116 N.C. 48, 20 S.E. 1019 (1895).

Verification and Notice. — The practice of appointing a receiver upon an

unverified complaint and without notice to creditors and other interested persons is not commended. *Fisher v. Trust Co.*, 138 N.C. 90, 50 S.E. 592 (1905).

What Judge Should Determine. — Upon an application for an injunction and receiver, it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. *Jones v. Boyd*, 80 N.C. 258 (1879); *City Nat'l Bank v. Bridgers*, 114 N.C. 381, 19 S.E. 642 (1894).

Effect on Both Parties Must Be Considered. — It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. *Hanna v. Hanna*, 89 N.C. 68 (1883); *Venable v. Smith*, 98 N.C. 523, 4 S.E. 514 (1887). See also, *Lewis v. John L. Roper Lumber Co.*, 99 N.C. 11, 5 S.E. 19 (1888).

As to which judge may appoint a receiver, see *Corbin v. Berry*, 83 N.C. 28 (1880); *Galbreath v. Everett*, 84 N.C. 546 (1881); *Hamilton v. Icard*, 112 N.C. 589, 17 S.E. 519 (1893); *Worth v. Piedmont Bank*, 121 N.C. 343, 28 S.E. 488 (1897).

Number of Receivers Appointed. — The court should not appoint more receivers than are necessary. *Battery Park Bank v. Western Carolina Bank*, 126 N.C. 531, 36 S.E. 39 (1900).

Section Fixes Place where Orders Are Returnable. — It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which the reviewing finds them because it was supposed that one or the other of them would at all times be within the district of the action. *Galbreath v. Everett*, 84 N.C. 546 (1881).

Place of Hearing. — The hearing as to a receiver may be held outside of the county where the main action is pending. *Parker v. McPhail*, 112 N.C. 502, 16 S.E. 848 (1893).

Retention of Jurisdiction by Judge Rotated out of District. — In an action challenging the appointment of operating receivers for a corporation where the trial judge made the appointment after he was rotated out of the district, the trial judge properly entered an order retaining jurisdiction in himself of all matters in the action. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. *Battle v. Davis*, 66 N.C. 252 (1872).

The interest of the owner is in nowise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. *Southern Pants Co. v. Rochester German Ins. Co.*, 159 N.C. 78, 74 S.E. 812 (1912).

As to relation back of receiver's title, see *Worth v. Piedmont Bank*, 121

N.C. 343, 28 S.E. 488 (1897).

As to determination of priority where two receivers have been appointed, see *Worth v. Piedmont Bank*, 121 N.C. 343, 28 S.E. 488 (1897).

Effect of Omission of Security. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N.C. 535 (1880).

As to proof of appointment of foreign receivers, see *Person v. Leary*, 127 N.C. 114, 37 S.E. 149 (1900).

Quoted in *Essex Inv. Co. v. Pickelsimer*, 210 N.C. 541, 187 S.E. 813 (1936); *National Sur. Corp. v. Sharpe*, 232 N.C. 98, 59 S.E.2d 593 (1950).

Cited in *Person v. Leary*, 126 N.C. 504, 36 S.E. 35 (1900); *Hopkins v. Swain*, 206 N.C. 439, 174 S.E. 409 (1934); *Bennett v. Mortgage Serv. Corp.*, 206 N.C. 902, 173 S.E. 22 (1934); *East Carolina Lumber Co. v. West*, 247 N.C. 699, 102 S.E.2d 248 (1958); *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964); *Koob v. Koob*, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

§ 1-502. In what cases appointed.

A receiver may be appointed —

- (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.
- (2) After judgment, to carry the judgment into effect.
- (3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.
- (4) In cases provided in G.S. 1-507.1 and in like cases, of the property within this State of foreign corporations.
- (5) In cases wherein restitution is sought for violations of G.S. 75-1.1.
- (6) In cases involving partition of real property, pursuant to G.S. 46-3.1.

The provisions of G.S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder. (C.C.P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 847; C.S., s. 860; 1955, c. 1371, s. 3; 1973, c. 614, s. 3; 1981, c. 584, s. 2.)

Legal Periodicals. — For article discussing installment land contracts in

North Carolina, see 3 Campbell L. Rev. 29 (1981).

For article on North Carolina receivership statutes applicable to insol-

vent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

This section is expressly made applicable to all receivers. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578, motion to vacate denial of cert. denied, 325 U.S. 837, 65 S. Ct. 1189, 89 L. Ed. 1963 (1944).

Effect of Section. — This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of North Carolina courts upon this subject. Skinner v. Maxwell, 66 N.C. 45 (1872).

The power to appoint a receiver is inherent in a court of equity. The change to the Code did not abridge, but enlarged, it. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

And Is Not Limited by This Section. — The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Receivership is ordinarily ancillary to some equitable relief. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver will not be appointed where there is a full and adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver of defendant's property will not be appointed at the request of a judgment creditor without more being shown where he has the remedy of execution against the property. Scoggins v. Gooch, 211 N.C. 677, 191 S.E. 750 (1937).

Unless Defense of Adequate Remedy at Law Is Waived. — A simple contract creditor may obtain equitable relief in proper cases where the answer admits indebtedness and consents to appointment of a receiver, waiving the defense of adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Appointment of Receiver Pendente Lite in Discretion of Court. — The appointment of a receiver pendente lite

is not a matter of strict right, but rests in the sound discretion of the court. Hanna v. Hanna, 89 N.C. 68 (1883).

A receiver may be appointed pendente lite in the discretion of the court. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents are in danger of being lost. Witz, Biedler & Co. v. Gray, 116 N.C. 48, 20 S.E. 1019 (1895); Pearce v. Elwell, 116 N.C. 595, 21 S.E. 305 (1895).

Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. Kerchner v. Fairley, 80 N.C. 24 (1879); Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880); Horton v. White, 84 N.C. 297 (1881); Oldham v. First Nat'l Bank, 84 N.C. 304 (1881); John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885); McNair v. Pope, 96 N.C. 502, 2 S.E. 54 (1887).

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. Skinner v. Maxwell, 66 N.C. 45 (1872).

Where the plaintiff makes it proper to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and the property must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Kelly v. McLamb, 182 N.C. 158, 108 S.E. 435 (1921).

Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by

his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. *Peoples Nat'l Bank v. Waggoner*, 185 N.C. 297, 117 S.E. 6 (1923).

It is generally necessary to show that the party in possession is insolvent. *Ellington v. Currie*, 193 N.C. 610, 137 S.E. 869 (1927); *In re Penny*, 10 F. Supp. 638 (M.D.N.C. 1935).

But Insolvency Alone Is Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. *Whitehead v. Hale*, 118 N.C. 601, 24 S.E. 360 (1896).

Danger of Loss Must Be Shown. — Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss. *Thompson v. McNair*, 62 N.C. 121 (1867); *Rheinstein v. Bixby*, 92 N.C. 307 (1885).

Under this section, apparent danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. *Rollins v. Henry*, 77 N.C. 467 (1877); *Twitty v. Logan*, 80 N.C. 69 (1879).

General Allegations of Threat of Loss Insufficient. — A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonappointment, without a full statement of the facts. *Hughes v. Person*, 63 N.C. 548 (1869); *Wood v. Harrell*, 74 N.C. 338 (1876); *Hanna v. Hanna*, 89 N.C. 68 (1883). See also, *Southern Flour Co. v. McIver*, 109 N.C. 120, 13 S.E. 905 (1891).

Apparently Good Title to Land Sufficient. — Where a party in an action involving the title and possession of land demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted or not unequivocally denied by his adversary. *Lovett v. Slocumb*, 109 N.C. 110, 13 S.E. 893 (1891).

Appointment of Receiver upon Application for Injunction. — Under the broad terms of this section the court has power to appoint a receiver upon an application for an injunction, where it

appears that this action will best serve the interests of both parties. *Hurwitz v. Carolina Sand & Gravel Co.*, 189 N.C. 1, 126 S.E. 171 (1925).

Insolvent Foreign Corporations. — An insolvent corporation, with its property or plant located in this State, is subject to the appointment by North Carolina courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state. *Holshouser v. Copper Co.*, 138 N.C. 248, 50 S.E. 650 (1905); *Summit Silk Co. v. Kinston Spinning Co.*, 154 N.C. 421, 70 S.E. 820 (1911).

Infant's Estate. — On the principle of protection, a receiver may be appointed for an infant's estate if it is not vested in a trustee, for he is incompetent to take charge of it himself. *Skinner v. Maxwell*, 66 N.C. 45 (1872).

Domestic Relations Cases. — Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Appointment Held Proper To Prevent Suspension of Business. — Where the property and franchise of a city water company were to be sold to satisfy a judgment, it was held that in order to prevent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a receiver. *McNeal Pipe & Foundry Co. v. Howland*, 111 N.C. 615, 16 S.E. 857 (1892).

Same — Fraudulent Confession of Judgment. — A receiver could be appointed under this section in a suit against a debtor and others to restrain an execution sale, where the debtor had confessed judgment apparently with fraudulent intent, and executions had been levied on the only property of the debtor within the State in favor of nonresident creditors who sought to take the property out of the State. *Stern & Co. v. Austern*, 120 N.C. 107, 27 S.E. 31 (1897).

Same — On Application of Mortgagee. — Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due could be ascertained, the defendant mortgagee was entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same

were in danger of being lost. *Oldham v. First Nat'l Bank*, 84 N.C. 304 (1881).

Where plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage, and the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent, and the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto, in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. *Kerchner v. Fairley*, 80 N.C. 24 (1879). See also, *Broeck v. Orchard*, 74 N.C. 409 (1876); *Rollins v. Henry*, 77 N.C. 467 (1877).

Same — Mining by One of Two Devisee-Executors. — Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executor was doubtful, appointment of a receiver was proper. *Stith v. Jones*, 101 N.C. 360, 8 S.E. 151 (1888).

Appointment Not Proper Where Receivership Would Cause Loss. — A receiver would not be appointed in an action to foreclose a mortgage on a newspaper where the defendant denied owing anything on the mortgage debt, and it was apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. *Whitehead v. Hale*, 118 N.C. 601, 24 S.E. 360 (1896).

Same — Mere Allegation of Insufficiency of Personalty. — Where an executor's petition to sell lands alleged merely that personalty was insufficient to pay debts, plaintiff executor was not entitled to the appointment of a receiver for the lands on the ground that the action could not be tried until a subsequent term, and that the devisee had refused to pay taxes; the allegation that the personalty was insufficient failed to show plaintiff executor's apparent right to the relief, especially as the devisee denied the allegation that the personalty was insufficient. *Neighbors v. Evans*, 210 N.C. 550, 187 S.E. 796 (1936).

Notice to Owner. — Notice to the owner of property should be given before appointment of a receiver therefor. *York v. McCall*, 160 N.C. 276, 76 S.E. 84 (1912).

No Requirement of Notice to Shareholders Who Are Not Parties. — In an action challenging the appointment of operating receivers for a corporation, there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no requirement in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee. — The appointment of a receiver is an equitable remedy and the provisions of this section and § 1-503, enacted before the giving of a deed of trust upon lands, may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions, so as to prevent North Carolina courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N.C. 428, 160 S.E. 475 (1931).

Turning over Assets to Bankruptcy Trustee. — Where the debtor and one small creditor agree to have a receiver appointed and to restrain all other creditors from doing anything, a receivership under such circumstances is an agency for the defendant, and the title of such a receiver to the assets of the bankrupt debtor is merely colorable and he may be required to turn over assets to trustee in bankruptcy. *In re Penny*, 10 F. Supp. 638 (M.D.N.C. 1935).

Applied in *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952); *Stegall Milling Co. v. Hettiger*, 27 N.C. App. 76, 217 S.E.2d 767 (1975); *Couch v. ADC Realty Corp.*, 48 N.C. App. 108, 268 S.E.2d 237 (1980).

Quoted in *National Sur. Corp. v.*

Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Cited in L. Levenson & Co. v. Elson, 88 N.C. 182 (1883); Rheinstein v. Bixby, 92 N.C. 307 (1885); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813

(1936); Harris v. Hilliard, 221 N.C. 329, 20 S.E.2d 278 (1942); York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959); Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

§ 1-503. Appointment refused on bond being given.

In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (1885, c. 94; Rev., s. 848; C.S., s. 861.)

CASE NOTES

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, to refuse the appointment of a receiver. *Sinclair v. Moore Cent. R.R.*, 228 N.C. 389, 45 S.E.2d 555 (1947).

Execution of Bond as Alternative to Appointment of Receiver. — Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. *John L. Roper Lumber Co. v. Wallace*, 93 N.C. 22 (1885); *Durant v. Crowell*, 97 N.C. 367, 2 S.E. 541 (1887); *Lewis v. John L. Roper Lumber Co.*, 99 N.C. 11, 5 S.E. 19 (1888); *Ousby v. Neal*, 99 N.C. 146, 5 S.E. 901 (1888).

Retention of Possession upon Giving Bond. — Upon application for a receiver, it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. *Frank v. Robinson*,

96 N.C. 28, 1 S.E. 781 (1887). See also, *Kron v. Smith*, 96 N.C. 386, 2 S.E. 463 (1887); *Godwin v. Watford*, 107 N.C. 168, 11 S.E. 1051 (1890).

Effect of Acceptance of Bond. — Plaintiffs who are parties at the time the court accepts bond and denies application for appointment of a receiver are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over the objection of the defendants. *Sinclair v. Moore Cent. R.R.*, 228 N.C. 389, 45 S.E.2d 555 (1947).

Appointment of Receiver Held Error. — The court erred in directing a receiver to take possession and control of mines and machinery for operating the same without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom as the court might subsequently direct. *Stith v. Jones*, 101 N.C. 360, 8 S.E. 151 (1888).

Bankruptcy of Defendant. — Where plaintiff in an action in the superior court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a

bond under this section, and defendant is adjudicated a bankrupt, the State court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, by execution, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. *Gordon v. Calhoun Motors, Inc.*, 222 N.C. 398, 23 S.E.2d 325 (1942).

Effect of § 1-111 on Power of Court.

— Section 1-111, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not

abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N.C. 327 (1884); *Durant v. Crowell*, 97 N.C. 367, 2 S.E. 541 (1887); *Arey v. Williams*, 154 N.C. 610, 70 S.E. 931 (1911).

Applied in *Woodall v. North Carolina Joint Stock Land Bank*, 201 N.C. 428, 160 S.E. 475 (1931); *Little v. Wachovia Bank & Trust Co.*, 208 N.C. 726, 182 S.E. 491 (1935).

Cited in *York v. Cole*, 251 N.C. 344, 111 S.E.2d 334 (1959).

