UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 41 | Number 4 Article 13

6-1-1963

Dedication -- Acceptance of Streets in Subdivision -- Public User

James M. Talley Jr.

we may have to discard all analogies and decide the issue by looking to the equities of the case.[26]

ARNOLD T. WOOD

Dedication—Acceptance of Streets in Subdivision—Public User

X, owner of a subdivision, sold lots therein by reference to a recorded map which showed the location of the lots and streets. *Y* owned a lot outside the subdivision upon which he built a home. He then opened his driveway onto a street in the subdivision. Although this subdivision street, which connected two public highways, had been regularly used by *Y* and other members of the general public for at least two years, it had never been accepted or maintained by public authority. When *X* barricaded the street, cutting off access to *Y*'s driveway, *Y* obtained a mandatory injunction for reopening the street. The North Carolina Supreme Court, in *Owens v. Elliot*,[1] reversed. The court held that an effective dedication to the property owners within the subdivision had been made, but as to the general public there was only an *offer* of dedication, requiring formal acceptance by the proper public authorities before *Y*, as a member of the general public, acquired a right to use the street.

When streets are shown on a recorded plat or map of a subdivision two types of interests are created.[2] First, purchasers of

bills which had been paid by the defendant under automobile medical payments insurance. The defendant's comprehensive insurance policy also contained a liability clause for payment on behalf of defendant of any tort liability within policy limits. The medical payments clause called for payments directly to injured persons regardless of the insured's negligence. The court, after stating the majority view that recovery could be had under both clauses, refused to allow a double recovery on the theory that there should be but one recovery for one injury regardless of what the source of the compensation.

[26] As stated by Lord Denning, M.R., in the principal case: "I prefer . . . to discard . . . analogies and ask myself the simple question: is it fair and just that, in assessing compensation, regard should be had to the fact that Sergeant Browning is already, as of right, in receipt of nearly half his pay? And my answer is, 'Yes.' He ought not receive compensation twice over. If he had remained in the Air Force, he would not have received both his pay and his pension. Nor should he do so now." [1963] 2 Weekly L.R. at 58.

[1] 258 N.C. 314, 128 S.E.2d 583 (1962). This case was before the court on appeal in 257 N.C. 250, 125 S.E.2d 589 (1962), where a judgment for damages was reversed. It was remanded to determine the injunction issue in light of pertinent evidence.

[2] See, *e.g.*, Russell v. Coggin, 232 N.C. 674, 62 S.E.2d 70 (1950), where the court stated, in effect, that when an owner subdivides and sells in reference to a plat or map, he dedicates the streets to the public in general and the purchasers in particular. See generally 11 MCQUILLAN, MUNICIPAL COR-

lots within the subdivision acquire a fixed right of ingress and egress immediately upon conveyance, and the grantor is estopped to deny them the use of the streets already laid out.[3] Secondly, the general public acquires an interest through dedication.[4]

In many states dedication of subdivision streets is usually accomplished by the recording of a plat or map of the subdivision in accordance with an express statutory scheme.[5] North Carolina has no such statute.[6] Consequently, dedication is accomplished here in accordance with long-established common-law principles. By analogy to the law of contracts a completed common-law dedication requires

PORATIONS § 33.24 (3d ed. 1949); 4 TIFFANY, REAL PROPERTY § 1103 (3d ed. 1939).

[3] See 11 McQUILLAN, *op. cit. supra* note 2, § 33.24; 4 TIFFANY, *op. cit. supra* note 2, § 1103; 31 N.C.L. REV. 202 (1953). It is generally agreed by the courts and treatise writers that the purchasers' rights to the unimpeded use of subdivision streets is not obtained by dedication, since technically there can be no dedication except to the public. However, more often than not this distinction is not made, and the purchasers' rights are loosely included in the term dedication. There need not be acceptance in any manner by the public or public authorities for the purchaser to enforce his rights. Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943).

