12-1-1966

Real Property -- Easements -- Prescriptive Acquisition in North Carolina

John G. Aldridge

Follow this and additional works at: http://scholarship.law.unc.edu/nclr
Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol45/iss1/28

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
as it expressly recognizes, but this time it is giving fair warning that if the experiment fails, it will be free to reconsider its holding. Failure of the prior experiments and support from only a bare majority for this decision indicate the likelihood that Linn will soon be severely restricted or overruled entirely.

R. WALTON McNairy, Jr.

Real Property—Easements—Prescriptive Acquisition in North Carolina

It has been said that the English law of prescription is in such an unsatisfactory condition that no mere restatement can clear up the confusion caused by the courts and legislature. This statement is equally applicable to the present situation in this country. The combination of the lost grant theory—a fiction indulged in as a means to cope with difficulties inherent in the common law prescriptive system—and the application of adverse possession law to pre-

1 Holdsworth, History of English Law 352 (2d ed. 1937).

2 In early England prescription was founded on the assumption that the right claimed had been enjoyed for a period beginning before the time of legal memory, the date of which was fixed by statute at 1189. During the twelfth and thirteenth centuries, user for such a period was conclusive, as evidence from before the time of legal memory could be of no avail to the owner of the land. This doctrine resulted in great hardship on the claimant, for as time passed, proof of user for such a long period became practically impossible. The courts remedied this situation by devising a rule that if proof of user was established as far back as living memory could go, it would be presumed that it existed from 1189. This also, however, failed to provide a satisfactory prescriptive period and in the absence of statutes pertaining to prescriptive acquisition of incorporeal rights, the courts invented a presumption of user from the time of legal memory whenever user for a period corresponding to that required by statutes of limitation could be shown. This method also caused much difficulty, for when the statutory period was reduced to twenty years, the presumption was often rebutted by proof that the user originated after 1189, although it had persisted for the twenty year period. By the eighteenth century English judges began to think it absurd that although twenty years enjoyment sufficed for the acquisition of a corporeal right, enjoyment since 1189 had to be shown before the claimant could acquire an easement in respect to the same corporeal body. Thus the courts resorted to a legal fiction founded on the medieval idea that every prescriptive title is based on a presumed grant made before the beginning of legal memory. Through this fiction of the lost grant the courts presumed from long user and exercise of right by the claimant with acquiescence of the owner, that there must have originally been a grant of the right which had become lost in modern times, i.e., after 1189. By analogy to the statute of limitations the prescriptive period was set at twenty years. This fiction successfully fulfilled its purpose as it destroyed the effect of proof of user beginning within the time of legal memory. It was in this form and with this background that the lost grant doctrine was ushered
scriptive easements has led to considerable difficulty in terms of application and terminology. It is the purpose of this discussion to comment on the state of prescriptive law in North Carolina with regard to its confusing historical evolution.

Common law rules as to the nature of user required to establish a prescriptive right were well established. The English, borrowing from Roman law, announced that the user must be nec vi, nec clam, nec precario—open and as of right.\(^3\) Also, as was stated by Coke, a long, continuous, and peaceable user was necessary.\(^4\) To these basic requirements American courts have added a number of elements by analogy to adverse possession. Thus today it is generally stated in all states that to acquire an easement by prescription, the user must be open, exclusive, continuous, uninterrupted, adverse, and under a claim of right with the knowledge and acquiescence of the owner for the prescriptive period.\(^5\)

