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Judgment -- Vacation Because of Surprise or Excusable Neglect

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refinements;[30] the distinction is illogical;[31] and the clauses are not readily distinguishable.[32]

The *Hammer* case falls within the majority rule both as regards injury contrasted with disease, and as to the distinction placed on the term accidental means. The court there held heat exhaustion to be an injury rather than a disease,[33] and found the accidental means in the *rays* of the sun rather than in the heat exhaustion itself.

Disregarding any possible social justification, it is submitted that, in view of the freedom of the parties to contract as they will, and the unambiguous language of the policies, the rules adopted by the majority decisions are those most consonant with settled legal principles.

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Judgment—Vacation Because of Surprise or Excusable Neglect

G. S. 1-220 provides, in part, that:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. . . ."

In 1883, Justice Ashe noted the great number of appeals based on the above statute, commenting, ". . . and still they come."[1] The statement is appropriate at the present time.[2] As the appeals are "still coming," a brief recapitulation of cases in which the statute is involved seems to be in order.

The relief provided by the terms of G. S. 1-220 must be sought by a motion in the cause and cannot be had in an independent action.[3]

[30] Burr v. Commercial Travelers' Mut. Acc. Ass'n., 295 N. Y. 294, 301, 67 N. E. 2d 248, 251 (1946) ("Our guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract. . . .").

[31] Murphy v. Travelers' Ins. Co., 141 Neb. 41, 48, 2 N. W. 2d 576, 580 (1942) (". . . the distinction between accidental result and accidental means cannot be said to exist.").

[32] Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N. W. 2d 588 (1948); Miser v. Iowa State Traveling Men's Ass'n., 223 Iowa 662, 273 N. W. 155 (1937); Lickleider v. Iowa State Traveling Men's Ass'n., 184 Iowa 423, 429, 166 N. W. 363, 366 (1918) (". . . the meaning of these words in law differs in no essential respect from the meaning attributed to them in popular speech.").

[33] The bulk of American authorities refuse to apply a pathological definition to the term, "sunstroke," holding instead that same is an accident within the meaning of an insurance policy. Lower v. Metropolitan Life Ins. Co., 111 N. J. L. 426, 168 Atl. 592 (1933); Continental Casualty Co. v. Clark, 70 Okla. 187, 173 P. 453 (1918); Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017 (1921); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 447 (1941). *Contra:* Dozier v. Fidelity and Casualty Co., 46 Fed. 446 (C. C. W. D. Mo. 1891).

[1] Kivett v. Wynne, 89 N. C. 39, 41 (1883).

[2] Over 175 cases involving relief sought under the statute have been decided since 1883, an average of more than two cases per year.

[3] Ins. Co. v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); Walker v. Gurley, 83 N. C. 429 (1880).

The statute applies only to judgments which are in all respects regular and according to the course and practice of the court,[4] and therefore has no application to irregular judgments.[5] Nor does it apply to judgments rendered during the term at which the motion is made.[6] The statute is applicable whether the judgment is by default or based upon a verdict.[7] The motion to set aside has been entertained by justices of the peace,[8] county courts,[9] and recorders' courts,[10] as well as by the superior courts.[11] A judge cannot hear a motion under the statute outside the county in which the judgment or order sought to be set aside was rendered, except by consent of the parties.[12] However, where the judge in the county of hearing finds as a fact that the case was continued by consent to be heard out of the original county, this finding is conclusive on appeal.[13]

There are three conditions precedent to relief under the statute:[14] (1) a showing of mistake, inadvertence, surprise or excusable neglect,[15] (2) a showing of a meritorious defense and (3) a motion to set aside,

[4] Gough v. Bell, 180 N. C. 268, 104 S. E. 535 (1920).

[5] Hood v. Stewart, 209 N. C. 424, 184 S. E. 36 (1936); Cox v. Boyden, 167 N. C. 320, 83 S. E. 246 (1914); Massie v. Hainey, 165 N. C. 174, 81 S. E. 135 (1914); Becton v. Dunn, 137 N. C. 559, 50 S. E. 289 (1905). Neglect before judgment does not necessarily bar the right to have an irregular judgment vacated on motion. Snow Hill Livestock Co. v. Atkinson, 189 N. C. 250, 126 S. E. 610 (1925).

[6] Gold v. Maxwell, 172 N. C. 149, 90 S. E. 115 (1916); McCullock v. Doak, 68 N. C. 267 (1873) (Orders and judgments are *in fieri* during the term and subject to control of the judge).