[4] An Oregon case illustrates one court's distaste with this distinction. "Many of the courts, in discussing this subject, have made too great an effort to discriminate between such purchasers and the general public. The former are not a distinct class from the latter; they belong to it; are as much a part of the public as those who use the streets for the purposes of travel . . . . [T]hey would, so far as I can see, represent the public in the affair as much as a like number of wayfarers who travel upon such streets, and have equal authority to accept a dedication of them for the public." Meier v. Portland Cable Ry., 16 Ore. 500, 509, 19 Pac. 610, 615 (1888).

Dedication is generally defined as devotion of land to a public use by an unequivocal act of the owner of the fee, manifesting an intention that it shall be accepted and used presently or in the future. See, *e.g.*, Manning v. House, 211 Ala. 570, 100 So. 772 (1924); Whippoorwill Crest Co. v. Town of Stratford, 145 Conn. 268, 141 A.2d 241 (1958); City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943); City of Kingman v. Wagner, 168 Kan. 558, 213 P.2d 979 (1950). See generally 11 McQUILLAN, *op. cit. supra* note 2, § 33.02.

[5] *E.g.*, MINN. STAT. ANN. § 505.01 (1947). Even in those states with statutory dedication there may still be common-law dedication. *E.g.*, Louisville & N.R.R. v. City of Owensboro, 238 S.W.2d 148 (Ky. 1951); City of Hardin v. Ferguson, 271 Mo. 410, 196 S.W. 746 (1917).

The term dedication, of course, includes both the statutory and common-law types. Where necessary to distinguish between the two it is generally surmised that a statutory dedication operates in the nature of a grant of an easement, while a common-law dedication operates by way of estoppel in pais. See generally 1 ELLIOT, ROADS AND STREETS § 125 (4th ed. 1925); 11 McQUILLAN, *op. cit. supra* note 2, § 33.03.

[6] The only statute in North Carolina expressly dealing with the subject merely provides a method of withdrawal of a street after it has been effectively dedicated but not used within fifteen years of the dedication date. N.C. GEN. STAT. § 136-96 (1958).

an offer of dedication and an acceptance by the public.[7] The offer, based on the dedicator's objective intent, may be indicated in a number of ways.[8] One of the most widely acknowledged methods, with which North Carolina is in full accord,[9] is by subdividing land and making sales with reference to a recorded map or plat.[10] The majority view is that a sale of lots in a subdivision settles the rights between the seller and buyer, but, as to the general public, the offer to dedicate remains revocable at will until there has been some act of acceptance on the part of the public.[11] In discussing the public acceptance sufficient to complete dedication of subdivision streets, the North Carolina court has stated the rule in various ways. Typically it is said that the public acceptance must be in some "recognized legal manner."[12] This rule is deceptively simple due to the evasive mean-

[7] Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Irwin v. City of Charlotte, 193 N.C. 109, 136 S.E. 368 (1927); Wittson v. Dowling, 179 N.C. 542, 103 S.E. 18 (1920); Elizabeth City v. Commander, 176 N.C. 26, 96 S.E. 736 (1918); Green v. Miller, 161 N.C. 25, 76 S.E. 505 (1912). See generally 11 McQUILLAN, *op. cit. supra* note 2, § 33.43.

[8] *E.g.*, by written instrument expressly for that reason, Gallagher v. City of Detroit, 262 Mich. 298, 247 N.W. 188 (1933); by recitals in a deed in which the rights of the public are recognized, Neill v. Hake, 254 Minn. 110, 93 N.W.2d 821 (1958); by oral declarations, Seaboard Air Line Ry. v. Dorsey, 111 Fla. 22, 149 So. 759 (1932); by affirmative acts of the owner in connection with his property, Atlantic Coast Line R.R. v. Donalsonville Grain & Elevator Co., 184 Ga. 291, 191 S.E. 87 (1937); by acquiescence of the owner in the public use of his property for a public purpose, City of Spokane v. Catholic Bishop of Spokane, 33 Wash. 2d 496, 206 P.2d 277 (1949).

[9] Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956); Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 266 (1954); Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); Foster v. Atwater, 226 N.C. 472, 38 S.E.2d 316 (1946); Evans v. Horne, 226 N.C. 581, 39 S.E.2d 612 (1946); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889 (1943); Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Somersette v. Stanaland, 202 N.C. 685, 163 S.E. 803 (1932). The rule announced in this line of cases is, in effect, that the process of subdividing, platting, and selling lots in a subdivision amounts to a dedication of the streets therein to the use of the purchasers of such lots and the general public.