The common law requirement of claim of right\(^6\) gave claimants little probative difficulty. It was generally reasoned that a continuing breach of the owner's possession without permission was patently adverse to the owner. Today this reasoning is followed by the majority of American courts in that a presumption of adverse user is created, in the absence of other explanation, whenever it appears that the servitude was enjoyed openly, continuously, and uninterruptedly for the prescriptive period.\(^7\) The obvious effect of this rule is to place upon the owner of the land the burden of overcoming the presumption. There is, however, a widely recognized exception to into American courts. See generally Lehigh Valley R.R. Co. v. McFarlan, 43 N.J.L. 605, 617-30 (E.&A. 1881); Dalton v. Angus, 6 App. Cas. 740 (1881); HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW § 8 (1927); SIMPSON, AN INTRODUCTION TO THE HISTORY OF LAND LAW 248 (1961); 4 TIFFANY, REAL PROPERTY § 1191 (3d ed. 1939) [hereinafter cited as TIFFANY]; WALSH, A HISTORY OF ANGLO-AMERICAN LAW § 141 (2d ed. 1932); WALSH, HISTORY OF ENGLISH AND AMERICAN LAW § 75 (1924).

\(^\text{3}\) HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW § 8, at 282 (1927).
\(^\text{4}\) Co. Littr. 113b.
\(^\text{5}\) See 25 Am. Jur. 2d Easements §§ 49-63 (1966); BURRY, REAL PROPERTY § 31 (3d ed. 1965); 3 POWELL, REAL PROPERTY § 413 (1952); RESTATEMENT (FIVE), PROPERTY § 457 (1944); 4 TIFFANY §§ 1195-99, 1201, 1202.
\(^\text{6}\) See Jacobs v. Brewster, 354 Mo. 729, 190 S.W.2d 894 (1945), to the effect that a use is adverse when made under a claim of right.
\(^\text{7}\) See Annot., 170 A.L.R. 776 (1947); 1 THOMPSON, REAL PROPERTY § 436 (1939); 4 TIFFANY § 1196A; 21 Mo. L. Rev. 91 (1956); 12 Wyo. L.J. 59 (1957).
this general rule where the land involved is considered to be wild, uninclosed, or unimproved. In this situation there is generally a presumption of permissiveness, or at least no presumption of adverseness.\(^8\)

Due to the similarity of the above elements to adverse possession law, their interpretation and application in prescriptive situations has caused no little difficulty. This is especially true when the lost grant doctrine with its connotations of initial permissiveness is commingled with the elements of adverse possession. In light of this it is not surprising that the majority of states hold that prescriptive acquisition of easements can be adequately supported by direct analogy to adverse possession law and the statute of limitations, thus rendering continued indulgence in the lost grant fiction unnecessary.\(^9\)

As to final result, the difference between these theories is one of degree only. Apparently there is no authority on the point, but it seems that a greater degree of adverseness is required under the adverse possession analogy than under the lost grant doctrine. Theoretically there is a notable difference. In adverse possession a statute of limitations generally bars the right of action and it must be pleaded as a defense by the person relying on it. Title by adverse possession is negative in that the right vests because the owner is prevented, by legislative enactment, to assert his title. On the other hand, prescription under the lost grant theory confers a positive title, by presumption of a grant, upon the person who enjoyed it for the prescriptive period.\(^10\) Thus title by adverse possession is a creature of the legislature, whereas title acquired under the lost grant doctrine is solely a creation of the judiciary.\(^11\)

\(^8\) See 25 Am. Jur. 2d Easements § 46 (1966); Annot. 1 A.L.R. 1368 (1919); 3 Powell, Real Property § 413 (1952); 4 Tiffany. To the effect that "unimproved" is the most appropriate word see Annot. 170 A.L.R. 776, 820 (1947).


\(^10\) The prescriptive period is usually the same as that required under the statute of limitations for adverse possession. This fact is at least partly responsible for the original analogy drawn between adverse possession and prescriptive acquisition of easements.

\(^11\) For an excellent discussion of the theoretical and practical differences between the lost grant doctrine and the adverse possession theory; and a strong argument for continued indulgence in the former, see Big Cottonwood Tanner Ditch Co. v. Moyle, 109 Utah 213, 219-229, 174 P.2d 148, 151-156 (1945).
The North Carolina cases concerning prescriptive acquisition of easements are not large in number. They are, however, adequate to provide a basis for several conclusions as to where this state stands in the midst of the confusing myriad of fictions and presumptions.