[7] Formerly it was held that the statute had no application to judgments such as necessarily followed a verdict. Brown v. Rhinehart, 112 N. C. 772, 16 S. E. 840 (1893). This was changed by PUBLIC LAWS OF 1893, ch. 81, which inserted the word "verdict" in the statute. Now, both the verdict and judgment may be vacated for excusable neglect. Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).

[8] Finlayson v. Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).

[9] Radeker v. Royal Pines Park, Inc., 207 N. C. 209, 176 S. E. 285 (1934); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903).

[10] Taylor v. Gentry, 192 N. C. 503, 135 S. E. 327 (1926).

[11] The Clerk of the Superior Court has power under G. S. 1-220 to set aside judgments rendered by him and appeal may be had to the judge. The judge has concurrent power with the clerk on motions to set aside judgments rendered by the clerk. Moody v. Howell, 229 N. C. 198, 49 S. E. 2d 233 (1948).

[12] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918); Godwin v. Monds, 101 N. C. 354, 7 S. E. 793 (1888); McNeil v. Hodges, 99 N. C. 248, 6 S. E. 127 (1888).

[13] Gaster v. Thomas, 188 N. C. 346, 124 S. E. 609 (1924) (The finding must be supported by competent evidence).

[14] Fellos v. Allen, 202 N. C. 375, 162 S. E. 905 (1932).

[15] Although the statute specifies four distinct grounds for relief, the bulk of the cases has been concerned with "excusable neglect." The scope of this note is limited to cases of surprise and excusable neglect under the statute. For cases involving "mistake" see Rierson v. York, 227 N. C. 575, 42 S. E. 2d 902 (1947); Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Earle v. Earle, 198 N. C. 411, 151 S. E. 884 (1930); Lerch v. Mckinne, 187 N. C. 419, 122 S. E. 9 (1924); Mann v. Hall, 163 N. C. 50, 79 S. E. 437 (1913); Phifer v. Travellers Ins. Co., 123 N. C. 405, 31 S. E. 715 (1898); Skinner v. Terry, 107 N. C. 103, 12 S. E. 118 (1890); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

made within one year after notice of the judgment, order, verdict or other proceeding.

Though relief under the statute is sought most frequently by defendants,[16] plaintiffs have on occasion utilized the terms of the section in seeking to vacate a judgment on a counterclaim,[17] a judgment of nonsuit,[18] or a judgment based upon a verdict.[19] The conditions precedent are the same for a plaintiff as for a defendant except that, instead of showing a meritorious defense to the cause of action, a plaintiff must show a meritorious cause of action,[20] or in case of a counterclaim, a meritorious defense to the counterclaim.[21]

Surprise

The "surprise" contemplated by the statute is not surprise at some action taken by the court,[22] but where an attorney withdraws from a case without notice to his client, the action of the attorney constitutes surprise to the client within the meaning of the statute.[23] The burden is on the party seeking to set aside the judgment to show lack of notice of the attorney's withdrawal,[24] and a meritorious defense must be shown.[25] Withdrawal of the attorney does not always amount to surprise. Thus, where the party is present and is notified in open court by the judge that he must obtain other counsel before the next term of court, there is no surprise.[26]

Excusable neglect

Since each case involving an attempt to set aside a judgment, order, verdict or other proceeding by reason of excusable neglect is determined by its particular circumstances,[27] the distinction between cases of excusable neglect and inexcusable neglect is difficult to enounce. The court has formulated two basic propositions: A warning that, "When a man has a case in court, the best thing he an do is to attend to it,"[28] and a standard that, "The least that can be expected of a

[16] Generally, where no answer is filed or if an answer is filed, where no appearance is made by defendant or his attorney.

[17] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951); Bradford v. Coit, 77 N. C. 72 (1877).

[18] Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896).

[19] Graver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[20] Turner v. Southeastern Grain and Livestock Co., 190 N. C. 331, 129 S. E. 725 (1925).

[21] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951).

[22] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945).

[23] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950): Roediger v. Sapos, 217 N. C. 95, 6 S. E. 2d 801 (1939); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933).

[24] Roediger v. Sapos, 217 N. C. 95, 6 S. E. 2d 801 (1939).

[25] *Ibid.*

[26] Baer v. McCall, 212 N. C. 389, 193 S. E. 406 (1937).

[27] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Henry v. Clayton, 85 N. C. 372 (1881).