§ 1-504. Receiver's bond.

A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Code, s. 383; Rev., s. 849; C.S., s. 862.)

Cross References. — As to bonds in surety company, see § 109-16 et seq.

CASE NOTES

The determination of the amount of the bond is within the discretion of the court. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578, motion to vacate denial of cert. denied, 325 U.S. 837, 65 S. Ct. 1189, 89 L. Ed. 1963 (1944).

Effect of Failure to Require Adequate Security. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N.C. 536 (1880).

An order appointing a receiver is not void because of an inadequate bond. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578, motion to vacate denial of cert. denied, 325 U.S. 837, 65 S. Ct. 1189, 89 L. Ed. 1963 (1944), citing *Nesbitt & Bro. v. Turrentine*, 83 N.C. 536 (1880).

Mortgagees Not Liable for Suggesting Inadequate Bond. — The fact that mortgagees suggested an inadequate amount in the bond of a receiver did not thereby render them legally liable to the mortgagor. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578, motion to vacate denial of cert. denied, 325 U.S. 837, 65 S. Ct. 1189, 89 L. Ed. 1963 (1944).

What Is a Breach of the Bond. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. *Bank of Washington v. Creditors*, 86 N.C. 323 (1882).

Default Must Be Ascertained before Suit on Bond. — A receiver and his surety cannot be sued upon the bond for an alleged breach of his trust before a default is ascertained, the proper prac-

tice being to apply to the court for a rule on the receiver to render his account. *Bank of Washington v. Creditors*, 86 N.C. 323 (1882); *Atkinson v. Smith*, 89 N.C. 72 (1883).

Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. *Waters v. Melson*, 112 N.C. 89, 16 S.E. 918 (1893).

Procedure for Recovery on Bond. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failure to

pay the same, for the court to grant leave to sue upon the bond. *Atkinson v. Smith*, 89 N.C. 72 (1883).

Independent Action against Sureties Required. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. *Black v. Gentry*, 119 N.C. 502, 26 S.E. 43 (1896).

Receiver Not Necessary Party to Action against Sureties. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. *Black v. Gentry*, 119 N.C. 502, 26 S.E. 43 (1896).

§ 1-505. Sale of property in hands of receiver.

In a case pending in the Superior Court Division in which a receiver has been appointed, the resident superior court judge or a superior court judge regularly holding the courts of the district shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed. In a case pending in the District Court Division in which a receiver has been appointed, the chief district judge or a district judge designated by the chief district judge to hear motions and enter interlocutory orders shall have the power and authority to order a sale of any property, real or personal, in the hands of a duly appointed receiver. Sales of property authorized by this section shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership. The procedure for such sales shall be as provided in Article 29A of Chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1; 1971, c. 268, s. 32.)

Legal Periodicals. — For article on North Carolina receivership statutes

applicable to insolvent debtors, see 17 *Wake Forest L. Rev.* 745 (1981).

CASE NOTES

As to sale of property in hands of receiver appointed to enforce payment of alimony, see *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959).

Stated in *Lowder v. All Star Mills, Inc.*, — N.C. App. —, 300 S.E.2d 230 (1983).

§ 1-506: Repealed by Session Laws 1955, c. 399, s. 2.

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

All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

CASE NOTES

Cited in *Koob v. Koob*, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss. 73, 79; Rev., ss. 1219, 1223; C.S., s. 1208; 1955, c. 1371, s. 2.)

Legal Periodicals. — For article on corporate receivership in North Carolina, see 32 N.C.L. Rev. 149 (1954).

For article on North Carolina

receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Broad Powers Conferred. — This Part is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. *Summit Silk Co. v. Kinston Spinning Co.*, 154 N.C. 421, 70 S.E. 820 (1911).

Section Does Not Limit Power of Court. — The power of the court to appoint a receiver in proper cases is not limited by this section or § 1-502. *Sinclair v. Moore Cent. R.R.*, 228 N.C. 389, 45 S.E.2d 555 (1947).

Selection of Receivers in Discretion of Court. — The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; hence, though the practice of appointing the plaintiff's attorney as receiver is not commended, he will not be removed, as a matter of law, on appeal, though like any other receiver, he may be removed upon application to the proper judge of the superior court. *Mitchell v. Aulander Realty Co.*, 169 N.C. 516, 86 S.E. 358 (1915). See also, *Fisher v. Southern Loan & Trust Co.*, 138 N.C. 90, 50 S.E. 592 (1905).

Presumption as to Order Made Without Specific Findings or Request Therefor. — Where an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. *Royall v. Carr Lumber Co.*, 248 N.C. 735, 105 S.E.2d 65 (1958).

Receiver Represents Both Creditors and Owners. — Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. *Observer Co. v. Little*, 175 N.C. 42, 94 S.E. 526 (1917).

Relation Back of Receiver's Title to Time of Order. — The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions

must first be performed and the receiver remains out of possession pending such performance. *Worth v. Bank of New Hanover*, 122 N.C. 397, 29 S.E. 775 (1898); *Pelletier v. Greenville Lumber Co.*, 123 N.C. 596, 31 S.E. 855 (1898); *Battery Park Bank v. Western Carolina Bank*, 127 N.C. 432, 37 S.E. 461 (1900); *Fisher v. Western Carolina Bank*, 132 N.C. 769, 44 S.E. 601 (1903).

Valid Liens Not Divested. — The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. *Battery Park Bank v. Western Carolina Bank*, 127 N.C. 432, 37 S.E. 461 (1900); *Roberts v. Bowen Mfg. Co.*, 169 N.C. 27, 85 S.E. 45 (1915).

A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. *Young v. Rollings*, 90 N.C. 125 (1884).

Effect of Appointment on Powers of Officers. — The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; they may not interfere with the business of the company and are entitled to no salaries during the continuance of the receivership. *Lenoir v. Linville Imp. Co.*, 126 N.C. 922, 36 S.E. 185 (1900).

Delivery of Funds to Receiver. — An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. *Young v. Rollings*, 90 N.C. 125 (1884).

Appointment of Assignee as Receiver. — One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets, after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. *Davis v. Industrial Mfg. Co.*, 114 N.C. 321, 19 S.E. 371 (1894).

Receiver Appointed after Reorganization. — The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved

corporation, they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. *Marshall v. Western N.C.R.R.*, 92 N.C. 322 (1885).

Dissolution of De Facto Corporation. — Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it as a corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. *Dobson v. Simonton*, 78 N.C. 63 (1878).

Fraudulent Disposal of Property. — If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. *Latta v. Catawba Elec. Co.*, 146 N.C. 285, 59 S.E. 1028 (1907).

Cessation of Business. — Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with statutory provisions. *Greenleaf v. Land & Lumber Co.*, 146 N.C. 505, 60 S.E. 424 (1908).

When Receiver May Be Appointed for a Solvent Corporation. — While appointing a receiver for a going, solvent corporation is an especially rare and drastic remedy, it has been found to constitute a proper remedy in cases where there is fraud or gross misconduct in the management of the corporation, where there is incapacity or neglect on the part of those operating it, where there is evidence of diversion of corporate funds, and even where there is a refusal to permit inspection of corporate books, at least when such a refusal occurs in combination with the existence of other grounds. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

When Receiver Unnecessary. — It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. *Chatham v. Mecklenburg Realty Co.*, 180 N.C. 500, 105 S.E. 329 (1920).

The law contemplates the settlement of all claims against the insolvent debtor in the original

action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver. *First-Citizens Bank & Trust Co. v. Berry*, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

No Requirement of Notice to Shareholders Not Parties. — In an action challenging the appointment of operating receivers for a corporation, there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no require-

ment in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

Adjudication of Bankruptcy during Insolvency Proceedings. — Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. *In re McKinnon Co.*, 237 F. 869 (E.D.N.C. 1916).

Cited in *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952); *Savannah Sugar Ref. Co. v. Royal Crown Bottling Co.*, 259 N.C. 103, 130 S.E.2d 33 (1963).

§ 1-507.2. Powers and bond.

The receiver has power and authority to —

- (1) Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.
- (2) Foreclose mortgages, deeds of trust, and other liens executed to the corporation.
- (3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.
- (4) Sell, convey, and assign all of the said estate, rights, and interest.
- (5) Appoint agents under him.
- (6) Examine persons and papers, and pass on claims as elsewhere provided in this part.
- (7) Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C.S., s. 1209; 1955, c. 1371, s. 2.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Source of Receiver's Authority. — A receiver receives his authority from the applicable statutes, together with the directions and instructions of the court in its order appointing him. *First-Citizens Bank & Trust Co. v. Berry*, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Capacity in which Receiver Holds and Disposes of Property. — The receiver holds and disposes of all property coming into his hands in his official capacity, under the direction of the court. *First-Citizens Bank & Trust Co. v. Berry*, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Power of Receiver to Sue. — The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. *Smathers v. Western Carolina Bank*, 135 N.C. 410, 47 S.E. 893 (1904).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. *Gray v. Lewis*, 94 N.C. 392 (1886); *Davis v. Industrial Mfg. Co.*, 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894); *Smathers v. Western Carolina Bank*, 135 N.C. 410, 47 S.E. 893 (1904).

Ordinarily the mere appointment of a receiver will not toll the statute of limitations unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, his appointment will not suspend the running of limitations under § 1-40. *Nicholas v. Salisbury Hdwe. & Furn. Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958).

Scope of Suit by Receivers of Bank. — In a suit by the receivers of a bank, all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set

out in the pleadings, could be adjudicated, and such judgment could be entered as would enforce the rights of the general creditors and also protect any equities that the defendant might be entitled to. *Smathers v. Western Carolina Bank*, 135 N.C. 410, 47 S.E. 893 (1904). See also, *Gray v. Lewis*, 94 N.C. 392 (1886); *Davis v. Industrial Mfg. Co.*, 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894).

Receiver May Plead Usury. — The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. *Riley v. Sears*, 154 N.C. 509, 70 S.E. 997 (1911).

Valid Existing Liens Protected. — The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. *Roberts v. Bowen Mfg. Co.*, 169 N.C. 27, 85 S.E. 45 (1915).

Power of Receiver after Charter Has Expired. — A receiver appointed under § 1-507.1 to wind up the affairs of a corporation may proceed to collect the assets and to prosecute and defend suits after the corporation has ceased to exist by the expiration of its charter. *Asheville Div. No. 15 v. Aston*, 92 N.C. 578 (1885).

Power to Make Conveyances. — While subdivision (4) of this section empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and his sales are subject to confirmation unless authority to convey on specified terms is expressly given. *Harrison v. Brown*, 222 N.C. 610, 24 S.E.2d 470 (1943).

Deed Held Sufficient to Pass Title. — Where, under a court order, the receiver of an insolvent bank conveyed lands according to the terms of a deed of trust by which the bank held the land, under this section and § 1-507.3 the deed was sufficient in law to pass title. *Wachovia Bank & Trust Co. v. Hudson*, 200 N.C. 688, 158 S.E. 244 (1931).

§ 1-507.3. Title and inventory.

All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss. 75, 80; Rev., ss. 1224, 1225; C.S., s. 1210; 1945, c. 635; 1955, c. 1371, s. 2.)

CASE NOTES

Receiver holds title to property vested in him as an officer of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Prior Liens Not Divested. — In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments and other liens existing at the time of his appointment. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale under § 1-507.8. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903); Garrison v. Vermont Mills, 154 N.C. 1, 69 S.E. 743 (1910); Witherell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

Effect of Subsequent Judgments. — The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder,

can acquire no lien in favor of the judgment creditor. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A judgment rendered in an independent action after the appointment of a receiver does not create a lien on the corporate property as against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Where a creditor held an unsecured claim against an insolvent partnership at the time of the appointment of the receiver, and subsequent to that event reduced such claim to judgment in an independent action against the partners, the creditor did not acquire any lien under the judgment on any of the property owned by the defendants as partners, because under this section such property vested in the receiver prior to the rendition of the judgment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Effect of Unrecorded Condition in Contract of Conditional Sale. — A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Insurance Policies Not Forfeited.

— The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. *Southern Pants Co. v. Rochester German Ins. Co.*, 159 N.C. 78, 74 S.E. 812 (1912).

Procedure where Receiver Refuses to Bring Action. — In an action brought by creditors, depositors or stockholders to

recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1925).

§ 1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.

Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265; 1955, c. 1371, s. 2.)

§ 1-507.5. May send for persons and papers; penalty for refusing to answer.

The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C.S., s. 1211; 1955, c. 1371, s. 2.)

§ 1-507.6. Proof of claims; time limit.

All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss. 1228, 1229; C.S., s. 1212; 1955, c. 1371, s. 2.)

CASE NOTES

Court May Limit Time for Presentation and Proof of Claims. — This section authorizes the court to limit the time within which creditors may present and prove to the receiver their respective claims against a corporation and may bar all creditors and claimants failing to prove their claims within the time allotted from participating in the distribution of the assets of the corporation. *Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co.*, 2 N.C. App. 531, 163 S.E.2d 510 (1968).

And Should Give Appropriate Notice Thereof. — The court in control of a receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of priority. *National Sur. Corp. v. Sharpe*, 232 N.C. 98, 59 S.E.2d 593 (1950).

Creditors must file and prove their claims when the court so directs or be barred. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

Proof of claims must be filed with the

receiver in writing pursuant to this section and within the time limit directed by the court or such claim may be barred. *First-Citizens Bank & Trust Co. v. Berry*, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

But Court May Extend Time for Filing. — The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. *Odell Hdwe. Co. v. Holt-Morgan Mills*, 173 N.C. 308, 92 S.E. 8 (1917).

Assignment of Claims. — After a receiver is appointed for a bank, a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a setoff. *Davis v. Industrial Mfg. Co.*, 114 N.C. 321, 19 S.E. 371 (1894).

Power of Receiver to Conduct Examination. — To enable the receiver to decide whether claims are just, the law confers upon him plenary power to examine the claimants and witnesses touching the claims, and to require the production of relevant books and papers. *National Sur. Corp. v. Sharpe*, 232 N.C. 98, 59 S.E.2d 593 (1950).

§ 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. (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.)

CASE NOTES

The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid or of less dignity than that alleged by him. Moreover, a creditor who has a valid claim is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, payment of which will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. *National Sur. Corp. v. Sharpe*, 232 N.C. 98, 59 S.E.2d 593 (1950).

Partner as "Interested Person". — A partner who is individually liable for partnership debts if the partnership assets are insufficient to discharge a claim is unquestionably an "interested person" who may challenge the validity of an asserted partnership obligation. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

The power to extend time for filing exceptions to a receiver's report is expressly given by this section. *Benson v. Roberson*, 226 N.C. 103, 36 S.E.2d 729 (1946).

