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SUGGESTED CHANGES IN NORTH CAROLINA CIVIL PROCEDURE

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For fifty years after the adoption of the Code of Civil procedure in North Carolina comparatively few changes were made in its provisions, and it is better that this should have been so, since frequent changes lead to more or less confusion and require time for readjustment. Important changes were made in 1919, and at every meeting of the General Assembly since that date amendments have been made, with the general tendency to restore the provisions of the original Code. There is no particular advantage in returning to the first provisions, but the purpose of any change should be to make the system of practice as simple and definite as possible, easily workable, and requiring few appeals for judicial construction upon mere questions of procedure. The different changes since 1919 have been discussed in this Review,[1] as to their probable effect upon the practice. A study of the more recent changes in 1927 suggests several questions which will probably arise for construction and which may be settled by slight amendments to make the meaning more definite.

1. *When is the summons in a civil action returnable?*

Prior to 1927, the summons was made returnable on a certain day named, and the defendant was required to answer within twenty days after that date. The plaintiff knew the return day when the summons was issued and he could readily keep up with his case, while the defendants all had the same time to answer after this return day and no judgment could be taken against them until the expiration of that time. By the act of 1927,[2] the defendant is required to appear and answer within thirty days after service, and if there are several defendants served at different times the last day on which an answer might be filed would be different for each one. It is also provided that the sheriff shall serve the summons within ten days after the date of its issue, and if not served within ten days he must return it to the clerk with the reasons noted for

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[1] 1 N. C. LAW REV. 7, 279; 6 N. C. LAW REV. 182.

[2] Laws 1927, c. 66.

failure to serve it. It is not provided, except by implication, when the summons is to be returned if it is served, but the meaning would seem to require that the summons contain an order to the sheriff to return it within ten days, whether served or not. In the recent case of *Neely v. Minus*,[2a] the question was discussed by Brogden, J., and the difficulty mentioned, but a definite decision was not necessary. The plaintiff does not know when he may expect an answer by the defendants, unless he is diligent to make inquiry of the sheriff as to the date of service. In those states in which the summons is issued by the plaintiff or his attorney, and generally served by an agent, as a simple notice of action brought, this difficulty would not exist; but where the summons is the process of the court, to be served by an officer of the court, it would seem to be an advantage to both parties to have a definite return day, from which the time to answer could be counted and fixing definitely the time when the plaintiff could demand a judgment for want of answer.

2. *When is the defendant to answer in case of publication?*

The same statute provides that where the service of summons is made by publication, such service shall be completed "within fifty days from the commencement of the action."[3] While no definite return day is named in the summons, the order and notice of publication require the defendant to appear and answer "at a time and place therein mentioned,"[4] "and the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court."[5] When the publication is completed, within the fifty days, the defendant is in court, but is he in court for the purpose of judgment on the day named, or must the plaintiff wait for thirty days after such service before he can proceed to judgment? Whatever the practice may be in this respect, the statute should definitely fix the rights of the parties.

3. *When is a warrant of attachment returnable?*

The statute requires that the warrant of attachment shall state when and where it is to be returned, and an amendment requires that it shall be made returnable before the clerk at the same time and place as the summons.[6] If no publication is to be made, it would

[2a] 196 N. C. 345, 145 S. E. ——
[3] Laws 1927, c. 66, 132.
[4] C. S. 485.
[5] C. S. 487.
[6] 3 C. S. 801.

be returnable within ten days from the date of its issue; but in most cases of attachment publication is necessary, and the order and notice should fix a definite return day. The question is the same as that presented in the summons.

4. *What is the proper form of summons in a special proceeding?*

The former section required the sheriff to summon the defendant to appear before the clerk on a day named in the summons, to answer the complaint, "and the number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service."[7] This has always appeared to be more or less confusing, and the difficulty has been met by making the return day far enough off to allow service to be made and to give the time required, or by extending the time to answer after the return day so as to give the ten days after service. The amended section provides that the summons shall require the defendant to appear and answer on a day named in the summons, and "the return date of the summons, the manner of service, whether by the sheriff or by publication, shall be as prescribed for summons in civil action."[8] Whether the defendant is required to answer on the date mentioned in the summons, or within thirty days after service, is still not very clear. The apparent intention of the amendment is to make the summons in a special proceeding the same as in a civil action, and there seems to be no good reason why it should be otherwise. In each case the summons is returnable and the pleadings are to be filed before the clerk, the only difference being in the jurisdiction of the clerk to proceed with the hearing of the case and to render judgment. The clerk is required to indicate on the summons that it is issued in a special proceeding.[9] The statute should be amended so as to remove any uncertainty in the practice.