[28] Pepper v. Clegg, 132 N. C. 312, 316, 43 S. E. 906, 907 (1903).

person having a suit in Court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business."[29] In order to determine what a "man of ordinary prudence" does when he is involved in a lawsuit, resort must be had to specific cases.[30]

(1) *Physical condition of movant*

Mere forgetfulness of the party in default is not a sufficient ground for setting aside a judgment,[31] even where the party is old and feeble,[32] or where he is a physician whose time has been subjected to heavy wartime demands.[33] Sickness in and of itself is an insufficient ground,[34] as is physical fatigue brought about by business worries and large business interests.[35] The court apparently considers as sufficient grounds physical condition such as would render the party *non compos mentis*[36] or at least legally unfit to attend to business.[37]

(2) *Neglect of service*

A party must not ignore service. If he thinks he has been served by mistake, he must ascertain whether or not he is the proper party. Failure to do so constitutes inexcusable neglect.[38] Inaction due to a mistaken belief that the summons is "some notice or paper" in a suit already pending between the same parties will not be excused.[39] The result is the same where the party served mistakenly believes that a complaint must be served on him before any action can be taken in the case.[40]

(3) *Employment of attorney*

Since a party generally directs his interest in a proceeding through an attorney, he should employ or at least consult counsel as to his case.[41]

[29] Sluder v. Rollins, 76 N. C. 271, 272 (1877).

[30] Henceforth, in the discussion of neglect, it is assumed that in all cases there has been some default in the legal proceeding due to the neglect of the party moving under G.S. 1-220, or his attorney.

[31] McDowell v. Justice, 167 N. C. 493, 83 S. E. 803 (1914) (defendant called at office of clerk several times, asking for the complaint in the case of "J. J. Bailey v. Justice." There was no such case.).

[32] Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914) (Defendants were approximately 76 years of age, feeble and "hard of hearing").

[33] Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945).

[34] Jernigan v. Jernigan, 179 N. C. 237, 102 S. E. 310 (1920).

[35] Hales-Bryant Lumber Co. v. Blue, 170 N. C. 1, 86 S. E. 724 (1915) (defendant's affidavits, made by doctors, tended to show that defendant had been in such physical condition as to neglect business matters; while plaintiff's affidavits tended to show that defendant was director of two banks, a good business man, and capable of looking after his own affairs).

[36] Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914).

[37] Hales-Bryant Lumber Co. v. Blue, 170 N. C. 1, 86 S. E. 724 (1915).

[38] Depriest v. Patterson, 85 N. C. 376 (1881).

[39] Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); White v. Snow, 71 N. C. 232 (1874).

[40] Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

[41] Holland v. Edgecombe Benevolent Ass'n., 176 N. C. 86, 97 S. E. 150 (1918); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883).

He is not giving his case the proper care when he simply writes letters of inquiry as to the extent of the claim against him, deriving no definite information from replies to the letters.[42] Where a party's attention to the litigation consists of writing to an attorney to request that he handle the case, after which he makes no further inquiry, his neglect is inexcusable.[43] The same result follows where the litigant merely "speaks to" an attorney without more.[44] Even when an attorney is retained, if the employment takes place so late that the attorney cannot appear before judgment, the neglect of the party is inexcusable.[45]

A litigant may not abandon his case simply because he employs counsel,[46] for the employment in and of itself is insufficient to constitute excusable neglect.[47] He must apprise the attorney of facts constituting his defense to the action.[48] He must be available in order to appear at the trial,[49] and may not willfully absent himself intending not to appear unless he is notified to do so by his attorney.[50] However, if the party leaves the court or remains away on the advice of his attorney that it is "needless for him to go,"[51] that "nothing more will be done" during the term,[52] that he is "no longer required"[53] or that he "need not concern himself until he is further advised,"[54] his neglect is excusable. When a party does appear in court, he must take notice of what occurs there.[55]

Formerly, the cases held that neglect of a party was inexcusable unless he employed an attorney who ordinarily practiced in the court where the action was instituted or one who especially engaged to go there.[56] If the party employed a non-local attorney, he had to see that

[42] Governor *ex rel.* Trustees of University of North Carolina v. Lassiter, 83 N. C. 38 (1880).
[43] Burke v. Stokely, 65 N. C. 569 (1871).
[44] Simonton v. Lanier, 71 N. C. 498 (1874).
[45] Finlayson v. The American Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).
[46] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903); Roberts v. Allman, 106 N. C. 391, 11 S. E. 424 (1890).
[47] Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925); Boing v. Raleigh & Gaston R. R. Co., 88 N. C. 62 (1883).
[48] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915); Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476 (1897).
[49] Henry v. Clayton, 85 N. C. 372 (1881); Sluder v. Rollins, 76 N. C. 271 (1877).
[50] Cobb v. O'Hagan, 81 N. C. 293 (1879); Bradford v. Coit, 77 N. C. 72 (1877).
[51] Ellington v. Wicker, 87 N. C. 14 (1882).
[52] English v. English, 87 N. C. 497 (1882).
[53] Pickens v. Fox, 90 N. C. 369 (1884).
[54] Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Edwards v. Butler, 186 N. C. 200, 119 S. E. 7 (1923).
[55] Carter v. Anderson, 208 N. C. 529, 181 S. E. 750 (1935) (Party was in court with counsel when continuance was denied. Both left without any definite agreement with adversary party or with the court, and failed to appear at the trial).
[56] Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N. C. 437.