One of the earliest North Carolina cases concerning prescription was *Wilson v. Wilson* in which the court found no error in the lower court instruction that

> the presumption of a grant, arising from the use of an easement for more than twenty years and acquiescence by the owners of the land, might be repelled by other evidence, and if the presumption was not repelled, they ought to find for the defendants.

It is evident that the theoretical foundation of this case, as well as other early cases, was the lost grant doctrine. Yet the significance of this particular decision lies in the fact that the North Carolina court, from the very beginning, did not consider the presumption of grant from twenty years user conclusive, but rebuttable. This line of thought is illustrative of the difficulties often caused by adherence to a fiction. The court could not have meant that the presumption of a grant was rebuttable, for as was noted above, the "presumption was a mere fiction, no one believing in such cases that a grant had ever been made." The anomaly is obvious in that the court was stating that it would accept evidence to rebut the presumption of a grant which by definition had never existed. Clearly all the court could have meant was that evidence would be accepted to show that the elements on which a presumption of grant is based did not exist. The *Wilson* case not only illustrates the initial difficulty encountered as to prescriptive terminology, but also constitutes early recognition in North Carolina of the analogy drawn by the courts between adverse possession and prescription. In the mid-nineteenth century North Carolina cases dealing with prescription took a turn which was ultimately to have a tremendous effect.

---

15 N.C. 154 (1833).

16 Id. at 155.


10 WALKER, A HISTORY OF ANGLO-AMERICAN LAW § 141, at 274 (2d ed. 1932).

11 It has been said that the presumption of a lost grant cannot be viewed as a true presumption; and since it is a fiction of the law, the courts cannot allow a direct attack upon it. Simonton, Fictional Lost Grant in Prescription—A Nocuous Archaism, 35 W. VA. L.Q. 46 (1929).

12 15 N.C. at 156.
In 1850 the North Carolina Supreme Court in a series of cases beginning with *Felton v. Simpson* emphasized that it is essential that the user be adverse and as of right in order to raise a presumption of a grant. This assertion becomes significant only when it is noted that it was made without any mention of an initial presumption of adverseness. It seems to be a reasonable deduction from these cases that North Carolina at this time did not presume adverseness from mere user, but required it to be proved without the aid of a presumption. The court in *Ray v. Lipscomb* sent the question of adverseness to the jury without any instruction as to a presumption or burden of proof. The court, in referring to the cases mentioned above, announced that

> these cases, as it seems to us, put the doctrine of the presumption of a right of way from *user*, on its true basis; and, as was said in the argument, considering the state of things among us for many years past, in regard to one neighbor’s passing over the uninclosed land of another, either on foot or horseback, or with his wagon, any other conclusion would have resulted in great inconvenience.

In the case of *Boyden v. Achenbach*, the court, relying on the *Ray* case, stated as dictum that “there must be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner’s consent.”

Earlier in this same case the court had reasoned that

> it would be unreasonable to deduce from the owner’s quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others, and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired.

It must be noted that the court in the above cases considered the land in question to be unimproved. Thus the application of the

---

19 33 N.C. 84 (1850).
20 48 N.C. 185 (1855).
21 See cases cited note 18 supra.
22 48 N.C. at 186.
23 86 N.C. 397 (1882).
24 Id. at 399. (Emphasis added.)
25 Id. at 398-99.
exception to the general rule of presumption of adverseness seems to have been warranted. It is, however, most probable that the court was unconcerned with the distinction between improved and unimproved land as it had applied a workable and realistic rule consistent with its obvious preoccupation with the idea of "neighborhood courtesy." This theory is borne out in the case of *Snowden v. Bell* where the court relied upon the *Boyden* case to establish the general rule of a permissive presumption from twenty years use in North Carolina. The immediate effect of this rule was to place a burden on the claimant to prove that the use was adverse or as of right and not permissive. Thus North Carolina departs sharply from the majority and the common law in presuming a permissive user. The effect of this development on North Carolina prescriptive law will be considered in the conclusion.