Effect of Exceptions Not Filed within Time Prescribed. — Exceptions filed and made a part of the record are not void as a matter of law merely because they are not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of a motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. *Benson v. Roberson*, 226 N.C. 103, 36 S.E.2d 729 (1946).

Validity of claim must be determined by court. *Brewer v. Elks*, 260 N.C. 470, 133 S.E.2d 159 (1963).

Refusal to Grant Hearing on Objections Held Error. — Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. *Peo-*

ples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 432, 31 S.E.2d 353 (1944). See also, Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 153, 29 S.E.2d 348 (1944).

Determining Claim to Be Preferred Improper without Notice. — An order of the superior court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the estab-

lished rules of practice and procedure in receivership proceedings. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

As to establishment of claim where jury trial waived, see National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Quoted in Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Cited in Webb v. Gaskins, 255 N.C. 281, 121 S.E.2d 564 (1961).

§ 1-507.8. Property sold pending litigation.

When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least 10 days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular session of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C.S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

CASE NOTES

As to the applicability of this section to pending litigation, see Martin

v. Valaningham, 189 N.C. 656, 127 S.E. 695 (1925).

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

Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. The court is authorized and empowered to allow counsel fees to an attorney serving as a receiver (in addition to the commissions allowed him as receiver as herein provided) where such attorney in behalf of the receivership renders professional services, as an attorney, which are beyond the ordinary routine of a receivership and of a type which would reasonably justify the retention of legal counsel by any such receiver not himself licensed to practice law. (1901, c. 2, s. 88; Rev., s. 1226; C.S., s. 1215; 1955, c. 1371, s. 2; 1967, c. 32.)

CASE NOTES

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N.C. 281, 63 S.E. 1048 (1909).

Allowance of Costs Affects a Substantial Right of Creditors. — The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Items Includible in Costs. — Costs of administration of a receivership include, inter alia, such items as the following: (1) Court costs in proceedings relating to the receivership; (2) Compensation for the receiver; (3) Reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership; (4) Costs of conserving property in receivership; (5) Costs of sales of property in receivership; (6) Premiums for fire insurance on property in receivership; (7) Bookkeeping, clerical and accounting expense and postage in connection with the administration of the receivership; (8) Payment of all taxes

on property real or personal in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership; (2) Compensation for the receiver; (3) Compensation for the receiver's attorney; (4) Bookkeeping and clerical expense; (5) Auditing expense; (6) Premiums for fire insurance on property in receivership; (7) Compensation for watchmen for services in guarding property in receivership; and (8) Costs of sale of property in receivership. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out of the corpus of the estate in the custody of the court. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N.C. 475,

20 S.E. 770 (1894), rehearing denied, 116 N.C. 647, 21 S.E. 431 (1895).

Section Limits Commissions to Five Percent. — A rate not exceeding five percent on receipts and five percent on disbursements is the statutory limit of a receiver's commissions. *Battery Park Bank v. Western Carolina Bank*, 126 N.C. 531, 36 S.E. 39 (1900).

But this section does not state that a receiver is entitled to a five percent commission upon receipts and disbursements. Rather, it states that "the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements." *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Commission May Be Divided Between Parties. — An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in the case of referees' fees. *Simmons v. Allison*, 119 N.C. 556, 26 S.E. 171 (1896).

Counsel Fees Not Allowed for Collecting Assets of Estate. — A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate, since it is the personal duty of the receiver to look after such matters. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

Nor for Duties Not Requiring Legal Skill. — The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership require no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself and are not the subject of an allowance of counsel fees. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

The court may charge against the interest of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

For case distinguishing costs of administration and expenses of operation, see *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration are preferred in payment to expenses of operation. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Expenses of Operation Subordinate to Claims of Nonconsenting Lienholders. — Indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of nonconsenting lienholders to the corpus of the property. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Application of First Assets to Costs. — Under this section, the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N.C. 281, 63 S.E. 1048 (1909); *Humphrey Bros. v. Buell-Crocker Lumber Co.*, 174 N.C. 514, 93 S.E. 971 (1917).

When Costs Take Priority over Mortgage. — One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. *Humphrey Bros. v. Buell-Crocker Lumber Co.*, 174 N.C. 514, 93 S.E. 971 (1917).

Allowance of Commissions Held Premature. — The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. *Delafield v. Mercer Constr. Co.*, 118 N.C. 105, 24 S.E. 10 (1896).

Allowance of Costs Is Subject to Review. — That the amount of the

allowance of costs by the superior court of attorney's fees is reviewable is well settled. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the appellate court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. *Graham v. Carr*, 133 N.C. 449, 45

S.E. 847 (1903); *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E.2d 493 (1963).

When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. *Talbot v. Tyson*, 147 N.C. 273, 60 S.E. 1125 (1908).

§ 1-507.10. Debts provided for, receiver discharged.

When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C.S., s. 1216; 1955, c. 1371, s. 2.)

CASE NOTES

Discharged Receiver Held Not a Proper Party. — Where the receiver of an insolvent railroad company had been discharged, he was not a proper party to

an action against a foreclosure purchaser to recover for personal injuries suffered after his discharge. *Howe v. Harper*, 127 N.C. 356, 37 S.E. 505 (1900).

§ 1-507.11. Reorganization.

When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C.S., s. 1217; 1955, c. 1371, s. 2.)

CASE NOTES

Power of Superior Court to Approve Reorganization. — This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation which provides for the readjustment of the company's capital structure, when

approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership or the vested rights of parties to the proceedings unless they fail to appear. *Commercial Nat'l Bank v. Mooresville Cotton Mills*,

222 N.C. 305, 22 S.E.2d 913 (1942).

Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned, and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. *Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co.*, 117 N.C. 544, 23 S.E. 490 (1895).

New Corporation Assumes Contracts of Old. — Where, by merger

of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. *Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co.*, 117 N.C. 544, 23 S.E. 490 (1895).

Duty of Fiduciaries. — In the reorganization of a corporation under this section, executors, trustees and other fiduciaries holding stock in the corporation not only have the right, but also the duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. *Commercial Nat'l Bank v. Mooresville Cotton Mills*, 222 N.C. 305, 22 S.E.2d 913 (1942).

ARTICLE 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.

When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (C.C.P., s. 215; Code, s. 380; Rev., s. 850; C.S., s. 863.)

CASE NOTES

When Custodian May Retain Fund. — Absent threatened irreparable damage or loss of a fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. *Thompson v. McNair*, 62 N.C. 121 (1867); *L. Levenson & Co. v. Elson*, 88 N.C. 182 (1883).

When Court Will Retain Fund. — When a disputed fund is in the possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. *Ponton v.*

McAdoo, 71 N.C. 101 (1874); *Morris v. Willard*, 84 N.C. 293 (1881); *L. Levenson & Co. v. Elson*, 88 N.C. 182 (1883).

Court Authorized to Order Money Delivered to Party. — Where a tenant, upon the uncontroverted facts, is entitled as a matter of law to the proceeds of a crop insurance policy paid into court by an insurer, free from the landlord's crop lien for advancements, the court has authority under this section to order that such fund be to the tenant. *Peoples v. United States Fire Ins. Co.*, 248 N.C. 303, 103 S.E.2d 381 (1958).

§ 1-509. Ordered seized by sheriff.

When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (C.C.P., s. 215; Code, s. 381; Rev., s. 851; C.S., s. 864.)

§ 1-510. Defendant ordered to satisfy admitted sum.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. (C.C.P., s. 215; Code, s. 382; Rev., s. 852; C.S., s. 865.)

CASE NOTES

This section may not be invoked where its application would give sanction to piecemeal recoveries which would be essentially inconsistent. *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 70 S.E.2d 176 (1952).

Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause con-

tinued as to the other. *Curran v. Kerchner*, 117 N.C. 264, 23 S.E. 177 (1895).

Where, in an action on a note, the defendants admitted liability in a certain part thereof, but denied liability for the balance, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note was authorized by this section. *Meadows Fertilizer Co. v. Farmers Trading Co.*, 203 N.C. 261, 165 S.E. 694 (1932).

Cited in *Wachovia Bank & Trust Co. v. Wilder*, 255 N.C. 114, 120 S.E.2d 404 (1961).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 40.

Mandamus.

§§ 1-511 to 1-513: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 41.

Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.

The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this Article. To the extent that rules of procedure are not provided for in this Article, the Rules of Civil Procedure shall apply. (R.C., c. 26, ss. 5, 25; C.C.P., s. 362; Code, s. 603; Rev., s. 286; C.S., s. 869; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Legal Periodicals. — For article, "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

For article, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

This Article prescribes a specific mode for trying the title to a public office. Such relief is to be sought in a civil action. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E.2d 292 (1951).

Title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incorporated in this Article. *Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952).

Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and there is in fact only a civil action in which the subject matter is a trial of the title to an office. *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898).

Interest of Public in Determining Title to Office. — Although the proceeding by information in the nature of

the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election, or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office; rather, the public has an interest in the question which the legislature seems to have considered paramount to that of the private rights of the persons aggrieved. Hence, the requirement that such actions must be brought by the Attorney General in the name of the people of the State, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right. And when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney General in the name of the people.

Patterson v. Hubbs, 65 N.C. 119 (1871); *People ex rel. Nichols v. McKee*, 68 N.C. 429 (1873); *Brown v. Turner*, 70 N.C. 93 (1874); *People ex rel. Nichols v. Hilliard*, 72 N.C. 169 (1875); *Hargrove v. Hunt*, 73 N.C. 24 (1875); *Saunders v. Gatling*, 81 N.C. 298 (1879).

Object of Former Writ of Scire Facias. — Writs of scire facias consisted of two classes: The object of the first class was to remedy defects in or to continue an action; that of the second class, to commence some proceeding. *McDowell v. Asbury*, 66 N.C. 444 (1872).

Substance of Remedy Not Affected by Section. — Proceedings in the nature of a scire facias of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and form of writs of this class and simplify the process into a notice or summons to

show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to affect the substance of the remedy. On such motion the judge may allow the defendant to make any defense of which he could have availed himself under the old scire facias proceeding. *McDowell v. Asbury*, 66 N.C. 444 (1872).

For historical discussion, see *State ex rel. Giles v. Hardie*, 23 N.C. 42 (1840); *Ex parte Daughtry*, 28 N.C. 155 (1845); *Saunders v. Gatling*, 81 N.C. 298 (1879); *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892).

Applied in *Stephens v. Dowell*, 208 N.C. 555, 181 S.E. 629 (1935); *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937).

Cited in *Bouldin v. Davis*, 197 N.C. 731, 150 S.E. 507 (1929).

§ 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:

- (1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
- (2) When a public officer, civil or military, has done or suffered an which, by law, makes a forfeiture of his office.
- (3) When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of G.S. 146-39. (C.C.P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C.S., s. 870; 1983, c. 768, s. 1.)

Cross References. — As to actions by the Attorney General in the name of the State to vacate land grants, see § 146-63.

Effect of Amendments. — The 1983 amendment, effective July 15, 1983, sub-

stituted "G.S. 146-39" for "§ 146-14" in subdivision (3).

Legal Periodicals. — For comment on taxpayers' actions, see 13 *Wake Forest L. Rev.* 397 (1977).

CASE NOTES

Scope of Provisions. — This and the subsequent sections provide for the fullest relief to the rightful claimant against an unlawful intrusion, and thereby dispense with the need of recourse to another process, unless those required to induct still refuse to do so after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge

of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties. *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883).

Actions of this character may be instituted in the name of the State on the relation of the Attorney General or of

any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. *Saunders v. Gatling*, 81 N.C. 298 (1879); *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892); *State ex rel. Hines v. Vann*, 118 N.C. 3, 23 S.E. 932 (1896); *State ex rel. Haughtalling v. Taylor*, 122 N.C. 141, 29 S.E. 101 (1898).

A private person cannot institute or maintain an action of this character in his own name or upon his own authority, even if he is a claimant of the office. The action must be brought and prosecuted in the name of the State by the Attorney General or in the name of the State upon the relation of a private person who claims to be entitled to the office, or in the name of the State upon the relation of a private person who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E.2d 292 (1951).

Relator need not allege title to the office or interest therein. *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892).

But the action is nonetheless personal as to the parties claiming the office, the issue between them being the right to the same. *Rhodes v. Love*, 153 N.C. 468, 69 S.E. 436 (1910). See also, *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883).

It is not permissible to try the title to an office by injunction or mandamus; a civil action in the nature of quo warranto is the appropriate remedy, to be tried before a judge and jury. *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883); *Lyon v. Board of Comm'rs*, 120 N.C. 237, 26 S.E. 929 (1897); *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898).

Procedure for Determining Title to Public Office. — One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the superior court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), citing

Harkrader v. Lawrence, 190 N.C. 441, 130 S.E. 35 (1925). See also, *State ex rel. Giles v. Hardie*, 23 N.C. 42 (1840); *Ex parte Daughtry*, 28 N.C. 155 (1845); *Saunders v. Gatling*, 81 N.C. 298 (1879).

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. *Rogers v. Powell*, 174 N.C. 388, 93 S.E. 917 (1917). See also, *State ex rel. Burke v. Commissioners of Bessemer City*, 148 N.C. 46, 61 S.E. 609 (1908).

Remedy to Determine Validity of Election. — A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the State by the Attorney General on the relation of the party aggrieved. *Saunders v. Gatling*, 81 N.C. 298 (1879); *Davis v. Moss*, 81 N.C. 303 (1879).

A tabulation of the result of an election by the clerk, in the manner required by law, is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. *Swain v. McRae*, 80 N.C. 111 (1879); *Gatling v. Boone*, 98 N.C. 573, 3 S.E. 392 (1887); *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898).

The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts. *Lyon v. Board of Comm'rs*, 120 N.C. 237, 26 S.E. 929 (1897).

How Right to Judge's Office Determined. — For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that

purpose by the Attorney General in the name of the State, upon his own information or upon the complaint of a private person. *In re Wingler*, 231 N.C. 560, 58 S.E.2d 372 (1950).

An action against a judge of probate to vacate his office is properly brought by the Attorney General under this section. *Patterson v. Hubbs*, 65 N.C. 119 (1871); *People ex rel. Attorney Gen. v. Heaton*, 77 N.C. 18 (1877).

Determination of Right to Hold Two Offices. — A citizen and taxpayer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892); *State ex rel. Hines v. Vann*, 118 N.C. 3, 23 S.E. 932 (1896); *State ex rel. Barnhill v. Thompson*, 122 N.C. 493, 29 S.E. 720 (1898).

Where board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been elected, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party, this could not in anywise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. *State ex rel. Roberts v. Calvert*, 98 N.C. 580, 4 S.E. 127 (1887).