the non-local attorney attended court and "stayed on guard for him."[57] In *Helderman v. Mills Co.*,[58] the court abrogated the requirement of employment of local counsel and indicated that a party could safely rely on a non-local attorney of high character and professional standing.[59] The present requirement seems to be that the party must (1) employ reputable, skilled and competent counsel and (2) impart to counsel facts constituting his defense.[60]

Where the defaulting party is chargeable with notice that his attorney will be unable to conduct his case, inaction will amount to inexcusable neglect. The party may be chargeable with notice that his attorney has died,[61] left the state,[62] joined the army,[63] or is too ill to handle the litigation.[64]

(4) *Effect of negotiations and deception*

Where the parties, or their attorneys, have engaged in negotiations, contemplating a settlement of the action, or the defaulting party has been reasonably misled by some statement of the other party or his attorney, neglect of the action may be excusable. Where a settlement was pending and it is shown that, except for excusable delay in notifying the adversary party of any acceptance of the proposed settlement, a judgment would not have resulted, a motion to set aside may be granted.[65] The motion may not be granted however, where an offer of settlement has been expressly withdrawn.[66] The result is the same where the defaulting party is notified that judgment will be taken

130 S. E. 12 (1925); Ham v. Person, 173 N. C. 72, 91 S. E. 605 (1917); McKeel Hardware Co. v. Buhmann, 159 N. C. 511, 75 S. E. 731 (1912); Stockton v. Wolverine Gold Mining Co., 144 N. C. 595, 57 S. E. 335 (1907); Osborn v. Leach, 133 N. C. 428, 45 S. E. 783 (1903); Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903); Manning v. Roanoke and Tar River R. R. Co., 122 N. C. 824, 28 S. E. 963 (1898).

[57] McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[58] 192 N. C. 626, 135 S. E. 627 (1926).

[59] *Ibid.*

[60] Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).

[61] Queen v. Gloucester Lumber Co., 170 N. C. 501, 87 S. E. 325 (1915) (Attorney retired and died seven months before judgment was rendered. Party did not employ other counsel until service of execution under the judgment); Simpson v. Brown, 117 N. C. 482, 23 S. E. 441 (1895); Kivett v. Wynne, 89 N. C. 39 (1883) (Attorney died three weeks prior to trial. He was a public figure; his death received much notoriety. Party did not employ other counsel, nor did he appear at the trial).

[62] Cahoon v. Brinkley, 176 N. C. 5, 96 S. E. 650 (1918) (Attorney ceased connection with case and moved to Colorado, intending to reside there permanently).

[63] Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919) (Defendant paid no attention to case when attorney had left the county to join the army two months before judgment).

[64] Holland v. Edgecombe Benevolent Ass'n, 176 N. C. 86, 97 S. E. 150 (1918) (Attorney confined to hospital under the care of the party. Party made no inquiry as to the state of the action).

[65] Cagle v. Williamson, 200 N. C. 727, 158 S. E. 391 (1931) (Neglect in notification, if any, was that of attorney and not that of party).

[66] Gray v. King, 180 N. C. 667, 104 S. E. 646 (1920).

unless an answer is filed,[67] or unless payment, upon terms previously agreed on, is made.[68]

The defaulting party cannot safely rely on the advice of a neighbor,[69] or upon the promise of the adversary party that judgment will not be taken, where the promise is not filed or brought to the attention of the court.[70] However, if the party is reasonably misled by his adversary's attorney, his resulting neglect might be held to be excusable.[71] But the reliance must be reasonable. For example, where plaintiff's attorney merely informs defendant that the plaintiff has an incontestable cause of action, the judgment will not be set aside.[72] Also, the defaulting party must be diligent.[73] If the defendant is reasonably misled, it is immaterial whether or not the misleading is intentional.[74]

(5) *Neglect of agent*

In General: As a general rule, in cases of simple agency, the inexcusable neglect of an agent is imputable to a principal moving to set aside.[75] The agent may be the movant's grantor,[76] co-defendant,[77] business manager,[78] general agent,[79] local agent,[80] surety[81] or insurance carrier.[82] However, the agent's neglect will not be imputed to the principal unless the agent is a "responsible agent."[83] A distinction is made between agents of a foreign corporation who are such because of a contractual relationship and those who are merely process agents due to operation of law. The court will not hold as a matter of law that the neglect of the latter is imputable to the corporation.[84]

[67] Union Guano Co. v. Middlesex Supply Co., 181 N. C. 210, 106 S. E. 832 (1921).