Practically the court saw no difficulty in continued adherence to the lost grant doctrine in spite of the permissive presumption rule, for in 1924, in the case of *Draper v. Conner* it was restated that a sufficient lapse of time raises a presumption that there must originally have been a grant from the owner to the claimant. It is conveniently designated a 'lost grant', not because the original is of primary importance, but to avoid the rule of pleading requiring profert.

Thus, as late as *Draper*, North Carolina was still adhering to the fiction of lost grant. This appears to be, however, the last comprehensive statement of lost grant theory in the North Carolina court, although it has been briefly mentioned in a number of subsequent cases.

The prescriptive litigation directly following *Draper* was char-
characterized by continued use of the permissive presumption and reliance on the philosophy that "the law should, and does encourage acts of neighborly courtesy." This philosophy is not by any means unique to North Carolina as most courts will apply it where the facts warrant. Yet it appears that in North Carolina it is relied upon even in situations where its application is most questionable. In *Weaver v. Pitts* the evidence showed that the plaintiff and those under whom they claimed had used a private way over the defendant's land for more than fifty years. At one point during the use the defendant owner obstructed the road for a few hours, but plaintiff cleared the obstruction and continued the use. At another time the defendant felled a large tree across the road whereupon the plaintiff asked him if he was willing for the road to be opened, stating that if he were not, an action would be brought at once. The owner agreed and plaintiff removed the obstruction. From these facts it would seem that a finding of adverseness or claim of right would be warranted. It was held, however, that the evidence tended to show a permissive use and that "it is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is called upon 'to go to law' to protect his rights." It is immaterial whether the court considered the land to be unimproved or not, for the plaintiff made it evident by his threat to institute an action that he recognized no right in the defendant to stop the user. The fact that another means of ingress and egress had recently been afforded the plaintiff may have influenced the court's decision. In any event it may be said that there is little similarity between the facts stated above and facts showing a merely casual use of a neighbors way, yet the same standards are applied in both situations. Five years later in *Chesson v. Jordan* it was again stated that prescription is founded on the fiction of lost grant. However, the court warned that "... the law will not assume, in the absence of proof, that the

---

53 Weaver v. Pitts, 191 N.C. 747, 133 S.E. 2, 3 (1926).
4 TIFFANY § 1196A.
54 191 N.C. 747, 133 S.E. 2 (1926).
55 Id. at 749, 133 S.E. at 3.
56 Ray v. Lipscomb, 48 N.C. 185 (1855).
57 See Darr v. Carolina Aluminum Co., 215 N.C. 768, 3 S.E.2d 434 (1939) where subjection of land to the use of a ditch for seventy years did not result in an easement for the claimant. The court held that the permissive presumption was not rebutted.
58 224 N.C. 289, 29 S.E.2d 906 (1944).
owner . . . made a grant . . . that substantially limits the use of his property . . . .”40 The language of the court is indicative of its reluctance to grant a prescriptive easement. More significant, however, is its statement in the same case that “the nature of the easement acquired rather than the character of the use must control the rights of the parties.”41 A logical interpretation of this general statement results in the conclusion that it is the type or extent of the easement claimed that is the overriding consideration, not whether the elements of prescription are proved. The latter, however, are most certainly necessary. Thus there seem to be strong policy considerations woven into the court’s preoccupation with the “nature of the easement” that result in an extremely strict interpretation of a prescriptive situation. This interpretation is seen most clearly in Henry v. Farlow42 where the plaintiff had, without asking or receiving permission, openly and continuously used a way over the defendant’s land for twenty-five years—a situation most indicative of a claim of right. The court reemphasized that the “law presumes that the use of a way over another’s land is permissive or with consent unless the contrary appears.”43 It continued by rationalizing that the “circumstance that the owners did not object to the use of the way harmonizes with the theory that they permitted the use of the way.”44 Here the court fails to recognize any distinction between “permission” and “acquiescence.”45 As was seen above46 it is generally held that acquiescence of the owner is a necessary element in prescription no matter which theory is followed. In fact, it has been stated that permission is evidence that a claimant does not have an easement by prescription, whereas acquiescence is evidence that he does.47 Apparently the requirement of acquiescence developed under the lost grant theory, it being reasoned that if the owned did