Recount of Ballots. — Preservation of ballots is required that they may be kept as evidence to certify or correct election returns when impeached, and on a quo warranto the ballot boxes may be brought into court and the recount made in the presence of the court and jury. *Broughton v. Young*, 119 N.C. 915, 27 S.E. 277 (1896); *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898).

Quo Warranto Is Not Proper Remedy to Test Validity of Tax. — Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax, even though it is levied under the authority of a popular election. *Barbee v. Board of Comm'rs*, 210 N.C. 717, 188 S.E. 314 (1936).

No Jurisdiction in Courts to Determine Contest for a Seat in the General Assembly. — The Constitution of North Carolina withdraws from the consideration of North Carolina courts the question of title involved in a contest

for a seat in the General Assembly, and an action in quo warranto will not lie under this section. *State ex rel. Alexander v. Pharr*, 179 N.C. 699, 103 S.E. 8 (1920).

What Is a Public Office. — An office such as properly comes within the legitimate scope of a quo warranto information may be defined as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public. *High Ex. Leg. Rem.*, § 620; *Eliason v. Coleman*, 86 N.C. 235 (1882).

The statute has reference to such usurping occupants as are exercising public functions or conferred franchises wrongfully; it is confined to an office which is a part of the government and part of the State policy, and to an officer who takes part in the government. *Eliason v. Coleman*, 86 N.C. 235 (1882). See also, *Nichols v. McKee*, 68 N.C. 429 (1873).

The true test of a public office is that it is a parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. *Eliason v. Coleman*, 86 N.C. 235 (1882).

While it has often been a matter of controversy what shall be said to be a public office, a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works are officers of such a public character as to come within the rule. *Rhodes v. Love*, 153 N.C. 468, 69 S.E. 436 (1910).

Chief of Police. — The office of chief of police is such an office that an action in the nature of a quo warranto may be brought to try the title to it. *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892).

Chief Engineer. — This section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely the Western North Carolina R.R. Company. *Eliason v. Coleman*, 86 N.C. 235 (1882); *State ex rel. Foard v. Hall*, 111 N.C. 369, 16 S.E. 420 (1892).

The business of selling liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. *Hargett v. Bell*, 134 N.C. 394, 46 S.E. 749 (1904).

The wrongful occupant must have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883).

As to allegation that defendant has usurped and is illegally exercising duties of office, see *Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898).

Scope of Review on Appeal. — The facts found by the referee as to the result of an election in a proceeding in the nature of a quo warranto, approved by the trial judge, are not subject to review on appeal when supported by competent evidence. *State ex rel. Robertson v. Jackson*, 183 N.C. 695, 110 S.E. 593 (1922).

The question of fraud in the returns of

the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds an absence of fraud, upon competent evidence. *State ex rel. Robertson v. Jackson*, 183 N.C. 695, 110 S.E. 593 (1922).

Applied in *State ex rel. Grimes v. Holmes*, 207 N.C. 293, 176 S.E. 746 (1934); *State ex rel. Pitts v. Williams*, 260 N.C. 168, 132 S.E.2d 329 (1963).

Cited in *Bouldin v. Davis*, 197 N.C. 731, 150 S.E. 507 (1929); *Edwards v. Board of Educ.*, 235 N.C. 345, 70 S.E.2d 170 (1952); *State ex rel. Tillett v. Mustain*, 243 N.C. 564, 91 S.E.2d 696 (1956); *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E.2d 278 (1960).

§ 1-516. Action by private person with leave.

When application is made to the Attorney General by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the State, upon the relation of such applicant, upon the applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action. (1874-5, c. 76; 1881, c. 330; Code, s. 608; Rev., s. 828; C.S., s. 871.)

CASE NOTES

Constitutionality. — This section, allowing the prosecution of an action in the name of the State to assert the right of a citizen to a public office, is not, for that reason, unconstitutional. *McCall v. Webb*, 135 N.C. 356, 47 S.E. 802 (1904).

The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney General. *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883).

Prerequisites to Prosecution of Action by Private Person. — Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney General for permission to bring the action, tender to the Attorney General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney General to bring the action in the name of the State upon his relation. *State ex rel.*

Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

In proceedings under this section and § 1-514 to try title to a public office, the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney General, the filing of the bond, etc., as required by this section, are prerequisites to the right of the relator to maintain the action. *Cooper v. Crisco*, 201 N.C. 739, 161 S.E. 310 (1931).

Applicability of Statutory Conditions to Second Suit after Voluntary Nonsuit. — Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by § 1-514 and the remedy in such matters is under the provisions of this section. And where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject matter against the same respondent, but fails to obtain permission to bring

the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. *Cooper v. Crisco*, 201 N.C. 739, 161 S.E. 310 (1931).

Judge Cannot Confer Power to Prosecute Action. — Where a relator had no leave from the Attorney General permitting him to sue as such, he was incapacitated by law to prosecute the action, and the trial judge could not confer upon him the legal power denied

to him by positive legislative enactment through the simple expedient of designating him a party-plaintiff and treating his answer as a complaint. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E.2d 292 (1951).

Applied in *State ex rel. Midgett v. Gray*, 159 N.C. 443, 74 S.E. 1050 (1912); *State ex rel. Grimes v. Holmes*, 207 N.C. 293, 176 S.E. 746 (1934).

Cited in *Bouldin v. Davis*, 197 N.C. 731, 150 S.E. 507 (1929); *Barbee v. Board of Comm'rs*, 210 N.C. 717, 188 S.E. 314 (1936).

§ 1-517. Solvent sureties required.

The Attorney General, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the State against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (1901, c. 595, s. 2; Rev., s. 829; C.S., s. 872.)

§ 1-518. Leave withdrawn and action dismissed for insufficient bond.

When the Attorney General has granted leave to a private relator to bring an action in the name of the State to try the title to an office, and it afterwards is shown to the satisfaction of the Attorney General that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the Attorney General may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the Attorney General to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (1891, c. 595; Rev., s. 830; C.S., s. 873.)

§ 1-519. Arrest and bail of defendant usurping office.

When action is brought against a person for usurping an office, the Attorney General, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (C.C.P., s. 369; 1883, c. 102; Code, s. 609; Rev., s. 831; C.S., s. 874.)

Cross References. — As to arrest and bail in civil actions, see § 1-409 et seq.

§ 1-520. Several claims tried in one action.

Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (C.C.P., s. 374; Code, s. 614; Rev., s. 832; C.S., s. 875.)

§ 1-521. Trials expedited.

All actions to try the title or right to any State, county or municipal office shall stand for trial at the next session of court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C.S., s. 876; 1947, c. 781; 1971, c. 381, s. 12.)

CASE NOTES

Stated in State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 1-522. Time for bringing action.

All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (1901, c. 519; 1903, c. 556; Rev., s. 834; C.S., s. 877.)

Legal Periodicals. — For article, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

When Section Does Not Apply. — This provision, requiring a private relator, upon leave of the Attorney General, to bring his action within 90 days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than 90 days before the

plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Applied in State ex rel. Long v. Smitherman, 251 N.C. 682, 111 S.E.2d 834 (1960).

§ 1-523. Defendant's undertaking before answer.

Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars (\$200.00), which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (1895, c. 105; Rev., s. 835; C.S., s. 878.)

§ 1-524. Possession of office not disturbed pending trial.

In any civil action pending in any of the courts of this State in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof. (1899, c. 33; Rev., s. 836; C.S., s. 879.)

CASE NOTES

Purpose of Section. — An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings, and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. *Patterson v. Hubbs*, 65 N.C. 119 (1871).

Title Should Be Determined First. — Individuals claiming to comprise the

board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. *Rogers v. Powell*, 174 N.C. 388, 93 S.E. 917 (1917).

Stated in *Osborne v. Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941).

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.

At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in G.S. 1-523. It is the duty of the judge to require the defendant to give the

undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (1895, c. 105, s. 2; 1899, c. 49; Rev., s. 837; C.S., s. 880.)

CASE NOTES

For a discussion of this section, see *Morganton Graded School v. McDowell*, 157 N.C. 316, 72 S.E. 1083 (1911).
McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904). See also, *State ex rel.*

§ 1-526. Service of summons and complaint.

The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (1899, c. 126; Rev., s. 838; C.S., s. 881.)

Cross References. — As to service of process in civil actions, see Rule 4 of the Rules of Civil Procedure (§ 1A-1).

CASE NOTES

As to sufficiency of summons, see *McLeod v. Pearson*, 208 N.C. 539, 181 S.E. 753 (1935).

§ 1-527. Judgment in such actions.

In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars (\$2000). (Const., Art. IX, s. 5; R.C., c. 95; C.C.P., ss. 370, 375; Code, ss. 610, 615; Rev., ss. 839, 840; C.S., s. 882.)

CASE NOTES

Where defendant went into office under an unconstitutional appointment by the General Assembly, the

court presumed that there was no criminal intent and did not impose the fine. *Nichols v. McKee*, 68 N.C. 429 (1873).

§ 1-528. Mandamus to aid relator.

In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (1885, c. 406, s. 1; Rev., s. 841; C.S., s. 883.)

§ 1-529. Appeal; bonds of parties.

No appeal by the defendant to the appellate division from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (1885, c. 406, s. 2; Rev., s. 842; C.S., s. 884; 1969, c. 44, s. 13.)

§ 1-530. Relator inducted into office; duty.

If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (C.C.P., ss. 371, 373; Code, ss. 611, 613; Rev., ss. 843, 844; C.S., s. 885.)

CASE NOTES

Recovery of Fees and Emoluments.

— Compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. *State ex rel. Howerton v. Tate*, 70 N.C. 161 (1874); *Swain v. McRae*, 80 N.C. 111 (1879); *State ex rel. Jones v. Jones*, 80 N.C. 127 (1879).

Person Entitled Has Property Interest in Office.

— A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property interest therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensa-

tion for his labor. *State ex rel. Howerton v. Tate*, 70 N.C. 161 (1874); *Osborne v. Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941).

Oath and Bond. — Where defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for refusal, that the relator had not filed bond or taken the oath of office, is properly denied, since such further allegations do not constitute a defense, the filing of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the *de jure* officer, because in such circumstances such action would be a vain thing which the law does not require and it being expressly provided by this section, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this

result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office. *Osborne v. Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941).

It is the intention of the lawmaking power that one who is rightfully entitled to an office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. *Osborne v. Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941).

Court Can Enforce Demand for Documents. — When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. *Rhodes v. Love*, 153 N.C. 468, 69 S.E. 436 (1910).

Cited in *Edwards v. Board of Educ.*, 235 N.C. 345, 70 S.E.2d 170 (1952).

§ 1-531. Refusal to surrender official papers misdemeanor.

If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (C.C.P., s. 372; Code, s. 612; Rev., s. 3601; C.S., s. 886.)

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

When any property, real or personal, is forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (C.C.P., s. 381; Code, s. 621; Rev., s. 845; C.S., s. 887.)

ARTICLE 42.

Waste.§ 1-533. **Remedy and judgment.**

Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (C.C.P., s. 383; Code, s. 624; Rev., s. 853; C.S., s. 888.)

CASE NOTES

Waste Defined. — Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

Nature of Action. — An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. *Rippey v. Miller*, 33 N.C. 247 (1850); *Butner v. Keelhn*, 51 N.C. 60 (1858); *Collier v. Arrington*, 61 N.C. 356 (1867); *Peebles v. North Carolina R.R.*, 63 N.C. 238 (1869); *Shuler v. Millsaps*, 72 N.C. 297 (1874); *Shields v. Lawrence*, 72 N.C. 43 (1875).

Discretion of Jury. — It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. *King v. Miller*, 99 N.C. 583, 6 S.E. 660 (1888); *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

In ascertaining whether a given act or omission subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

No one shall have an action of waste unless he has the immediate estate of inheritance. *Edens v. Foulks*,

2 N.C. App. 325, 163 S.E.2d 51 (1968).

One entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost. *Edens v. Foulks*, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

An action cannot be maintained by plaintiff a contingent remainderman because, if allowed, the life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened. *Edens v. Foulks*, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

If a person's interest is a contingent remainder, such person has no standing to maintain an action for waste and forfeiture under this section. *Edens v. Foulks*, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

But a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain. *Edens v. Foulks*, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Contingent and vested remainder distinguished. *Edens v. Foulks*, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Cited in *Batten v. Corporation Comm'n*, 199 N.C. 460, 154 S.E. 748 (1930).

§ 1-534. For and against whom action lies.

In all cases of waste, an action lies in the appropriate trial division of the General Court of Justice at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R.C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C.S., s. 889; 1971, c. 268, s. 33.)

CASE NOTES

The writ of waste is founded upon principles peculiar to itself and is dependent upon privity between the reversioner and tenant. No one shall have the action of waste, unless he has the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privity, the waste being committed in the lifetime of the reversioner. *Browne v. Blick*, 7 N.C. 511 (1819).

Contingent Remainderman Cannot Sue. — A contingent remainderman cannot sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. *Gordon v. Lowther*, 75 N.C. 193 (1876); *Latham v. Lumber Co.*, 139 N.C. 9, 51 S.E. 780 (1905); *Richardson v. Richardson*, 152 N.C. 705, 68 S.E. 217 (1910).

The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common

law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. *Jones v. Britton*, 102 N.C. 166, 9 S.E. 554 (1889).

The right to sue for waste includes the right to restrain its commission. *Hinson v. Hinson*, 120 N.C. 400, 27 S.E. 80 (1897); *Morrison v. Morrison*, 122 N.C. 598, 29 S.E. 901 (1898).

While persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. *Gordon v. Lowther*, 75 N.C. 193 (1876); *Jones v. Britton*, 102 N.C. 166, 9 S.E. 554 (1889); *Farabow v. Green*, 108 N.C. 339, 12 S.E. 1003 (1891).

Cited in *Howell v. Shaw*, 183 N.C. 460, 112 S.E. 38 (1922).

§ 1-535. Tenant in possession liable.

Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (11 Hen. VI, c. 5; R.C., c. 116, s. 2; Code, s. 626; Rev., s. 855; C.S., s. 890.)

§ 1-536. Action by tenant against cotenant.

Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (13 Edw. I, c. 22; R.C., c. 116, s. 4; Code, s. 627; Rev., s. 856; C.S., s. 891.)

CASE NOTES

Section Changes Common-Law Rule. — One of the settled rules at common law in England, was that one

tenant in common could not sue his cotenant, except for partition. However, the legislature, feeling the practical diffi-

culties at an early date, authorized a tenant in common to maintain an action for waste against his cotenant or joint tenant. And such tenant can also restrain his cotenant from the commission of waste. *Morrison v. Morrison*, 122 N.C. 598, 29 S.E. 901 (1898).