[68] Perkins v. Sharp, 191 N. C. 224, 131 S. E. 584 (1926).

[69] Mauney v. Gidney, 88 N. C. 200 (1883) (The neighbor stated that he had consulted counsel and that no defense was available to defendant).

[70] LeDuc v. Slocomb, 124 N. C. 347, 32 S. E. 726 (1899).

[71] Union Guano Co. v. Hearne, 172 N. C. 398, 90 S. E. 420 (1916) (Where plaintiff's attorney intimated that judgment would be sought against defendants' separate balances on a single contract, when, in fact, the action was instituted against defendants jointly, charging them with fraudulent misapplication).

[72] Mauney v. Gidney, 88 N. C. 200 (1883).

[73] Kerchner v. Baker, 82 N. C. 169 (1880) (plaintiff's attorney agreed iwth defendant's attorney that no action would be taken without notice to defendant or his attorney, but plaintiff's attorney died and plaintiff recovered judgment. Defendant never made any inquiry concerning the action).

[74] Union Guano Co. v. Hearne, 172 N. C. 398, 90 S. E. 420 (1916) (The earlier case of Mauney v. Gidney, 88 N. C. 200 (1883) apparently made artifice by the plaintiff an essential ingredient).

[75] Morris v. Liverpool Ins. Co., 131 N. C. 212, 42 S. E. 577 (1902); Finlayson v. The Amercian Accident Co., 109 N. C. 196, 13 S. E. 739 (1891).

[76] Norwood v. King, 86 N. C. 80 (1882).

[77] Bank of Statesville v. Foote, 77 N. C. 131 (1877).

[78] Pate v. Pittman Hospital, 234 N. C. 637, 68 S. E. 2d 288 (1951).

[79] Stallings v. Spruill, 176 N. C. 121, 96 S. E. 890 (1918).

[80] Hershey Corp. v. Atlantic Coastline R. R. Co., 203 N. C. 184, 165 S. E. 550 (1932).

[81] Elramy v. Abeyounis, 189 N. C. 278, 126 S. E. 743 (1925).

[82] Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952).

[83] Pate v. Pittman Hospital, 234 N. C. 637, 68 S. E. 2d 288 (1951).

[84] Townsend v. Carolina Coach Co., 231 N. C. 81, 56 S. E. 2d 39 (1949) (The

Attorney—Client: Ordinarily, a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care.[85] However, where an attorney is not performing his professional duties, but is doing some act that the client can and should perform, then the attorney is a mere agent of the client and his neglect is imputable.[86] Thus, where the client employs counsel, not to appear in the case, but merely to select counsel who will appear, neglect of the first attorney in failing to employ counsel is imputable to the client.[87] But if the "selecting" attorney reasonably believes that he has employed counsel and repeatedly assures the client that he has, his neglect is not imputable to the client.[88]

Husband-wife: Where a husband is acting as agent for his wife in handling her interest in litigation, his neglect is not imputable to her,[89] whether the action is against husband and wife jointly,[90] or against the wife alone.[91] In legal contemplation, the wife is inclined to trust her interest in an adversary suit to her husband and failure of the husband to employ counsel and attend to the suit is deemed to make her consequent failure to defend a case of excusable neglect.[92]

Meritorious defense

In order to set aside under G. S. 1-220 a party must show *both* excusable neglect and a meritorious defense,[93] for the court has said

"agent" here had no contractual relationship with the defaulting defendant. She was an employee of lessees of a bus station and merely sold tickets for the defendant, therefore she came within the definition of a "person receiving money" under N. C. GEN. STAT. § 1-97 (1) (1943), making her defendant's agent for service of process. The court held that she was not the type agent whose neglect is imputable to defendant for purposes of G. S. 1-220. The court uses language that seems to indicate a liberal attitude toward defendants seeking to set aside in circumstances such as appeared in this case. ". . . no officer or agent, *charged with the duty of defending actions against the corporation* (italics added) knew of the existence of the suit until after judgment had been taken." Townsend v. Carolina Coach Co. *supra* at p. 84, 56 S. E. 2d at p. 41).