40 Id. at 292, 29 S.E.2d at 909.
41 Id. at 293, 29 S.E.2d at 909.
42 238 N.C. 542, 78 S.E.2d 244 (1953).
43 Id. at 544, 78 S.E.2d at 245; Note that the court no longer mentions “unimproved” land when stating this rule.
44 Id. at 544, 78 S.E.2d at 245.
45 Acquiescence commonly means passive assent, quiescence, or consent by silence; while permission denotes permission in fact, express or by necessary implication. 25 Am. Jur. 2d Easements § 61 (1966).
46 See note 5 supra and accompanying text. To the effect that North Carolina requires acquiescence, see Gruber v. Eubank, 197 N.C. 280, 148 S.E. 246 (1929); Wilson v. Wilson, 15 N.C. 154 (1833).
47 Naporra v. Weckwerth, 178 Minn. 203, 226 N.W. 569 (1929); 4 TIFFANY § 1191.
not object, there must have originally been a grant. Yet the North Carolina court in the above case uses the very same reasoning to reach the opposite result that acquiescence is evidence, not of a grant, but of permission. The court may have reasoned that the acts of the defendant did not constitute acquiescence, yet if this is true, it is difficult to conceive of any situation in which a party would be held to have acquiesced. Most probably the court simply rejected quiet acquiescence as indicative of the prescriptive acquisition of an easement. This would seem to indicate that a verbal or active acquiescence is a necessary element in North Carolina. If this is correct, the claimant’s burden will be even more difficult, as there is an even finer line between this type acquiescence and actual permission.

The logical opposite of the conclusion reached in the Henry case would seem to be that an objection by the owner would be evidence of adverseness. Unfortunately Ingraham v. Hough has been cited as stating the proposition that a mere verbal protest is sufficient to interrupt the user and thus prevent the right from vesting. The dilemma is obvious. Seemingly if the owner objects to the use, there is an interruption and the claimant is denied an easement; yet if the owner is silent, it is evidence of permissiveness and the claimant is again denied an easement. The court in the Henry case must have noticed these difficulties, yet it defended its position by announcing that there was no inconsistency between the circumstance that the plaintiff and her tenants used the way without asking the owners of the soil for permission to do so, and the conclusion that the plaintiff and her tenants used the way with the implied consent of the owners of the soil. When all is said, the assertion that the plaintiff and her tenants used the way without asking the permission of the

48 See Mebane v. Patrick, 46 N.C. 23 (1853) where the court stated that it is the fact of his [the claimant] being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant... upon the idea that this adverse state of things would not have been submitted to if there had not been a grant. Id. at 25. (Emphasis added.)

49 There is some indication of a distinction between “quiet” acquiescence and acquiescence even in early cases. See Weaver v. Pitts, 191 N.C. 747, 133 S.E. 2 (1926); State v. Norris, 174 N.C. 808, 93 S.E. 950 (1917); Boyden v. Achenbach, 86 N.C. 397 (1882).

50 Annot. 5 A.L.R. 1325 (1920).
owners of the soil is tantamount to the assertion that the plaintiff and her tenants used the way in silence. Neither law nor logic can confer upon a silent use a greater probative value than inherent in a mere use. This holding in itself may be consistent, but in order to find this consistency it is necessary to wipe out the substantial body of case law that precedes it.