Under this section, one tenant in common may sue his cotenant for waste for cutting down trees to be sold as cross ties and hauled off the land. *Hinson v. Hinson*, 120 N.C. 400, 27 S.E. 80 (1897).

Applied in *Daniel v. Tallassee Power Co.*, 204 N.C. 274, 168 S.E. 217 (1933).

§ 1-537. Action by heirs.

Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R.C., c. 116, s. 5; Code, s. 628; Rev., s. 857; C.S., s. 892.)

CASE NOTES

Cited in *Hybart v. Jones*, 130 N.C. 227, 41 S.E. 293 (1902); *State v. Palmer*, 212 N.C. 10, 192 S.E. 896 (1937).

§ 1-538. Judgment for treble damages and possession.

In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (6 Edw. I, c. 5; 20 Edw. I, st. 2; R.C., c. 116, s. 3; Code, s. 629; Rev., s. 858; C.S., s. 893.)

CASE NOTES

Application of Section. — Under this section a life tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

Section Changes Former Law. — This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect

only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

For case discussing prospective damages, see *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

Judgment Must Be in Accord with

This Section. — In an action by remaindermen against the life tenant for waste under § 1-533, judgment must be in accord with this section, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid to the life tenant. *Parrish v. Parrish*, 247 N.C. 584, 101 S.E.2d 480 (1958).

In an action for waste where the jury finds insignificant damages, judgment will be arrested. *Sheppard v. Sheppard*, 3 N.C. 382 (1806).

Judgment for Damages Only Authorized. — It is not error for the judgment in an action of waste to be for

the damages only, and not also for the place wasted. *Bright v. Wilson*, 1 N.C. 251 (1800).

New Action for Subsequent Injury Authorized. — If the life tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

Appeal. — Under this section the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890).

ARTICLE 43.

Nuisance and Other Wrongs.

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

Any person or other legal entity shall be entitled to recover actual damages suffered in an amount not to exceed a total of one thousand dollars (\$1,000) from the parent or parents of any minor who shall maliciously or willfully injure such person or destroy the real or personal property of such person. Parents whose custody and control have been removed by court order or by contract prior to the act complained of shall not be liable under this act. This act shall not preclude or limit recovery of damages from parents under common law remedies available in this State. (1961, c. 1101; 1981, c. 414, s. 1.)

Legal Periodicals. — For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

CASE NOTES

Constitutionality. — The enactment of this section is within the police power of the State and it is not violative of the provisions of Const., Art. I, § 17, or of the provisions of the Fifth Amendment to the federal Constitution. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

This section gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. *General Ins. Co. of Am. v. Faulkner*, 259

N.C. 317, 130 S.E.2d 645 (1963).

Purpose of Section. — This section and similar statutes appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

The rationale of this section apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will

stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

Section Imposes Vicarious Liability on Parents. — In an action against the parents under this section the complaint is not fatally defective because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of an injury to plaintiff, for the reason that this section imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilful destruction of property by a child under the age of eighteen. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

At common law, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130

S.E.2d 645 (1963).

For the plaintiff to recover from the parents he must establish, inter alia, by the greater weight of the evidence, that the minor was under the age of eighteen years, and that the child maliciously or wilfully destroyed property, real, personal, or mixed. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

Insurer Paying Loss May Sue on Subrogated Claim. — An insurance company, as plaintiff, may bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who pursuant to the provisions of this section, would have been able to bring such an action in its own name. *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

Application of Section. — For application of section to automobile collision case, see *Smith v. Simpson*, 260 N.C. 601, 133 S.E.2d 474 (1963).

Applied in *In re Berry*, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

Cited in *S & N Freight Line v. Bundy Truck Lines*, 3 N.C. App. 1, 164 S.E.2d 89 (1968); *Moore v. Crumpton*, 55 N.C. App. 398, 285 S.E.2d 842 (1982).

§ 1-539. Remedy for nuisance.

Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (C.C.P., s. 387; Code, s. 630; Rev., s. 825; C.S., 894.)

Cross References. — As to injunction against nuisance, see § 1-485.

CASE NOTES

Nuisance Defined. — That which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him is a nuisance. *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883).

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general as to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public

wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. *McManus v. Southern Ry.*, 150 N.C. 655, 64 S.E. 766 (1909).

Adequate Remedies Available for Nuisance. — Where a nuisance has been established, working harm to the rights of an individual citizen, the law of North Carolina is searching and adequate to afford an injured person ample redress,

both by remedial and preventive remedies. *McManus v. Southern Ry.*, 150 N.C. 655, 64 S.E. 766 (1909).

The ancient writ of nuisance has been superseded under this section by civil action for damages or for a removal of the nuisance, or for both. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E.2d 923 (1949).

Damages in nuisance action should be such as to lead to the abatement of the nuisance. *Bradley v. Amis*, 3 N.C. 399 (1806).

Appreciable Damage Must Be Suffered. — To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. *McManus v. Southern Ry.*, 150 N.C. 655, 64 S.E. 766 (1909).

An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. *Pedrick v. Railroad*, 143 N.C. 485, 55 S.E. 877 (1906); *McManus v. Southern Ry.*, 150 N.C. 655, 64 S.E. 766 (1909); *Barrier v. Troutman*, 231 N.C. 47, 55 S.E.2d 923 (1949).

An action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, although others in the community suffered sickness from the same cause. *Pruitt v. Bethell*, 174 N.C. 454, 93 S.E. 945 (1917).

One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. *Reyburn v. Sawyer*, 135 N.C. 328, 47 S.E. 761 (1904).

Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful.

Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Permanent damages for the depreciation of property cannot be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. *Taylor v. Seaboard Air Line Ry.*, 145 N.C. 400, 59 S.E. 129 (1907).

Proximate Cause. — In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. *McGhee v. Norfolk & S. Ry.*, 147 N.C. 142, 60 S.E. 912 (1908).

Abatement of a private nuisance is not dependent upon recovery of damages. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E.2d 923 (1949).

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. It was held that the complaint alleged a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff was entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E.2d 923 (1949).

An airport is not a nuisance per se, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E.2d 923 (1949).

Diminution of Damage. — In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. *Brown v. Virginia-Carolina Chem. Co.*, 162 N.C. 83, 77 S.E. 1102 (1913).

Cited in *Hampton v. North Carolina Pulp Co.*, 49 F. Supp. 625 (E.D.N.C. 1943), rev'd on other grounds, 139 F.2d 840 (4th Cir. 1944).

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

(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) If any person, firm or corporation shall willfully and intentionally set on fire, or cause to be set on fire, in any manner whatever, any valuable wood, timber or trees on the lands of another, such person, firm or corporation shall be liable to the owner of said lands for double the value of such wood, timber or trees damaged or destroyed thereby.

(c) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594; 1971, c. 119; 1977, c. 859.)

Legal Periodicals. — For article discussing remedies for trespass to land

in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Strict Construction. — Strict construction of this section requires that everything be excluded from the operation of the section which does not come within the scope of the language used, taking the words in their natural and ordinary meaning. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E.2d 422 (1972).

Effect of Section. — This section not only doubles the value of the timber cut but imposes strict liability as well. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Alternative Measures of Damages. — Where plaintiff sues for the unlawful cutting or removal of timber, there are two alternative measures of damages available. One gives the landowner the difference in the value of his property immediately before and immediately after the cutting, and the other gives plaintiff the value of the timber itself. This latter value is then doubled by reason of this section, which allows plaintiff to recover double the value of timber cut or removed. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Plaintiffs who sought to recover both

their statutory damages for cut timber and damages for diminution in value of their property elected to recover their statutory damages when they proceeded upon that theory at trial and recovered damages thereunder. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Owner May Recover Value Added by Intentional Wrongdoer. — If the trespasser is an intentional and knowing wrongdoer, the owner of the land may recover the enhanced value of the timber added to it by the labor of the trespasser. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E.2d 422 (1972).

But This Section and the Enhanced Value Theory Are Mutually Exclusive. — The common-law theory of enhanced value and the statutory remedy of double value are mutually exclusive. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E.2d 422 (1972).

And Section May Not Be Applied to Enhanced Value. — A strict interpretation of this section would not permit its application to an enhanced value situation. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E.2d 422 (1972).

While this section provides that the wrongdoer shall be liable to the owner of the land for double the value of the wood or trees injured, cut or removed, the statute does not indicate when the value should be doubled. To collect double the enhanced value plaintiffs would be proceeding under the common-law theory of an action in trover to recover the value of the goods in their enhanced condition and at the same time proceeding under the statutory remedy. The two remedies are exclusive and are not to be combined to provide an additional remedy. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 190 S.E.2d 422 (1972).

In order to recover penalties under this section plaintiff must establish ownership of the land from which the timber was cut. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Defendants' denial of plaintiff's allegation of title and trespass placed the burden on plaintiff of establishing each of these allegations. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Where the plaintiff claims damages for unlawful cutting of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing his title to the described lands. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In an action for permanent damages to the freehold, or to the ownership interest, plaintiff must rely upon the strength of his own title. This requirement may be met by various methods: (1) He may offer a connected chain of title or a grant direct from the State to himself; (2) Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under

color of title in himself and those under whom he claims, for 21 years before the action was brought; (3) He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title to himself and those under whom he claims, for seven years before the action was brought; (4) He may show, as against the State, possession under known and visible boundaries for 30 years, or as against individuals for 20 years before the action was brought; (5) He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought; or (6) He may connect the defendant with a common source of title and show in himself a better title from that source. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E. 430 (1972).

The possession of real property is not a sufficient interest upon which to base a recovery for permanent damages to the freehold — the ownership interest. *Woodard v. Marshall*, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Instruction Directing Jury to Double Damages Authorized. — In an action for wrongful cuttings of timber on plaintiffs' land, it was not error for the court to instruct the jury that if they found the plaintiffs had suffered damages they should double the amount of damages in arriving at their verdict, rather than instructing the jury to determine the amount of damages and then doubling it himself. *Pridgen v. Callaway*, 44 N.C. App. 163, 260 S.E.2d 441 (1979).

Applied in *Pine Burr Golf, Inc. v. Poole*, 8 N.C. App. 92, 173 S.E.2d 478 (1970); *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E.2d 239 (1971); *Tyson v. Winstead*, 15 N.C. App. 585, 190 S.E.2d 281 (1972); *Dawson v. Sugg*, 32 N.C. App. 650, 233 S.E.2d 639 (1977).

Cited in *Paschal v. Autry*, 256 N.C. 166, 123 S.E.2d 569 (1962); *Brandenburg Land Co. v. White*, 26 N.C. App. 548, 216 S.E.2d 912 (1975); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978).

§ 1-539.2. Dismantling portion of building.

When one person owns a portion of a building and another or other persons own the remainder of said building, neither of said owners shall dismantle his portion of said building without making secure the portions of said building belonging to other persons. Any person

violating the provisions of this section shall be responsible in damages to the owners of other portions of such building. (1955, c. 1359.)

ARTICLE 43A.

Adjudication of Small Claims in Superior Court.

§§ 1-539.3 to 1-539.8: Repealed by Session Laws 1971, c. 268, s. 34.

ARTICLE 43B.

Defense of Charitable Immunity Abolished.

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

The common-law defense of charitable immunity is abolished and shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967. (1967, c. 856.)

CASE NOTES

Stated in *Darsie v. Duke Univ.*, 48 N.C. App. 20, 268 S.E.2d 554 (1980).

§§ 1-539.10 to 1-539.14: Reserved for future codification purposes.

ARTICLE 43C.

Actions Pertaining to Local Units of Government.

§ 1-539.15: Repealed by Session Laws 1981, c. 777, s. 1.

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

No local act, including city charters, shall require a notice to a local unit of government of any claim against it and prohibit suit against the local unit if notice is not given or limit the period during which an action may be brought on such a claim after notice has been given. (1981, c. 777, s. 2.)

§§ 1-539.17 to 1-539.20: Reserved for future codification purposes.

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 minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent. (1975, c. 685, s. 1.)

Legal Periodicals. — For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

CASE NOTES

This section does not create an arbitrary classification in violation of the equal protection clauses of the North Carolina Const., Art. I, § 19, and the Fourteenth Amendment of the United States Constitution. *Ledwell v. Berry*, 39 N.C. App. 224, 249 S.E.2d 862 (1978), cert. denied, 296 N.C. 585, 254 S.E.2d 35 (1979).

An unemancipated minor child injured prior to October 1, 1975, by the ordinary negligence of its parent, has no right of action against the parent, since this section applies to action

occurring on or after that date. *Cassidy v. Cheek*, 58 N.C. App. 742, 294 S.E.2d 414 (1982).

Quoted in *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E.2d 3 (1977); *Triplett v. Triplett*, 34 N.C. App. 212, 237 S.E.2d 546 (1977).

Cited in *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976); *Snow v. Nixon*, 52 N.C. App. 131, 277 S.E.2d 850 (1981); *Furr v. Pinoca Volunteer Fire Dep't*, 53 N.C. App. 458, 281 S.E.2d 174 (1981); *Carver v. Carver*, 55 N.C. App. 716, 286 S.E.2d 799 (1982).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

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

In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (1874-5, c. 178; Code, s. 574; Rev., s. 859; C.S., s. 895.)

Legal Periodicals. — For discussion of the law of contracts in relation to this section, see 13 N.C.L. Rev. 45.

CASE NOTES

- I. In General.
- II. Illustrative Cases.

I. IN GENERAL.

Constitutionality. — This section is constitutional. *Koonce v. Russell*, 103 N.C. 179, 9 S.E. 316 (1889); *Petit v. Woodlief*, 115 N.C. 120, 20 S.E. 208 (1894); *Wittkowsky v. Baruch*, 127 N.C. 313, 37 S.E. 449 (1900).

This section applies as a compromise and settlement when an agreement is made and accepted. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties. *York v. Westall*, 143 N.C. 276, 55 S.E. 724 (1906). See also, *Williams v. Alexander*, 39 N.C. 207 (1845); *Barnawell v. Threadgill*, 56 N.C. 50 (1856); *Mayo v. Gardner*, 49 N.C. 359 (1857); *Mathis v. Bryson*, 49 N.C. 508 (1857); *Findly v. Ray*, 50 N.C. 125 (1857).

When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. *Petit v. Woodlief*, 115 N.C. 120, 20 S.E. 208 (1894).

Essentials of Compromise. — As in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. *Horn v. Detroit Dry Dock Co.*, 150 U.S. 610, 14 S. Ct. 214, 37 L. Ed. 1199 (1893).

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, delib-

erately and understandingly. *Hennessy v. Bacon*, 137 U.S. 78, 11 S. Ct. 17, 34 L. Ed. 605 (1890).