[85] Rierson v. York, 227 N. C. 575. 42 S. E. 2d 902 (1947); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Grandy v. Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Schiele v. North State Fire Ins. Co., 171 N. C. 426, 88 S. E. 764 (1916); Griel v. Vernon, 65 N. C. 76 (1871).

[86] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916).

[87] Kerr v. Joint Stock Bank, 205 N. C. 410, 171 S. E. 367 (1933); Pailin v. Cedar Works, 193 N. C. 256, 136 S. E. 635 (1927); Manning v. Roanoke and Tar River R. R., 122 N. C. 824, 28 S. E. 963 (1898). This situation frequently arises where a business firm employs a general counsel whose duties include assigning litigation to attorneys at the location of the action.

[88] Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1927). For a discussion of the rule of non-imputation of attorney's neglect to client, see 26 N. C. L. REV. 84 (1947).

[89] Nicholson v. Cox, 83 N. C. 48 (1880).

[90] Wachovia Bank and Trust Co. v. Turner, 202 N. C. 162, 162 S. E. 221 (1931); Morris Plan Industrial Bank v. Turner, 202 N. C. 165, 162 S. E. 222 (1931); Farmers Nat. Bank and Trust Co. v. Turner, 202 N. C. 166, 162 S. E. 223 (1931).

[91] Sikes v. Weatherly, 110 N. C. 131, 14 S. E. 511 (1892).

[92] Nicholson v. Cox, 83 N. C. 48 (1880).

[93] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949); Garrett v.

that "It would be idle to vacate a judgment where there is no real or substantial defense on the merits."[94] Of course, in the absence of a showing of excusable neglect, any question of meritorious defense becomes immaterial.[95] Some examples of meritorious defense are release,[96] want of service,[97] denial of plaintiff's title or title in defendant by adverse possession[98] and breach of the contract sued upon.[99] Also, an allegation of actual notice to plaintiff of the retirement of defendant from a partnership prior to an extension of credit by the plaintiff to the partnership is considered a sufficient averment of a meritorious defense.[100] However, a technical defense, such as the statute of limitations, is not meritorious.[101] As a general rule, a meritorious defense is one that goes to the intrinsic merit of the case and is founded in good conscience.[102]

Time of motion

A party seeking relief under G. S. 1-220 must present his motion within one year.[103] The statute does not apply to cases where service is by publication.[104] Therefore, since a party who is personally served or who is in court by voluntary appearance has notice of all that occurs in court,[105] the one year period runs from the date of the rendition of the judgment. By this is meant the actual date of rendition and not the first day of the term during which the judgment was rendered.[106]

Procedure on the motion

A party seeking to set aside a judgment under G. S. 1-220 must file affidavits, along with an application to set aside the judgment, with the court. Notice of motion is given to the adversary party, who may submit counter-affidavits. The court then hears the motion on the affi-

Trent, 216 N. C. 162, 4 S. E. 2d 319 (1939); Woody v. Privett, 199 N. C. 378, 154 S. E. 625 (1930); Battle v. Mercer, 187 N. C. 437, 122 S. E. 4 (1924); Crumpler v. Hines, 174 N. C. 283, 93 S. E. 780 (1917); Minton v. Hughes, 158 N. C. 587, 73 S. E. 810 (1912); Bank of Statesville v. Foote, 77 N. C. 131 (1877).

[94] Cayton v. Clark, 212 N. C. 374, 375, 193 S. E. 404 (1937).

[95] Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952).

[96] Sircey v. Hans Rees' Sons, 155 W. C. 296, 71 S. E. 310 (1911).

[97] Monroe v. Niven, 221 N. C. 362, 20 S. E. 2d 311 (1942).

[98] Duffer v. Brunson, 188 N. C. 789, 125 S. E. 619 (1924).

[99] Everett v. Johnson, 219 N. C. 540, 14 S. E. 2d 250 (1941).

[100] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949). See notes 111-114 *infra* for further indications as to what constitutes a meritorious defense.

[101] Wyche v. Ross, 119 N. C. 174, 25 S. E. 878 (1896).

[102] 1 FREEMAN, LAW OF JUDGMENTS § 286 (5th ed. 1925).

[103] Gordon v. Pintsch Gas Co., 178 N. C. 435, 100 S. E. 878 (1919); Currie v. Golconda Mining and Milling Co., 157 N. C. 209, 72 S. E. 980 (1911); Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581 (1904).

[104] Foster v. Allison Corp., 191 N. C. 166, 131 S. E. 648 (1926).