[10] There is virtually no conflict among the jurisdictions on this point. McQuillan calls it "one of the clearest ways of declaring an intention to dedicate." 11 McQUILLAN, *op. cit. supra* note 2, § 33.30. *But see* 4 TIFFANY, *op. cit. supra* note 2, § 1003, for a mild criticism.

[11] McQUILLAN, *op. cit. supra* note 2, § 33.45. Tiffany disagrees with McQuillan and makes the statement that the weight of authority is that once sales are made in reference to a plat, a dedication effected thereby cannot be revoked even though there has been no indication of an acceptance by the public. He criticizes this rule because it eliminates the necessity of acceptance by the public. 4 TIFFANY, *op. cit. supra* note 2, § 1106. To be sure, there is at least agreement that there is disagreement.

[12] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 583 (1962); Gault v. Town

ing of the words "acceptance" and "recognized legal manner." This evasiveness has led to a state of confusion in North Carolina concerning public user[13]—one of the universally recognized modes of acceptance, and the one relied on by the plaintiff in the *Owens* case.[14]

The usual modes of acceptance of an offer of dedication are (1) by formal or express acts of public authorities; (2) by implication from acts of public authorities; (3) by implication from user by the public for the purpose for which the property was dedicated.[15] North Carolina has recognized these three methods,[16] but often the third has been disregarded.[17] Where there has been an attempt to impose liability on a public authority for repairs and maintenance of streets, no doubt the omission has been deliberate.[18] In this context public user is properly not a "recognized legal manner" of acceptance. Much of the confusion has been caused by the indiscriminate application of this principle of non-recognition of public user to cases in which imposition of liability on a public authority is not involved.[19] The principal case is a prime example.

It is generally held in North Carolina that a public highway, in the sense that the public is responsible for its maintenance, may be established only by (1) regularly instituted proceedings by public authorities; (2) user by the public and control by public authorities

of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931); Wright v. Town of Lake Waccamaw, 200 N.C. 616, 158 S.E. 99 (1931).

[13] Although unable to find "public user" anywhere precisely defined, a reading of numerous cases indicates that it can range from mere use of dedicated land by members of the public, to public use with the additional element of maintenance and repair by a public authority. Maintenance in this context is carried on without any formal authorization and, therefore, is also considered to be an ingredient of "public user."

[14] Brief for Plaintiff, pp. 2, 3.

[15] Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956), cited in 11 McQUILLAN, *op. cit. supra* note 2, § 33.47.

[16] Town of Blowing Rock v. Gregorie, *supra* note 15, at 367, 90 S.E.2d at 901; Wittson v. Dowling, 179 N.C. 542, 545, 103 S.E. 18, 19 (1920).

[17] Owens v. Elliot, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962); Scott v. Schackelford, 241 N.C. 738, 743, 86 S.E.2d 453, 457 (1955); Chesson v. Jordan, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944); Stewart v. Frink, 94 N.C. 487, 488 (1886); Kennedy v. Williams, 87 N.C. 6, 8 (1882).

[18] There is a split of authority as to whether mere public user is sufficient to impose liability on a public authority for repairs and maintenance. 11 McQUILLAN, *op. cit. supra* note 2, § 33.50; 4 TIFFANY, *op. cit. supra* note 2, § 1107. McQuillan takes the stand that user should be sufficient, basing this on the ground that the public is in reality the municipality, while the principal officers are merely agents of the public. North Carolina has never decided this point.