The word "agreement" implies the parties are of one mind, that all have a common understanding of the rights and obligations of the others and that there has been a meeting of the minds. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

A compromise and settlement must be based upon a disputed claim. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

This section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. *Smith v. Richards*, 129 N.C. 267, 40 S.E. 5 (1901).

Elements of Accord and Satisfaction. — An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981); *Sharpe v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 302 S.E.2d 893 (1983).

For additional case discussing elements of accord and satisfaction, see *Allgood v. Wilmington Sav. & Trust Co.*, 242 N.C. 506, 88 S.E.2d 825 (1955).

Same — Consideration Required.

— Consideration must in some form or other be present in an accord. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Slight Irregularities Do Not Vitiolate.

— Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. *McAuley v. Sloan*, 173 N.C. 80, 91 S.E. 701 (1917).

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. *Ramsey v. Browder*, 136 N.C. 251, 48 S.E. 651 (1904).

Applicability of Accord and Satisfaction to Tort and Contract Actions. — Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43 (1921).

A plea of accord and satisfaction is recognized as a method of discharging a contract or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

The accord is the agreement. — *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An accord is an agreement between the parties that discharges a contract or settles a cause of action. *Barber v. White*,

46 N.C. App. 110, 264 S.E.2d 385 (1980).

And the satisfaction is the execution or performance of the agreement. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969); *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

An accord and satisfaction may be based on an undisputed or liquidated claim. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

But Accord and Satisfaction Does Not Result from Part Payment of Liquidated and Undisputed Claim. —

The fact that a remittance by check purporting to be "in full" is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed, under the generally accepted rule that an accord and satisfaction does not result from the part payment of a liquidated and undisputed claim. The creditor is justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Distinction between Liquidated and Unliquidated Claims. — There is a well-recognized distinction between liquidated or undisputed claims and unliquidated or disputed ones. Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt due, was held to be a nudum pactum as to all in excess of the sum actually paid. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Account Deemed Liquidated. — An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The acceptance of a lesser sum in full payment of a larger sum is valid under this section. *Koonce v. Russell*, 103 N.C. 179, 9 S.E. 316 (1889); *Union Bank v. Board of Comm'rs*, 116 N.C. 339, 21 S.E. 410 (1895); *Lochner v. Silver Sales Serv., Inc.*, 232 N.C. 70, 59 S.E.2d 218 (1950).

Under the construction placed upon this section the offer of a less sum than is

due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. And the courts are governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under the statute. *Petit v. Woodlief*, 115 N.C. 120, 20 S.E. 208 (1894).

Acceptance of Part Payment Acts as Complete Discharge. — The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. *Tiddy v. Harris*, 101 N.C. 589, 8 S.E. 227 (1888); *Koonce v. Russell*, 103 N.C. 179, 9 S.E. 316 (1889); *Petit v. Woodlief*, 115 N.C. 120, 20 S.E. 208 (1894); *Union Bank v. Board of Comm'rs*, 116 N.C. 339, 21 S.E. 410 (1895); *Wittkowsky v. Baruch*, 127 N.C. 313, 37 S.E. 449 (1900).

Ordinarily when a creditor calls on his debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge, even though the sum or property received is less than the amount actually owing. *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963).

And Precludes Further Action Thereon. — Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. *Pruden v. Asheboro & M.R.R.*, 121 N.C. 509, 28 S.E. 349 (1897).

Payment of One Account Not Settlement of Another. — While the acceptance of a lesser sum in full payment of a larger sum is valid under this section, the payment of one account is not the settlement of another. And the acceptance of a lesser sum constitutes a settlement only as to those items of liability embraced in the settlement. *Lochner v. Silver Sales Serv., Inc.*, 232 N.C. 70, 59 S.E.2d 218 (1950).

Executed Agreement Terminating Controversy Is a Contract. — Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. *Baillie Lumber Co. v. Kincaid*

Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Section Incorporated into Contract. — Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. *Union Bank v. Board of Comm'rs*, 116 N.C. 339, 21 S.E. 410 (1895), citing *Koonce v. Russell*, 103 N.C. 179, 9 S.E. 316 (1889).

The question of accord and satisfaction may be one of fact and of law. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Accord and Satisfaction Is Question of Law. — Normally, the existence of an accord and satisfaction is a question of fact for the jury. But where the only reasonable inference is existence or nonexistence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record. *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C.App. 633, 279 2.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

When Creditor Is Remitted to Original Rights. — If the debtor repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. *Ramsey v. Browder*, 136 N.C. 251, 48 S.E. 651 (1904). See also, *Hunt v. Wheeler*, 116 N.C. 422, 21 S.E. 915 (1895).

Right to Demand Acceptance. — When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment. *Boykin v. Buie*, 109 N.C. 501, 13 S.E. 879 (1891).

When Payer Is Entitled to Restitution. — Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a

restitution for the money advanced by him. *Fickey v. Merrimon*, 79 N.C. 585 (1878).

A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. *Cashmar-King Supply Co. v. Dowd & King*, 146 N.C. 191, 59 S.E. 685 (1907).

Rule prior to Enactment of Section. — Prior to the passage of the Acts 1874-75, c. 178, an agreement to receive a part in lieu of the whole of a debt due was held to be a nudum pactum as to all in excess of the sum actually paid. *Hayes v. Davidson*, 70 N.C. 573 (1874); *Mitchell v. Sawyer*, 71 N.C. 70 (1874); *Love v. Johnston*, 72 N.C. 415 (1875); *Currie v. Kennedy*, 78 N.C. 91 (1878); *Petit v. Woodlief*, 115 N.C. 120, 20 S.E. 208 (1894); *Union Bank v. Board of Comm'rs*, 116 N.C. 339, 21 S.E. 410 (1895).

Applied in *B.B. Walker Co. v. Ashland Chem. Co.*, 474 F. Supp. 651 (M.D.N.C. 1979).

Cited in *McAuley v. Sloan*, 173 N.C. 80, 91 S.E. 701 (1917); *Walker v. Burt*, 182 N.C. 325, 109 S.E. 43 (1921).

II. ILLUSTRATIVE CASES.

Bonds. — When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. *King v. Phillips*, 94 N.C. 555 (1886).

Checks. — Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Mercer v. Frank Hitch Lumber Co.*, 173 N.C. 49, 91 S.E. 588 (1917); *Blanchard v. Edenton Peanut Co.*, 182 N.C. 20, 108 S.E. 332 (1921); *De Loache v. De Loache*, 189 N.C. 394, 127 S.E. 419 (1925); *Allgood v. Wilmington Sav. & Trust Co.*, 242 N.C. 506, 88 S.E.2d 825 (1955); *Fidelity & Cas. Co. v. Nello L. Terre Co.*, 250 N.C. 547, 109 S.E.2d 171 (1959).

Where a settlement was arrived at between the parties by the terms of which all claims between them were settled by the payment to plaintiff of \$10,000 and

for which he executed releases in full on all claims against the defendants or either of them, and payment was made by check of defendant on which was plainly typed: "Settlement of all accounts in full as of today November 8, 1954," and the check was endorsed and cashed by plaintiff, this section is clearly applicable and controlling. *Jordan Motor Lines v. McIntyre*, 157 F. Supp. 475 (M.D.N.C. 1957).

When in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept a benefit of the check so tendered and at the same time retain the right to sue for an additional amount. *Moore v. Greene*, 237 N.C. 614, 75 S.E.2d 649 (1953).

The cashing of a "full payment check," i.e., a check marked with some indication that it is tendered in full payment of a disputed claim, is an accord and satisfaction as a matter of law. *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

In an action to recover on an account, plaintiff's retention of a cashier's check marked "for payment in full," tendered by defendant, though the check was not deposited, was sufficient acceptance of a lesser amount than plaintiff claimed was due it to result in an accord and satisfaction or compromise and settlement. *FCX, Inc. v. Ocean Oil Co.*, 46 N.C. App. 755, 266 S.E.2d 388 (1980).

Where an employee was discharged and received and cashed a check for \$125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." *Kerr v. Sanders*, 122 N.C. 635, 29 S.E. 943 (1898).

A check given and received by the creditor, which purports to be payment in full of an account, does not preclude the creditor accepting it from showing that in fact it was not in full unless, under the principle of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. *Baillie Lumber Co. v.*

Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement; but the principle, of course, does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts; but sometimes the evidence may be such as to make it a question for the jury. *Aydlett v. Brown*, 153 N.C. 334, 69 S.E. 243 (1910); *Lochner v. Silver Sales Serv., Inc.*, 232 N.C. 70, 59 S.E.2d 218 (1950).

Where plaintiff's evidence was to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. The acceptance of such checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raised for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments. *Lochner v. Silver Sales Serv., Inc.*, 232 N.C. 70, 59 S.E.2d 218 (1950).

The cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. In such case the claim is extinguished, regardless of any disclaimers which may be communicated by the payee. *Sharpe v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 302 S.E.2d 893 (1983).

Insurance. — Payment to beneficiary of one half of proceeds of life insurance policy did not constitute accord and satisfaction as a matter of law where beneficiary testified that by virtue of such payment she did not abandon her right to balance of proceeds, and receipt did not expressly state that the sum received was in full settlement. *Allgood*

v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

Execution of a sworn statement in proof of fire loss, which established the value of the loss, constituted an accord as to the unliquidated claim and a satisfaction occurred upon plaintiff's acceptance and negotiation of the draft from the insurer. Insured's attempt to alter its terms was unavailing, since insured had to accept it on the terms offered by defendant or not at all, and acceptance and negotiation of it constituted an accord and satisfaction despite insured's attempt to characterize it as merely partial payment. *Sharpe v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 302 S.E.2d 893 (1983).

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. *Moore v. Maryland Cas. Co.*, 150 N.C. 153, 63 S.E. 675 (1909).

Mistake as to Amount. — Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. *Holden v. Warren*, 118 N.C. 326, 24 S.E. 770 (1896).

Money Paid into Court. — Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. *Cline v. Rudisill*, 126 N.C. 523, 36 S.E. 36 (1900).

Offer and Acceptance by Telegram. — Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by debtor, constitutes a valid compromise in full satisfaction of the claim. *Pruden v. Asheboro & M.R.R.*, 121 N.C. 509, 28 S.E. 349 (1897).

Where the plaintiff's damages, caused by the defendant's breach of contract, were based upon two distinctive items, the plaintiff agreeing upon and receiving compensation for the first item did not preclude a recovery

upon the second one, when it appeared that the settlement had been made in contemplation of the first item alone. *Garland v. Linville Imp. Co.*, 184 N.C. 551, 115 S.E. 164 (1922).

Where at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt, it was held that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. *Jones v. Wilson*, 104 N.C. 9, 10 S.E. 79 (1889).

Where two of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former

transaction is a part of the consideration for the new one, and is enforceable. *Standing Stone Nat'l Bank v. Walser*, 162 N.C. 53, 77 S.E. 1006 (1913).

Partnership Accounting. — Where a partnership in real estate held for rentals had title to land purchased with partnership funds and, after demand by one of the two partners for an accounting, one of the pieces of real estate was conveyed to him with the verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.

The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise. (1961, c. 212.)

Legal Periodicals. — For comment on effect of release given tort-feasor causing initial injury in later action for malpractice against treating physician, see 40 N.C.L. Rev. 88 (1961).

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

For comment on aggravation of injury by treating physicians, see 2 Wake Forest Intra. L. Rev. 91 (1966).

For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

CASE NOTES

Constitutionality. — Section does not violate N.C. Const., Art. I, § 1. *Galloway v. Lawrence*, 263 N.C. 433, 139 S.E.2d 761 (1965).

This section on its face applies only to actions for personal injury. *Simmons v. Wilder*, 6 N.C. App. 179, 169

S.E.2d 480 (1969).

Actions for wrongful death are not included in the terms of this section. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Former Law. — Prior to October 1, 1961, a release executed in favor of one

responsible for the original injury protected a physician or surgeon against a claim based on negligent treatment of the injury. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Applied in *Carver v. Carver*, 55 N.C. App. 716, 286 S.E.2d 799 (1982).

Cited in *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

§ 1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.

In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident. (1967, c. 662, s. 1.)

CASE NOTES

Maintenance of Action where Defendant's Release Relied on to Defeat Counterclaim. — This section, which provides that the settlement of a property damage claim does not constitute the admission of liability as to personal injury claims from an automobile accident, that it may not be used as evidence to that effect, and that, of itself, the settlement shall not act as a bar to

any claim other than the property damage claim unless, by the terms of the settlement, all claims arising from the accident are covered, does not affect the rule that a plaintiff may not maintain an action for personal injuries while relying on a complete release given by defendant to defeat defendant's counterclaim for property damages. *Leach v. Robertson*, 49 N.C. App. 455, 271 S.E.2d 405 (1980).

§ 1-540.3. Advance payments.

(a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries or to the personal representative of any person claimed to have sustained fatal injuries may be made to such person

or such personal representative by the person or party against whom such claim is made or by the insurance carrier for the person, party, corporation, association or entity which is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person, party, corporation, association or entity on whose behalf the payment or payments are made or by the insurance carrier making the payments. It shall be incompetent for any party in a civil action to offer into evidence, through any witness either by oral testimony or paper writing, the fact of the advance or partial payment or payments made by or on behalf of the opposing party. The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims and causes of action for personal injuries or wrongful death, as applicable.

(b) In any civil action for personal injuries or wrongful death the person or party against whom claim is made for such injuries or death and by or on whose behalf advance or partial payment or payments have been made to the party asserting the claim shall file with the Court and serve upon opposing counsel a motion setting out the date and amount of payment or payments and praying that said sums be credited upon any judgment recovered by the opposing party against the party on whose behalf the payment or payments were made. Prior to the entry of judgment, the trial judge shall conduct a hearing and may consider affidavits, oral testimony, depositions, and any other competent evidence, and shall enter his findings of fact and conclusions of law as to whether the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s) to the party asserting the claim for injuries or wrongful death. Upon a finding that the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s), all such payments shall be credited by the trial judge upon any judgment rendered in favor of the person or representative who received the payment or payments. Advance payments made by one joint tort-feasor shall not inure to the benefit or credit of any joint tort-feasor not making such payments.

No claim for reimbursement may be made or allowed by or on behalf of the person or party making such advance payment or payments against the person or party to whom such payment or payments are made except a claim based on fraud.

The making of any advance payment shall not affect in any way whatsoever the running of the statute of limitations. (1971, c. 854.)