5. *Who is responsible for issuing an alias or pluries summons?*

It is made the duty of the plaintiff, under C. S. 480, to have an alias or pluries summons issued when the original is returned without service, and a failure to do this works a discontinuance of the action.[10] The recent amendment provides that if the summons is returned unserved, for want of time, "the clerk shall, within

[7] C. S. 753.
[8] Laws 1927, c. 66.
[9] Laws 1927, c. 66.
[10] C. S. 481.

three days thereafter, issue an alias or pluries summons, as the case may require."[11] It is not clear whether the latter provision was intended to repeal the former section and relieve the plaintiff of the duty of looking after the alias or pluries summons, by requiring the clerk to issue these as a matter of course, and if he should fail to do so, whether it would have the effect of a discontinuance. In the case of *Neely v. Minus*,[11a] the court decides that there was a discontinuance under the circumstances of the case, but the question as to whether the burden of issuing an alias or pluries summons is upon the clerk or upon the plaintiff is said to be "a question for legislative and not judicial determination." The evident purpose of the orignal section was to make the plaintiff diligent in looking after his case, with the possible effect of losing his case entirely through the statute of limitations, if his attorney should overlook the technicality of having the chain of summons complete.[12] It would seem to be a reasonable requirement in such cases to substitute the duty of the clerk for that of the plaintiff or his attorney.

6. *How many copies of the complaint must be served?*

The present statute provides that the complaint is to be filed with the clerk "at or before the issuance of the summons, and a copy thereof delivered to the defendant, or defendants, at the time of the service of the summons."[13] Taken literally, this means that if there are a dozen different defendants there must be a copy of the complaint served upon each one, although they may be represented by the same attorney and file one answer. The work of the plaintiff is somewhat lighter if he gets an extension of time to file his complaint, since he is then required to file "one copy for the use of the defendant and his attorney," or if there are several defendants the clerk may require him to file additional copies, not to exceed six. Unless it is intended that there shall be a copy served upon each defendant, (the statute says "delivered to the defendant, or defendants",) in the first instance, the requirement should be more definitely stated. Under the original Code it was optional with the plaintiff to serve a copy of the complaint, but he was required to file with the clerk a copy for each defendant, or one copy for those who appeared by one attorney.[14]

[11] Laws 1927, c. 66.
[11a] 196 N. C. 345, 145 S. E. ——.
[12] Hatch v. Alamance Ry. Co., 183 N. C. 617, 112 S. E. 529 (1922).
[13] Laws 1927, c. 66.
[14] C. C. P. 76

7. When may an execution be issued on a judgment?

As the law existed before the adoption of the Code, execution could be issued within a year and a day, and if more than that time had elapsed execution could not be issued without a notice to the defendant to show cause.[15] Under the Code, this was changed to three years, and a judgment could be kept alive for purpose of execution, by issuing execution every three years, or a dormant judgment could be revived, after three years, by issuing a notice to the defendant to show cause.[16] This was repealed by the act of 1927, and it seems to be an open question whether a judgment ever becomes dormant, and what would be the effect of the statute of limitations upon the right to issue an execution. The present statute allows the party to proceed by execution "at any time after the entry of judgment,"[17] except that no execution shall issue until the end of the term at which the judgment was rendered.[18] Under the former law, if a judgment became dormant by failure to issue execution and it was also barred by the statute of limitations, no execution could issue without giving the defendant an opportunity to take advantage of the bar of the statute.[19] If execution may now be issued "at any time", could the clerk refuse to issue it when it appears that the judgment is barred? If it should be issued, the defendant, when he learns of it, could make a motion to recall it, but there is no provision for giving him notice. If the defendant had no notice, or failed to make the motion to prevent a sale, would the purchaser at such sale get a good title? In view of the former decisions, the logical result of the change would seem to be that no execution could issue upon a judgment that is barred by the statute of limitations. It would prevent uncertainty if the intended effect of the repealing statute should be definitely stated.