[19] See note 18 *supra*.

for twenty years; or (3) dedication by the owner with the sanction of public authorities which have accepted it.[20] When this rule is coupled with the doctrine of acceptance of dedication by public user[21] in a context other than an attempt to impose liability on the public for maintenance, formal recognition of the latter rule is practically vitiated.[22] Upon analysis it becomes clear that the two rules are directed at different ends and should not be invariably construed together. The rule of public user is directed toward the dedicator and makes his offer of dedication irrevocable. The rule concerning establishment of public highways is directed toward state agencies and defines the manner in which a duty of public maintenance is created. This duty carries with it tort liability for negligent failure to properly maintain the street.[23] But the creation of a right in the public to use a dedicated street does not necessarily impose a concomitant duty on the public to maintain it.[24] In such a case the public is free to use the dedicated street as a public highway but at

[20] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 583 (1962); Scott v. Shackelford, 241 N.C. 738, 86 S.E.2d 453 (1955); Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944); Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937); Stewart v. Frink, 94 N.C. 487 (1886); Kennedy v. Williams, 87 N.C. 6 (1882).

[21] In cases not involving streets in a subdivision North Carolina has recognized user as a proper device for accepting a dedication. Draper v. Conner & Walters Co., 187 N.C. 18, 121 S.E. 29 (1924); Penland v. Barnard, 146 N.C. 378, 59 S.E. 1109 (1907); Crump v. Mims, 64 N.C. 767 (1870).

[22] That the doctrine of user and this rule can exist together is not questioned. However, this is true only in contexts in which it was originally employed, that is, where the intent of the owner to dedicate is in issue. Intent, either express or implied through conduct, is the fundamental prerequisite of an offer to dedicate. Draper v. Conner & Walters Co., *supra* note 21.

[23] Savannah Beach, Tybee Island v. Drane, 205 Ga. 14, 52 S.E.2d 439 (1949); Richmond v. City of Marseilles, 154 Ill. App. 345 (1910); State v. Wilson, 42 Me. 9 (1856); Kennedy v. City of Cumberland, 65 Md. 514, 9 Atl. 234 (1886); Chapman v. City of Sault Ste. Marie, 146 Mich. 23, 109 N.W. 53 (1906); Cincinnati & M.V.R.R. v. Village of Rosevill, 76 Ohio St. 108, 81 N.E. 178 (1907); City of Winchester v. Carroll, 99 Va. 727, 40 S.E. 37 (1901); Pence v. Bryant, 54 W. Va. 263, 46 S.E. 275 (1903). *Contra,* Makepeace v. City of Waterbury, 74 Conn. 360, 50 Atl. 876 (1902); City of Hammond v. Maher, 30 Ind. App. 286, 65 N.E. 1055 (1903); Dunn v. City of Oelwien, 140 Iowa 423, 118 N.W. 764 (1908); Phelps v. City of Mankato, 23 Minn. 276 (1877); Benton v. City of St. Louis, 217 Mo. 687, 118 S.W. 418 (1909); Sweeney v. Village of Newport, 65 N.H. 86, 18 Atl. 86 (1889); Ackerman v. City of Williamsport, 227 Pa. 591, 76 Atl. 421 (1910); City of Austin v. Ritz, 72 Tex. 291, 9 S.W. 884 (1888); Cady v. City of Seattle, 42 Wash. 402, 85 Pac. 19 (1906).

[24] Gilbreath v. City of Greensboro, 153 N.C. 396, 69 S.E. 268 (1910); Jones v. Town of Henderson, 147 N.C. 120, 60 S.E. 894 (1908); State v. Fisher, 117 N.C. 733, 23 S.E. 158 (1895).

their own risk.[25] Tort liability may be voluntarily assumed by the municipality or public authority but it cannot be forced upon them.

Another oft-used doctrine is that a person who purchases a lot on the outside boundaries of a subdivision has no rights in respect to the dedicated streets of that subdivision other than those enjoyed by the general public.[26] One can hardly take issue with the rule standing alone. However, when used in the context of the principal case it begs the question. The landowner in the principal case became a "user" of the street as a member of the general public and, therefore, played his part in aiding consummation of the dedication.