CASE NOTES

Legislative Purpose. — The obvious purpose of the legislature in enacting this section was to alleviate the harsh consequences of application of the accord and satisfaction doctrine to personal

injury cases and to encourage the making of partial payments to the claimant prior to an agreement on a final settlement. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

Effect of Section. — As a result of this statute, seriously injured persons who require long-term medical treatment can now accept piecemeal payments from an insurer before any determination of liability, and those payments represent neither an admission of liability on the part of the insurer nor full satisfaction of the injured party's claims. Under the present law, acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claim. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

This section, by its express terms, applies only to partial or advance payment and prohibits claims for reimbursement only when the payment made was partial or advance; it does not affect the power of a trial judge to order reimbursement when the payment or payments made were in final settlement of all claims. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

Intent of Parties Determines whether Payment Is Partial or Final.

— Although this section is concerned solely with advance or partial payments, it nowhere defines those terms or indicates how the character of the payment is to be determined. Whether the payment was partial or final under the statute depends upon the intent of the parties giving and receiving it. *Thornburg v. Lancaster*, 303 N.C. 89,

277 S.E.2d 423 (1981).

And the determination of intent is a question of fact and, therefore, can be resolved only by the trier of fact unless the evidence of intent is undisputed. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

Issue of Fact as to Intent Created Absent Settlement Agreement. —

Absent a properly executed settlement agreement, a claimant's testimony that he or she, at the time of the agreement, intended the settlement to be partial or advance creates an issue of fact and is enough to take the case to the jury. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

Reimbursement Order Held Improper Where Issue of Fact Existed. —

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, where there was an issue of fact as to whether a payment made to plaintiff by defendants' insurer was a partial or final settlement, the trial court's reimbursement order, with which plaintiff did not comply, was improperly entered, since under this section acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claims. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E.2d 423 (1981).

Stated in *Thornburg v. Lancaster*, 47 N.C. App. 131, 266 S.E.2d 738 (1980).

§§ 1-541 to 1-543: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed sections, see Rule 68 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 44A.

Tender.

§ 1-543.1. Service of order of tender; return.

In all matters in which it is proper or necessary to make or serve a tender, the clerk of the superior court in the county in which the tender is to be made shall, upon request of the tendering party, direct the sheriff of said county to serve an order of tender, together with the property to be tendered, upon the party or parties upon whom said tender is to be made. In the event said property is incapable of being manually tendered, said order of tender shall so state and service of said order tendering same shall have the same legal effect as if the property had been manually tendered. Within five

days after receipt of the order, the sheriff shall make his return thereon, showing upon whom the same was served, the date and hour of service, the property tendered, and whether or not said tender was accepted, or that, after due diligence, the party or parties upon whom service was to be made could not be found within the county. He shall then return said order of tender to the clerk who issued it, and this shall constitute proper tender. Nothing in this section shall be construed to prevent other methods of tender or tender by any party to an action in open court upon any other party to said action. (1965, c. 699.)

ARTICLE 45.

Arbitration and Award.

§§ 1-544 to 1-567: Repealed by Session Laws 1973, c. 676, s. 1.

Cross References. — For present provisions covering the subject matter of the repealed sections, see §§ 1-567.1 through 1-567.20.

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1. Short title.

This Article may be cited as the Uniform Arbitration Act. (1927, c. 94, s. 24; 1973, c. 676, s. 1.)

Cross References. — As to arbitration of labor disputes, see §§ 95-36.1 to 95-36.9.

Editor's Note. — Session Laws 1973, c. 676, s. 2, contains a severability clause.

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For note discussing arbitration of domestic cases, see 4 Campbell L. Rev. 203 (1981).

Effect of Article. — This Article provides that parties may agree in writing to submit to arbitration "any controversy" then existing between them or include in any written contract a provision for settlement by arbitration of "any controversy" arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with the consent of the parties, without regard to the justiciable character of the controversy. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

This Article provides only two exceptions to which it will not apply: (1) any agreement or provision to arbitrate in which it is stipulated that it will not apply and (2) arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that it will apply. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

The purpose of arbitration is to reach a final settlement of disputed

CASE NOTES

The purpose of arbitration is to reach a final settlement of disputed

matters without litigation. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

General contract law governs the issue of the existence of an agreement to arbitrate. *Southern Spindle & Flyer Co. v. Miliken & Co.*, 53 N.C. App. 785, 281 S.E.2d 734 (1981), cert. denied, 304 N.C. 729, 288 S.E.2d 381 (1982).

Binding arbitration is not available in this State by court order in a civil action for alimony, custody and child support. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

But May Be Had by Agreement. — Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration under this Article to settle the issue of spousal support. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Once a civil action has been filed and is pending, the court has no authority to order binding arbitration, even with the parties' consent. But ordinarily, with the parties' consent, the judge can refer these issues to a referee. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

While in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Power of Court to Modify Award. — While provisions of a valid arbitration

award concerning alimony may by agreement be made binding on the parties and nonmodifiable by the courts, provisions of the award concerning custody and child support continue to be within the court's jurisdiction and are modifiable pursuant to § 50-13.7. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration. Hence those provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Attempt to Frustrate Federal Arbitration by Filing State Action. —

Where a construction contract contained a broad arbitration clause, the "reactive" filing of a state declaratory action by one party, asserting the nonarbitrability of a dispute before the other party had any real opportunity to seek arbitration, could not frustrate the right of the other party to an order of arbitration by the federal district court pursuant to the Federal Arbitration Act. *Mercury Constr. Corp. v. Moses H. Cone Mem. Hosp.*, 656 F.2d 933 (4th Cir.), rehearing denied, 664 F.2d 936 (4th Cir. 1981), cert. granted, 455 U.S. 937, 102 S. Ct. 1426, 71 L. Ed. 2d 647 (1982), aff'd, — U.S. —, 103 S. Ct. 927, 74 L. Ed. 765 (1983).

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

(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

(b) This Article shall not apply to:

- (1) Any agreement or provision to arbitrate in which it is stipulated that this Article shall not apply or to any arbitration or award thereunder;
- (2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply. (1927, c. 94, s. 1; 1973, c. 676, s. 1; 1975, c. 19, s. 1.)

Legal Periodicals. — For note discussing arbitration of domestic cases, see 4 Campbell L. Rev. 203 (1981).

For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior law.

Legislative Intent. — By enacting this Article the legislature intended to encourage parties to submit disputed matters to arbitration when it is feasible and expedient for them to do so. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Effect of Article. — This Article provides that parties may agree in writing to submit to arbitration "any controversy" then existing between them or include in any written contract a provision for settlement by arbitration of "any controversy" arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with the consent of the parties, without regard to the justiciable character of the controversy. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

The Uniform Arbitration Act provides only two exceptions to which it will not apply: (1) Any agreement or provision to arbitrate in which it is stipulated that it will not apply and (2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that it will apply. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Agreements to arbitrate future disputes are now, by virtue of this section which was effective August 1, 1973, binding and irrevocable. Sims v. Ritter Constr., Inc., N.C. App. —, 302 S.E.2d 293 (1983).

Party Must Be Content with Results. — Public policy includes the judicial admonition that a party who has accepted this form of adjudication must be content with the results. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Arbitration as Matter of Contract. — By statute, the right of arbitration is made a matter of contract; and it is only

by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect, for it has been held uniformly in this State that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. Sprinkle v. Sprinkle, 159 N.C. 81, 74 S.E. 739 (1912).

Where the contract between the parties contained an agreement to submit any controversy to arbitration, such agreement, pursuant to this section, was valid, enforceable and irrevocable. Therefore, it was error for the court to withdraw the matter from arbitration and place it on the trial calendar. Sims v. Ritter Constr., Inc., — N.C. App. —, 302 S.E.2d 293 (1983).

But the Contract Is Not a Defense to the Cause of Action Itself. — The agreement of the parties to arbitrate is a contract. The relation of the parties is contractual. Their rights and liabilities are controlled by the law of contract. A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate. In an action on the contract the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by refusing to entertain the suit until after arbitration is had under the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement. Nelson v. Atlantic Coast Line R.R., 157 N.C. 194, 72 S.E. 998 (1911).

As to necessity for writing under prior law, see Crissman v. Crissman, 27 N.C. 498 (1845); Gaylord v. Gaylord, 48

N.C. 368 (1856); *Fort v. Allen*, 110 N.C. 183, 14 S.E. 685 (1892).

National Corp. for Hous. Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974).

Cited in *C.P. Robinson Constr. Co. v.*

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

(a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown. (1973, c. 676, s. 1.)

Legal Periodicals. — For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 *Wake Forest L. Rev.* 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 *Wake Forest L. Rev.* 487 (1979).

CASE NOTES

Issues Determinable by Court. — The scope of an arbitration award and its res judicata effect are issues properly determinable by the court and not the arbitrators. *C & O Dev. Co. v. American Arbitration Ass'n*, 48 N.C. App. 548, 269 S.E.2d 685 (1980), cert. denied, 301 N.C. 719, 274 S.E.2d 227 (1981).

It was within the authority of the trial court to determine whether the subject matter of the demand for arbitration had been previously litigated between the parties and reduced to a judgment

binding upon them. *C & O Dev. Co. v. American Arbitration Ass'n*, 48 N.C. App. 548, 269 S.E.2d 685 (1980), cert. denied, 301 N.C. 719, 274 S.E.2d 227 (1981).

Retention of Jurisdiction. — For examples of situations in arbitration disputes in which the court retains jurisdiction over the proceeding, see this section. *Sims v. Ritter Constr., Inc.*, — N.C. App. —, 302 S.E.2d 293 (1983).

Effect of Participation in Arbitration without Protest. — Consent to

submission of a matter to arbitration and participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, results in a waiver of the right to subsequently challenge the arbitration process. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

Parties who agree to abide by the decision of a panel of arbitrators will not

generally be heard to attack the regularity or fairness of an award. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

Stated in *Southern Spindle & Flyer Co. v. Milliken & Co.*, 53 N.C. App. 785, 281 S.E.2d 734 (1981).

Cited in *R.B. Brunemann & Sons v. Duke Univ.*, 533 F. Supp. 365 (M.D.N.C. 1982).

§ 1-567.4. Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement. (1927, c. 94, s. 4; 1973, c. 676, s. 1.)

§ 1-567.5. Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this Article. (1973, c. 676, s. 1.)

CASE NOTES

Quoted in *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

§ 1-567.6. Hearing.

Unless otherwise provided by the agreement:

- (1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.
- (2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.
- (3) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final

award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

- (4) Upon the request of any party or any arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing. (1927, c. 94, ss. 6, 7; 1973, c. 676, s. 1.)

Legal Periodicals. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior law.

The award on its face ought to show that the arbitrators have acted upon all the matters submitted. *Crisp v. Love*, 65 N.C. 126 (1871).

It has always been necessary for arbitrators to pass on all the points particularly referred to them. *Osborne v. Calvart*, 83 N.C. 365 (1880.)

But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. *Walker v. Walker*, 60 N.C. 255 (1864).

Passing on Matters Not Submitted. — Matters passed on by the arbitrators but not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. *Robertson v. Marshall*, 155 N.C. 167, 71 S.E. 67 (1911).

The power of the arbitrators is derived from the submission and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. *Cullifer v. Gilliam*, 31 N.C. 126 (1848); *Cutler v. Cutler*, 169 N.C. 482, 86 S.E. 301 (1915).

Where the decision of submitted questions involved the decision of other ques-

tions not submitted, the decision of the latter was not error. *Zell v. Johnston*, 76 N.C. 302 (1877).

Arbitrators May Not Seek Evidence Outside Hearing. — The arbitrators 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. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380 (1976).

And Such Action Violates Arbitration Agreement. — Actions of the arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties is a violation of this article and hence of the arbitration agreement. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380 (1976).

Right to Notice. — A party to an arbitration agreement has the right, both at common law and by statute, to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the superior court. *Grimes v. Homes Ins. Co.*, 217 N.C. 259, 7 S.E.2d 557 (1940), decided under prior law.

§ 1-567.7. Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this Article. A waiver thereof prior to the proceeding or hearing is ineffective. (1927, c. 94, s. 9; 1973, c. 676, s. 1.)

§ 1-567.8. Witnesses; subpoenas; depositions.

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be as provided in G.S. 7A-314. (1927, c. 94, ss. 10, 11; 1973, c. 676, s. 1.)

CASE NOTES

As to procedure under common law, see *McCrae v. Robeson*, 6 N.C. 127 (1832); *Pierce v. Perkins*, 17 N.C. 250 (1832); *Hurdle v. Stallings*, 109 N.C. 6, 13 S.E. 720 (1891).

§ 1-567.9. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. (1927, c. 94, ss. 8, 14; 1973, c. 676, s. 1.)

CASE NOTES

Form of Award. — There has never been any requirement in this State as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. *Ball-Thrash Co. v. McCormack*, 172 N.C. 677, 90 S.E. 916 (1916), decided under former law.

"Making" and "Delivery" of Award Distinguished. — The Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. *Poe & Sons v. University of N.C.*, 248 N.C. 617, 104 S.E.2d 189 (1958), decided under former law.

§ 1-567.10. Change of award by arbitrators.

On application of a party or, if an application to the court is pending under G.S. 1-567.12, 1-567.13 or 1-567.14, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the

grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 1-567.14, or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within 10 days from the notice. The award so modified or corrected is subject to the provisions of G.S. 1-567.12, 1-567.13 and 1-567.14. (1973, c. 676, s. 1.)

§ 1-567.11. Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. (1973, c. 676, s. 1.)

§ 1-567.12. Confirmation of an award.

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14. (1927, c. 94, s. 15; 1973, c. 676, s. 1.)

Legal Periodicals. — For note on the admission of an arbitrator's depositions and testimony to prove misconduct or

fraud on the part of arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

CASE NOTES

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel

of arbitrators, will not generally be heard to attack the regularity or fairness of an award. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

§ 1-567.13. Vacating an award.

(a) Upon application of a party, the court shall vacate an award where:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court

of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in subdivision (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with G.S. 1-567.4, or, if the award is vacated on grounds set forth in subdivisions (3) or (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with G.S. 1-567.4. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award. (1927, c. 94, s. 16; 1973, c. 676, s. 1.)

Legal Periodicals. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

CASE NOTES

Sections 1-567.13 and 1-567.14 provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Attacks on Regularity or Fairness of Awards Generally. — The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981); *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

Consent to submission of a matter to arbitration and participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, results in a waiver of the right to subsequently challenge the arbitration process. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

An arbitration award is ordinarily presumed valid. *Thomas v. Howard*, 51

N.C. App. 350, 276 S.E.2d 743 (1981).

And the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators acted improperly. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Arbitrators Generally Required to Be Impartial. — An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission (and by statute), and he must be incorrupt and impartial, and not exceed or fall short of his duty; if he acts otherwise, his award may be set aside. *Crisp v. Love*, 65 N.C. 126 (1871), decided under prior law.