These are some of the questions suggested by a study of the recent statutes, and they may be finally settled by judicial interpretation, but this is sometimes an expensive and difficult method of settlement. When any change is made in an established method of procedure, it is an advantage to attorneys and litigants that the effect of such changes should be indicated with reasonable certainty,

[15] Rev. Code, c. 31, s. 114.
[16] C. S. 668.
[17] C. S. 667, amended by 1927, c. 24.
[18] Laws 1927, c. 110.
[19] Lytle v. Lytle, 94 N. C. 683 (1886).

so as to prevent expense and delay and to promote uniformity in practice.

There are certain other questions of practice which have arisen in other jurisdictions and which have been settled by statute as an improvement over the former system, and in any material change in our present practice some of these might be worthy of consideration.

8. *The use of the demurrer as a pleading.*

In some of the states, in the federal equity practice, and in the English practice, the demurrer has been abolished as a pleading, and the defendant is allowed to raise in his answer or by motion the objections which were formerly taken by demurrer.[20] The whole case is thus brought before the court at one time, and the questions of law could be decided by the court as preliminary matter or during the progress of the trial. There should be some opportunity for a party to object to his opponent's pleading as a matter of law, and this might be done as readily in the answer or by motion as by a separate pleading. The most important objections, as to the jurisdiction and a failure to state a cause of action, may now be taken by answer or by motion at any time, and the other causes for demurrer are more or less technical, to be remedied by an amendment. If the causes for demurrer do not appear upon the face of the pleading, objection is now taken by answer to be decided by the court, except that the facts are not admitted, and there should be no greater difficulty in reaching a decision when the facts are admitted. The reasons for omitting the demurrer as a pleading are, that it simplifies the pleading, prevents delay, brings the whole matter before the court at once, and does not interfere with the rights of the parties. The principal objection to the change is that it is a radical departure from a long established rule, by which the demurrant is not required to present his side of the controversy until the sufficiency of his opponent's statement has been determined. As a matter of practice its effect is to point out to the opponent the way to improve his statement, except for the two substantive objections, and the rule of adhering to a long established practice would have prevented the change from the old common law and equity systems to the reformed procedure under the Code.

[20] Fed. Eq. Rules 29; ODGERS, PLEAD. AND PRAC., 175; CLARK, CODE PLEADING (1928) 371.

9. *Alternative pleading.*

The plaintiff may set forth several different causes of action in his complaint, or upon one cause of action he may ask for relief in the alternative, but this is not the same as alternative pleading. The plaintiff may know that one of two persons is liable, but not both, and selects at his peril the one to be sued, unless he can make it a joint liability. Some courts allow the plaintiff to state his cause of action in the alternative, and he may recover according to the effect of his proof, and the right of the plaintiffs to sue in the alternative is also recognized. The old rules of pleading and the present Code do not recognize alternative pleading as a proper statement, but this has been changed in some of the states and in the English practice.[21]

10. *Declaratory Judgments.*

In an existing controversy before the court, the rights of the parties are declared and determined by the judgment rendered, because it is necessary to a settlement of their rights as presented, and the case is one which calls for an immediate adjustment; or in the case of an executor or trustee asking for advice, the court may declare the rights and direct the proper course to be taken, but it contemplates immediate action and not an inquiry as to what should be done if certain circumstances should arise. This has been changed in the English practice and in several states, so that the court may settle disputes between the parties before there has been any actual injury or loss.[22] This is extending the principle of bills for advice or suits to quiet title, and it has been considered an advantage in the jurisdictions in which it has been adopted. As a recent development in judicial procedure the following provision for a "Uniform Declaratory Judgments Act" has been prepared for adoption, as in the Uniform Sales Act, Negotiable Instruments Law, and others: "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 decree or judgment."[23]

[21] English practice, ODGERS, PLEAD. AND PRAC. 31; CLARK, CODE PLEADING (1928) 273; 35 Yale L. J. 278; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450, 51 L. R. A. N. S. 640 (1913).

[22] FREEMAN, JUDGMENTS, p. 2780; 33 C. J. 1097; CLARK, CODE PLEADING (1928) 230; 5 N. C. LAW REV. 228; ODGERS, PLEAD. AND PRAC., 399.

[23] Uniform Laws Annotated, vol. 9, p. 87.