[105] Roberts v. Allman, 106 N. C. 391, 11 S. E. 424 (1890); McLean v. McLean, 84 N. C. 365 (1881).

[106] Jernigan v. Jernigan, 178 N. C. 84, 100 S. E. 184 (1919). (The rule of judgments "relating back" to the first day of the term is not applicable.)

davits.[107] The circumstances alleged as constituting surprise, mistake, inadvertence or excusable neglect must of necessity be set forth in the affidavits as they will not appear in any other records of the case.

(1) *Showing a meritorious defense*

In the absence of an answer, a meritorious defense must be alleged by affidavits.[108] The allegations in the affidavit must be definite.[109] Facts, not conclusions of law, must be alleged.[110] Where a verified answer denying the material allegations of the complaint is filed and is a part of the record, it may be sufficient to show a meritorious defense.[111] If the plaintiff is the movant, his complaint may be sufficient to show a meritorious defense to a counterclaim.[112] Where a case goes on to trial, after the former judgment has been set aside on motion, and the defendant wins the case, this is held to be ". . . a very fair test of good defense."[113] Other records on which a finding of meritorious defense may be established are a judgment of the case on a former trial and an opinion of the Supreme Court on a former appeal.[114]

It is only necessary to *allege* facts constituting a meritorious defense or a meritorious cause of action. The facts alleged do not have to be conclusive, but they must show a prima facie defense or cause of action.[115] The judge does not determine the truth or falsity of the defense,[116] thus there may be a sufficient allegation of meritorious defense even though, in fact, there is no defense.[117]

(2) *Findings of fact and conclusions*

The court hearing the motion should find the facts as to surprise or excusable neglect and as to the matter of a meritorious defense or cause of action. However, the judge is not required to find facts, in the ab-

[107] McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE § 655 (1929).
[108] Fellos v. Allen, 202 N. C. 375, 162 S. E. 905 (1932). Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).
[109] Montague v. Lumpkins, 178 N. C. 270, 100 S. E. 417 (1919).
[110] Hooks v. Neighbors, 211 N. C. 382, 190 S. E. 236 (1937).
[111] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950); Cagle v. Williamson, 200 N. C. 727, 158 S. E. 391 (1931); Gallins v. Globe-Rutgers Fire Ins. Co., 174 N. C. 553, 94 S. E. 300 (1917). See Chosen Confections Inc. v. Johnson, 218 N. C. 500, 11 S. E. 2d 472 (1940), where defense was shown by answer. Although the answer was ordered stricken, it was preserved in the record by an exception.
[112] Godwin v. Brickhouse, 220 N. C. 40, 16 S. E. 2d 403 (1941). *Cf.* Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946).
[113] Sircey v. Hans Rees' Sons, 155 N. C. 296, 299, 71 S. E. 310, 311 (1911).
[114] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950).
[115] Crumpler v. Hines, 174 N. C. 283, 93 S. E. 780 (1917).
[116] Gaylord v. Berry, 169 N. C. 733, 86 S. E. 623 (1915).
[117] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949). *But see,* Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946), where the court said that although the allegations of a verified complaint may be used as evidence of a cause of action or defense, the allegations are not conclusive or irrebuttable and

sence of a request to do so.[118] If a request is made, it is error for the judge to refuse to find facts.[119] Therefore, one of two courses may be taken. If the judge does not find facts, it will be presumed on review that he found such facts as would support his ruling.[120] If the judge does find facts, the facts found are conclusive on review,[121] except in the following cases: (1) where there is an exception that there is no evidence to support the facts,[122] (2) where there is an exception that the judge failed to find material facts,[123] (3) where there is an exception that the judge considered facts not material[124] and (4) where the judge found facts under a misapprehension of the law or the facts.[125]

Upon the facts found, the judge determines whether or not there is surprise or excusable neglect and a meritorious defense or cause of action.[126] From this, either party may appeal.[127] Unless the judge concludes correctly that there was both excusable neglect (or surprise) and a meritorious defense, he is without power to set aside the judgment.[128] If he concludes that there was both excusable neglect or surprise and a meritorious defense, then he may, in his discretion, set aside the judgment.[129] This exercise of discretion is not reviewable except in case of abuse[130] or misapprehension of power to set aside.[131]

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will not override a finding of the judge made on conflicting testimony that there is no cause of action or defense.

[118] Holcomb v. Holcomb, 192 N. C. 504, 135 S. E. 287 (1926).

[119] *Ibid.*

[120] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Holcomb v. Holcomb, 192 N. C. 504, 135 S. E. 287 (1926); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).