Public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

But May Be Acquainted with Case or Parties. — This section by its terms, does not necessarily prevent parties from

accepting arbitrators who they know are acquainted in some way with the case or the parties. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Defendant was not entitled to have an arbitration award set aside under subdivision (a)(2) of this section because the arbitrator appointed by plaintiff had prior knowledge of the facts and a business connection with plaintiff where the written arbitration agreement between the parties shows that defendant accepted the arbitrator appointed by plaintiff with full knowledge of his business dealings with plaintiff and the possible bias that could result from that connection. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Partiality of Arbitrator Not Appointed as Neutral. — This section does not provide relief from an award when there is "evident partiality" by an arbitrator who is not appointed as a neutral or umpire. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Waiver of Disability of Arbitrator. — The disability of an arbitrator is waived if the complaining party had

prior knowledge of it. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Parties May Depose Arbitrators. — Where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380 (1976).

And such depositions are admissible in a proceeding under this section to vacate an award. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E.2d 380 (1976).

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack on the ground that he exceeded his authority under a mistake of law and upon other grounds. *Calvine Cotton Mills, Inc. v. Textile Workers Union*, 238 N.C. 719, 79 S.E.2d 181 (1953), decided under former law.

Applied in *Chambers v. McLean Trucking Co.*, 550 F. Supp. 1335 (M.D.N.C. 1981).

§ 1-567.14. Modification or correction of award.

(a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

- (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
- (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award. (1927, c. 94, s. 17; 1973, c. 676, s. 1.)

Legal Periodicals. — For a note on the admission of an arbitrator's depositions and testimony to prove misconduct

or fraud on the part of arbitrators, see 13 *Wake Forest L. Rev.* 803 (1977).

CASE NOTES

Sections 1-567.13 and 1-567.14 provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

Scope of Judicial Review. — Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute. *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Errors of Law or Fact Generally Insufficient to Invalidate Award. — Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

When Fairness or Regularity of Award May Be Impeached. — The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that 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. *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Subdivision (a) (1) Directed toward

Mathematical Errors Only. — In providing in this section that awards could be modified or corrected for "evident miscalculation of figures," the legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. This section is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently; such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration process. *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Court's Power under Subdivision (a) (3) Limited. — The provision of this section which allows courts to modify or correct an award which is "imperfect in a matter of form" does not permit the court to substitute its interpretation for that of the arbitrators. *Carolina Va. Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Waiver after 90-Day Period. — Where plaintiff filed a motion requesting modification of an order confirming an arbitration award and the award itself so as to increase the amount for alimony and child support more than 90 days after delivery of a copy of the award, he waived his ability to contend that the award was imperfect. *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981), rev'd on other grounds, 306 N.C. 518, 293 S.E.2d 793 (1982).

Cited in *In re Cohoon*, — N.C. App. —, 298 S.E.2d 729 (1983).

§ 1-567.15. Judgment or decree on award.

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court. (1927, c. 94, ss. 19, 21; 1973, c. 676, s. 1.)

CASE NOTES

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well

established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be

heard to attack the regularity or fairness of an award. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

Cited in Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

§ 1-567.16. Applications to court.

Except as otherwise provided, an application to the court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1927, c. 94, s. 5; 1973, c. 676, s. 1.)

CASE NOTES

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel

of arbitrators, will not generally be heard to attack the regularity or fairness of an award. *McNeal v. Black*, — N.C. App. —, 300 S.E.2d 575 (1983).

§ 1-567.17. Court; jurisdiction.

The term "court" means any court of competent jurisdiction of this State. The making in this State of an agreement described in G.S. 1-567.12, or any agreement providing for arbitration in this State or under the laws thereof, confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award thereunder. (1927, c. 94, s. 3; 1973, c. 676, s. 1.)

Editor's Note. — It would appear that by the reference in this section to an agreement described in G.S. 1-567.12, an

arbitration agreement under § 1-567.2 was intended.

CASE NOTES

Editor's Note. — The cases cited below were decided under prior law.

Contracts to submit future disputes to arbitration, and thus oust the jurisdiction of the courts, are invalid, and the courts will not specifically, or by indirection, compel performance of such contracts by refusing to entertain a suit until after arbitration. *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N.C. 1964).

When a cause of action has arisen the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. *Skinner v. Gaither*

Corp., 234 N.C. 385, 67 S.E.2d 267 (1951); *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N.C. 1964).

Courts have uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination

of the legal liability of the insurer.
 Pioneer Mfg. Co. v. Phoenix Assurance
 Co., 106 N.C. 28, 10 S.E. 1057 (1890);
 Braddy v. New York Bowery Fire Ins.

Co., 115 N.C. 354, 20 S.E. 477 (1894);
 Kelly v. Trimont Lodge, No. 249, 154
 N.C. 97, 69 S.E. 764 (1910).

§ 1-567.18. Appeals.

(a) An appeal may be taken from:

- (1) An order denying an application to compel arbitration made under G.S. 1-567.3;
- (2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing;
or
- (6) A judgment or decree entered pursuant to the provisions of this Article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1927, c. 94, s. 22; 1973, c. 676, s. 1.)

CASE NOTES

The right to appeal from an order staying arbitration has no greater latitude than the right to appeal from any other civil judgment or order. *Peloquin Assocs. v. Polcaro*, — N.C. App. —, 300 S.E.2d 477 (1983).

Presumption on Appeal. — Where parties to an action in ejectment consented to arbitration on questions of boundaries and an order was made

accordingly, but the record disclosed no evidence upon which the arbitrators based their decision, the courts would assume that there was evidence to support their action. *Bryson v. Higdon*, 222 N.C. 17, 21 S.E.2d 836 (1942), decided under former law.

Stated in *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

§ 1-567.19. Article not retroactive.

This Article applies only to agreements made on or after August 1, 1973. (1973, c. 676, s. 1.)

CASE NOTES

Applied in *C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships*, 375 F. Supp. 446 (M.D.N.C. 1974).

§ 1-567.20. Uniformity of interpretation.

This Article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23; 1973, c. 676, s. 1.)

Legal Periodicals. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

ARTICLE 46.

Examination before Trial.

§ 1-568: Repealed by Session Laws 1951, c. 760, s. 2.

§§ 1-568.1 to 1-568.27: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to depositions and discovery, see Rules 26 to 37 of the Rules of Civil Procedure (§ 1A-1).

§§ 1-569 to 1-576: Repealed by Session Laws 1951, c. 760, s. 2.

ARTICLE 47.

Motions and Orders.

§§ 1-577 to 1-584: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to motions generally, see Rule 7 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 48.

Notices.

§§ 1-585 to 1-589: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of pleadings and other papers, see Rule 5 of the Rules of Civil Procedure (§ 1A-1). As to service of subpoenas, see Rule 45 of the Rules of Civil Procedure.

§ 1-589.1. Withholding information necessary for service on law-enforcement officer prohibited.

When service of subpoena, or any other court process, is sought upon any law-enforcement officer of the State or of any political subdivision thereof pursuant to the provisions of G.S. 1-589, or of any other statute, it shall be unlawful for any officer or employee of the agency by whom the officer sought to be served is employed willfully to withhold the address or telephone number of the officer sought to be served with subpoena or other process. (1967, c. 456.)

Editor's Note. — Section 1-589, referred to in this section, was repealed by Session Laws 1967, c. 954, s. 4.

§§ 1-590 to 1-592: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of subpoenas, see Rule 45 of the Rules of Civil Procedure (§ 1A-1).

ARTICLE 49.

Time.

§ 1-593. How computed.

The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure. (C.C.P., s. 348; Code, s. 596; Rev., s. 887; C.S., s. 922; 1957, c. 141; 1967, c. 954, s. 3.)

CASE NOTES

Applied in *Jackson v. Stanwood Corp.*, 38 N.C. App. 479, 248 S.E.2d 576 (1978).

Quoted in *Harris v. Latta*, 298 N.C. 555, 259 S.E.2d 239 (1979).

Cited in *Robbins v. Bowman*, 9 N.C. App. 416, 176 S.E.2d 346 (1970); *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E.2d 585 (1979); *Anderson v. Gooding*, 300 N.C. 170, 265 S.E.2d 201 (1980).

§ 1-594. Computation in publication.

Except as otherwise expressly provided, the time for publication of legal notices shall be computed in the manner prescribed by Rule 6 of the North Carolina Rules of Civil Procedure. (C.C.P., s. 359; Code, s. 602; Rev., s. 888; C.S., s. 923; 1979, c. 579, s. 2.)

CASE NOTES

Applied in *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

Cited in *Harris v. Latta*, 298 N.C. 555, 259 S.E.2d 239 (1979).

ARTICLE 50.

General Provisions as to Legal Advertising.

§ 1-595. Advertisement of public sales.

When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C.S., s. 924.)

CASE NOTES

Notice of Sale under Mortgage Essential. — Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918).

Where a mortgage of lands provided that notice of the sale under the power thereof given in the conveyance should be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should have been inserted in the newspaper once a week

for four consecutive weeks, and not consecutively for 30 days, and an allowance made in the superior court for an advertisement for 30 consecutive days was erroneous. *Raleigh Sav. Bank & Trust Co. v. Leach*, 169 N.C. 706, 86 S.E. 701 (1915).

Burden of Proof. — The presumption of law is in favor of regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden of showing such failure is on the person setting it up. *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166 (1918).

§ 1-596. Charges for legal advertising.

The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C.S., s. 2586; 1945, c. 635; 1949, c. 205, s. 1½.)

Local Modification. — Nash: 1949, c. 205, s. 2. Mitchell: 1979, 2nd Sess., c. 1170.

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

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, 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 twenty-five of the twenty-six 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 of 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.)

Local Modification. — Chatham: 1981, c. 893; McDowell: 1981, c. 893.

CASE NOTES

Legislative Intent. — The legislature intended that this section apply to all legal notices required to be published in newspapers. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the

newspaper contains information of general interest. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

A newspaper of general circulation is a publication to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinions, and advertisements, and thereby to render it probable that a "notice" would be brought to the attention of the general public. *Great S. Media, Inc. v. McDowell County*, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

Whether a newspaper is one of general circulation is not determined merely by the number of its subscribers, but by the diversity of those subscribers, and even if the newspaper is of particular interest to a particular class of persons, if it contains news of a general character and interest to the community, although that news may be limited in amount, the newspaper qualifies as one of general circulation. *Great S. Media, Inc. v. McDowell County*, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

The "general circulation" provision in § 105-369(d) does not conflict with its counterpart in this section. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

What Newspapers May Publish Notices of Tax Lien Sales. — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both §§ 105-369(d) and this section.

Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Reading both this section and § 105-369(d) together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of "general circulation to actual paid subscribers" in the taxing unit. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, as is required by this section and § 105-369(d), it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

Notice Ineffective unless Published as Provided. — The publication of a notice of sale under a power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation within the county where the land to be sold is located to subscribers who have actually paid the subscription price therefor. *Jones v. Percy*, 237 N.C. 239, 74 S.E.2d 700 (1953), decided under former law.

Cited in *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E.2d 593 (1965); *Love v. Nationwide Mut. Ins. Co.*, 45 N.C. App. 444, 263 S.E.2d 337 (1980).

§ 1-598. Sworn statement prima facie evidence of qualifications; affidavit of publication.

Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of G.S. 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by G.S. 1-597, such sworn written statement shall be received in all courts in this State as prima facie evidence that such newspaper was at the time stated

therein a newspaper meeting the requirements and qualifications of G.S. 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named was at the time stated therein a qualified newspaper within the meaning of G.S. 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of G.S. 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of G.S. 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of G.S. 1-597. (1939, c. 170, s. 1½; 1947, c. 213, ss. 1, 2.)

CASE NOTES

Applied in *Brock v. North Carolina Property Tax Comm'n*, 29 N.C. App. 324, 224 S.E.2d 295 (1976).

§ 1-599. Application of two preceding sections.

The provisions of G.S. 1-597 to 1-599 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 to 1-599 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed by G.S. 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49.)

CASE NOTES

Quoted in *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.

(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor,

managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2; 1957, c. 204.)

§ 1-601. Certain legal advertisements validated.

Legal advertisements published prior to June 1, 1983, by a newspaper that met every requirement for publication of legal notices and advertisements under G.S. 1-597 when the advertisement was published except that the newspaper had a second class United States mail permit in a county adjacent to the county in which the advertisement was published instead of the county in which it was published may not be held to be invalid because of the lack of a second class United States mail permit in the proper county. (1983, c. 582, s. 2.)

Editor's Note. — Session Laws 1983, c. 582, s. 3, makes this section effective upon ratification. The act was ratified June 22, 1983.

Section 3 of the 1983 act further provides that nothing in the act shall affect any pending litigation.

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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,
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N. C. DOCUMENTS

Volume 1A, Part I DEC 8 1987

Chapter 1

N. C. STATE LIBRARY
RALEIGH

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.**

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Preface

This Cumulative Supplement to Replacement Volume 1A, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 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.

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Permanent portions of the General Laws enacted by the General Assembly through the 1987 Regular Session affecting Chapter 1 of the General Statutes.

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

North Carolina Reports through Volume 319, p. 464.
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For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

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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).

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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 re-

pose. 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 be-

gins 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 be-

gins 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 stat-

ute 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 Garriss 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 cor-

porate 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 "im-

provement 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. *Col-*

ony 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 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 alleg-

ing 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 or 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 Searce*, 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 association 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 sec-

tion, 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 Caro-

lina 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); *Humphrey v. Sinnott*, — N.C. App. —, 352 S.E.2d 443 (1987).

In accord with 3rd paragraph in main volume. See *Humphrey 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. *Humphrey 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. Habbegger*, 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 capac-

ity, 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 per-

sonal 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. *Humphrey 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. *Humphrey 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. *Humphrey 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. *Humphrey 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 Com-

missioner 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, in-

cluding 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 provi-

sional 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 dis-

missed 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. Gas-

ton 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. Gas-*

ton 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 judg-

ment 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 dis-

missed, 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 cor-

rected 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 irretrievably 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 author-

ity 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 ap-

peal 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 judg-

ment, 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 indispensable 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 au-

thority 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 entirety 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 pro-

vide 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 attach-

ment, 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 encumbered 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 at-

tached 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 ac-

quired 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 no-

tice 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, des-

ignated 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, permit-

ting 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, October 1, 1987, and applicable to acts c. 519, s. 2 makes this section effective 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, non-profit 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 Pro-

tection," 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 Caro-

lina 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. Ex-

ceptions 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 agree-

ment 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 fail-

ure 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, sub-

stituted "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