Confusing the issue still further is the subtle intrusion of the law of prescriptive easements into the domain of dedication. This handy tool was employed in the principal case by simply stating that the mere permissive use of a way over land does not imply a dedicatory right in the public to unimpeded use.[27] Doubtless the rule is validly applied to create an easement of passage over land where there is adverse user. However, user in prescription is not at all analogous to user in dedication.[28] Prescriptive user must contain an element of hostility and an absence of acquiescence by the owner, at least for twenty years.[29] The easement is created by use which has the same

[25] See, *e.g.*, Palmer v. East River Gas Co., 115 App. Div. 677, 101 N.Y. Supp. 347 (1906), where this point was made with unusual clarity by a concurring judge who said, "Though a street used by the public generally be not an official one, so that the city is under duty to keep it in repair, and liable for damages for dangerous defects in it, it may nevertheless be a public street in the sense that the public have and exercise the right of travel over it, such right being conferred by the owner of the land in the street by dedication, such as granting the land abutting on it by conveyances bounding on the street as shown by a map."

[26] Owens v. Elliot, 258 N.C. 314, 128 S.E.2d 538 (1962); Janicki v. Lorek, 255 N.C. 53, 120 S.E.2d 413 (1961); Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937).

[27] The case cited to support this proposition, Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944), concerned an easement and not dedication.

[28] A most succinct discussion of the dissimilar elements of user in prescription and user in dedication is found in Drimmell v. Kansas City, 180 Mo. App. 339, 168 S.W. 280 (1914). On this point the court said, *inter alia*, "The throwing open of land to public use as a street without other formality is sufficient to establish the fact of dedication to the public and if individuals become interested to have it continue so, the owner cannot resume it. To establish dedication by prescription in this state, user for ten years must be shown; but a valid common-law dedication may be shown by an act of dedication and of the animus dedicandi without reference to the period of use." *Id.* at 344, 168 S.W. at 281.

[29] Nicholas v. Salisbury Hardware & Furniture Co., 248 N.C. 462, 103 S.E.2d 837 (1958); Henry v. Farlow, 238 N.C. 542, 78 S.E.2d 244 (1953); Whitacre v. City of Charlotte, 216 N.C. 687, 6 S.E.2d 558 (1940); Darr v. Carolina Aluminum Co., 215 N.C. 768, 3 S.E.2d 434 (1939); Hemphill v.

characteristics as adverse possession. A dedicator affirmatively manifests an intent for the public to use his property. Adverse user is simply not in play.[30] The language in the principal case further illustrates a commingling and confusion of the two doctrines by adding the requirement of use for twenty years in a context involving acceptance of an offer of dedication of subdivision streets.[31] This is wholly incorrect. It is generally accepted that, in a situation where the owner has made an express offer of dedication, length of time of use is not controlling and has nothing to do with the period of adverse use necessary for a perfected prescriptive easement.[32] It is merely evidence of the intent of the public to accept the dedication.[33] More important evidence of acceptance is the sufficiency of the character of the use, such as whether the land has been used for the purpose for which it is dedicated, and whether the quantum of use is

Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937); City of Durham v. Wright, 190 N.C. 568, 130 S.E. 161 (1925); Draper v. Conners & Walters Co., 187 N.C. 18, 121 S.E. 29 (1924). In some cases the two doctrines have been correctly distinguished. After a finding of insufficient intent to dedicate, the court has examined the facts to ascertain whether the conditions precedent for prescriptive easement have been met. See, *e.g.*, Nicholas v. Salisbury Hardware & Furniture Co., *supra*.

[30] Transue v. Croffoot, 179 Kan. 219, 294 P.2d 216 (1956); City of Spokane v. Catholic Bishop of Spokane, 33 Wash. 2d 496, 206 P.2d 277 (1949). Where, in addition to acceptance, there is a question of intent to dedicate, the two doctrines are more nearly parallel. In that instance some courts have drawn an analogy to prescription and have often required a satisfying of the same elements, including adverseness and use for a twenty year period. Feuer v. Brenning, 201 Misc. 792, 115 N.Y.S.2d 384 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 1033, 112 N.Y.S.2d 382 (1952), *aff'd*, 304 N.Y. 881, 110 N.E.2d 173 (1953).

[31] The court cited Scott v. Shackelford, 241 N.C. 738, 86 S.E.2d 453 (1955); Chesson v. Jordan, 224 N.C. 289, 29 S.E.2d 906 (1944); and Hemphill v. Board of Aldermen, 212 N.C. 185, 193 S.E. 153 (1937). These cases deal with prescriptive easements, *not* dedication.