[121] Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Clayton v. Adams, 206 N. C. 920, 175 S. E. 185 (1934); Crye v. Stoltz, 193 N. C. 802, 138 S. E. 167 (1927); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 W. E. 706 (1919); Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917); Marion v. Tilley, 119 N. C. 473, 26 S. E. 26 (1896); Weil v. Woodard, 104 N. C. 94, 10 S. E. 129 (1889); Branch v. Walker, 92 N. C. 91 (1885).

[122] Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917); Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269 (1899) and cases cited there.

[123] Beaufort Lumber Co., v. Cottingham, *supra* note 122.

[124] Gorman v. Yorke, 214 N. C. 524, 199 S. E. 729 (1938).

[125] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950); Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949); Marsh v. Griffin, 123 N. C. 660, 31 S. E. 840 (1898); Where this occurs, the case will be remanded for a proper finding of facts. Coley v. Dalrymple, 225 N. C. 67, 33 S. E. 2d 477 (1945).

[126] Beaufort Lumber Co. v. Cottingham, 173 N. C. 323, 92 S. E. 9 (1917).

[127] Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919).

[128] Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919); Stockton v. Wolverine Gold Mining Co., 144 N. C. 595, 57 S. E. 335 (1907); Manning v. Roanoke and Tar River R. R., 122 N. C. 824, 28 S. E. 963 (1898); Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896).

[129] Garner v. Quakenbush, 187 N. C. 603, 122 S. E. 474 (1924).

[130] Wyche v. Ross, 119 N. C. 174, 25 S. E. 878 (1896).

[131] Crissman v. Palmer, 225 N. C. 472, 35 S. E. 2d 422 (1945); Albertson v. Terry, 108 N. C. 75, 12 S. E. 892 (1891) (The burden is on the movant to show that the judge is not exercising discretion. The party should request specification of grounds of decision and assign error).

(3) *Exceptions*

In order to insure a complete review of the trial court's action on motions under G. S. 1-220, the following request and exceptions should be considered: (1) a request that the trial judge find facts, with an exception if the request is refused,[132] (2) exceptions to individual findings of fact,[133] and (3) exceptions to conclusions of the judge as to surprise or excusable neglect and meritorious defense.[134] Also, the question of what is presented for review by the following exceptions should be recognized. A "broadside" exception presents for review only the question of whether or not the facts found by the judge support his judgment.[135] A general exception to the findings of fact on which the judgment of the trial court rests, *i.e.* "a shot at the covey," will not be considered on appeal.[136] An exception to the judgment below presents only two questions: Whether the facts found support the judgment and whether errors of law appear on the face of the record.[137]

JOHN R. MONTGOMERY, JR.

Trusts—Constructive Trust—Recovery of Proceeds of Wrongful Disclosure of Confidential Information

Defendant, a geologist, was employed full time by the plaintiff to secure and classify geological data for use in locating and acquiring oil properties. The information was highly confidential. Upon discovery that defendant had been divulging parts of this information to confederates, who through its use were able to secure valuable oil interests for themselves and for defendant, an action was begun to impress a constructive trust on the interests thus secured. It was held that defendant had breached his fiduciary duty to his employer in divulging this information, and it was decreed that defendant and his confederates held the interests and profits therefrom as constructive trustees for the plaintiff.[1]

Defined broadly, a constructive trust is a remedial device used to compel one who holds property wrongfully acquired or retained to

[132] McLeod v. Gooch, 162 N. C. 122, 78 S. E. 4 (1913).
[133] Radeker v. Royal Pines Park, Inc., 207 N. C. 209, 176 S. E. 285 (1934); Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950). (Exceptions must be to *individual* findings of fact, as a general exception to findings will not be considered on appeal.) See cases cited *supra* notes 121-124.
[134] Southern Butane Gas Corp. v. Bullard, 232 N. C. 730, 62 S. E. 2d 335 (1950).
[135] Dillingham v. Blue Ridge Motors, 234 N. C. 171, 66 S. E. 2d 641 (1951).
[136] Perkins v. Sykes, 233 N. C. 147, 63 S. E. 2d 133 (1950).
[137] Hanford v. McSwain, 230 N. C. 229, 53 S. E. 2d 84 (1949).

[1] Hunter v. Shell Oil Company, 198 F. 2d 485 (5th Cir. 1952); *accord*, Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937), approved in 25 VA. L. REV. 848 (1939); Ohio Oil Company v. Sharpe, 135 F. 2d 303 (5th Cir. 1943) reversing 45 F. Supp. 969 (D. C. Okla. 1942), approved in 41 MICH. L. REV. 747 (1943).