[32] Tise v. Whitaker-Harvey Co., 146 N.C. 374, 59 S.E. 1012 (1907). Acceptance may be shown by proof of public use for a lesser period of time than that required for prescriptive easements or adverse possession. Fitzhugh v. Goforth, 228 Ark. 568, 309 S.W.2d 196 (1958); City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 Pac. 658 (1919); W.T. Congleton & Co. v. Roberts, 221 Ky. 712, 299 S.W. 576 (1927); North Beach v. North Chesapeake Beach Land & Improvement Co., 172 Md. 101, 191 Atl. 71 (1937).

[33] Gunn v. Fontes, 148 Cal. App.2d 351, 306 P.2d 928 (Dist. Ct. App. 1957); Atlantic Coast Line R.R. v. Sweatman, 81 Ga. App. 269, 58 S.E.2d 553 (1950); Chatham Motorcycle Club, Inc. v. Blount, 214 Ga. 770, 107 S.E.2d 806 (1959); Henry Walker Park Ass'n v. Mathews, 249 Iowa 1246, 91 N.W.2d 703 (1958); North Beach v. North Chesapeake Beach Land & Improvement Co., *supra* note 32. Length of time of user is more important and consequently may be required to continue for a longer period of time when also relied on to create a presumption of dedication. City of Kansas City v. Burke, 92 Kan. 531, 141 Pac. 562 (1914).

consonant with the potential use in light of the surrounding circumstances.[34]

In the final analysis the status of the doctrine of acceptance of dedication by user in North Carolina is confused. The decided cases have left a wake of conflicting statements and strangely amalgamated concepts which do not entirely agree with the better reasoned authorities. At least in the context of the principal case,[35] a simple solution would be to acknowledge that the general public, relying on the manifested intent to dedicate streets in a subdivision, could make the offer irrevocable by user without thereby imposing a duty of maintenance on the public authorities.

JAMES M. TALLEY, JR.

Insurance—Contribution Rights under G.S. § 1-240

Of extreme practical importance to the practicing bar is the contribution statute, G.S. § 1-240,[1] around which a maze of questionable procedural rules has been judicially constructed.[2] Considerable

[34] *E.g.*, Dormont Borough Appeal, 371 Pa. 84, 89 A.2d 351 (1952) (use only by residents of immediate neighborhood, insufficient acceptance by general public).

[35] The finding of an incomplete dedication in the principal case may well have been supportable on the facts, even if the court had recognized user as a mode of acceptance. Even so, it would seem that a discussion of user and the weighing of the factors that combine to determine whether there has been sufficient user was necessary to correctly reach the final result.

[1] N.C. GEN. STAT. § 1-240 (1953) provides in effect that "(1) those who are jointly and severally liable as judgment debtors, either as joint obligors or as joint tort-feasors, may pay the judgment and have it transferred to a trustee for their benefit, and such transfer shall have the effect of preserving the lien of the judgment against the judgment debtor who does not pay his proportionate part thereof to the extent of his liability; (2) joint tort-feasors against whom judgment has been obtained may, in a subsequent action therefor, enforce contribution from other joint tort-feasors who were not made parties to the action in which the judgment was taken; (3) joint tort-feasors who are made parties defendant, at any time before judgment is obtained, may, upon motion, have the other joint tort-feasors made parties defendant; (4) joint judgment debtors who do not agree as to their proportionate liability, by petition in the cause, in which it is alleged that any other joint judgment debtor is insolvent or a nonresident and cannot be forced under execution to contribute to the payment of the judgment, may have their proportionate liability ascertained by court and jury; and (5) joint judgment debtors who tender payment of judgment and demand in writing transfer thereof to a trustee for their benefit, and are refused such transfer by judgment creditors, may not thereafter have execution issued against them upon said judgments." Gaffney v. Lumbermen's Mut. Cas. Co., 209 N.C. 515, 518, 184 S.E. 46, 47 (1936).

[2] See 40 N.C.L. REV. 633 (1962).