This leads one to ask what a claimant must do in North Carolina to acquire an easement by prescription. Some help may be found in the 1966 case of Dulin v. Faires where the defendants had used the way in question for the prescriptive period of twenty years. In addition the defendants worked and maintained the road throughout the period and used it as an entrance to a business enterprise situated on their land. When the defendants requested that the plaintiff aid in the maintenance of the road, the plaintiff answered: "the road belongs to you; you keep it up." The court held that the evidence, considered in a light most favorable to the defendants "was sufficient to permit, although not compel, a jury finding that such use was adverse and under claim of right." The statement of the plaintiff and the fact that the defendants maintained the road seem strongly to suggest a recognition by the plaintiff that the defendants were acting under a claim of right. In addition it could certainly be reasoned that there was verbal or active acquiescence on the part of the plaintiff. This case then is perhaps indicative of the nature of the user as well as the nature of the easement necessary in a North Carolina prescription case.

The difficulties encountered in the foregoing discussion have resulted from an attempt over the years to retain the lost grant doctrine, in part if not in whole, while at the same time analogizing prescription to adverse possession. In addition, the attempted reconciliation of both theories with modern policy considerations has added to the confusion. In order to adequately understand the terminology, the presumptions, and the rules of prescription, the North Carolina lawyer is compelled to delve deeply into history. It has been seen how the term "acquiescence" has taken on extraordinary legal meanings over the years, with the result that today it

---

Henry v. Farlow, 238 N.C. 542, 544, 78 S.E.2d 244, 245 (1953).
Id. at 262, 145 S.E.2d at 877.
Id. at 263, 145 S.E.2d at 877.
is difficult to determine how the courts will define it. Many jurisdictions have completely dropped the lost grant fiction and now apply adverse possession law by direct analogy. Yet it must be remembered that the law of adverse possession was designed to deal primarily with corporeal bodies, and its application to incorporeal interests is not entirely satisfactory. Thus under either theory the court is faced with overly complicated situations.

As has been seen, North Carolina requires strong evidence of adverseness, and this fact along with the usual presumption of permissiveness seem to indicate that North Carolina tends toward a direct analogy with adverse possession law. In addition, the holding of the court in Henry is, theoretically at least, in direct conflict with the lost grant doctrine as acquiescence is no longer conducive to the presumption of a grant, but to permissiveness. Yet, as was noted in the discussion, North Carolina would probably hold on the authority of an early case that a mere verbal protest interrupts the user. If true, this would have to be based on a lost grant theory as such protest would be sufficient to overcome the presumption of a grant, but without the aid of an actual obstruction would be insufficient on the adverse possession theory. In general then, it may be said that North Carolina relies on elements of both theories, but leans heavily toward a direct analogy with adverse possession. This tendency is in large part due to the fact that under modern notions of neighborliness, prescriptive rights are generally not favored in the law as they necessarily result in the forfeiture of the rights of others.

---

66 See Annot., 170 A.L.R. 776 (1947) where it was stated:

there is little similarity between adverse possession and prescriptive use. To say that the possession must be continuous, then explain that it need not be continuous if it is availed of as needed; to say that the use must be uninterrupted, then declare (as some courts have declared) that it is interrupted if it is merely protested against; to say that it must be with the knowledge of the owner, then explain that it need not be with his actual knowledge if it is open and visible; to say that it must be with his acquiescence, then admit that if he tries to stop it, and the party persists in it, the claim of prescriptive right is strengthened rather than annulled; to declare that the use must be exclusive, then, explain that it need not really be exclusive if it is in the party's own right—all these attempts at measurement by the terms of adverse possession causes needless discussion.

Id. at 778.

67 See 32 N.C.L. Rev. 379, 484 (1954) where it is also recognized that the permissive presumption brings North Carolina closer to the adverse possession theory.


69 Annot., 5 A.L.R. 1325 (1920).
The courts in North Carolina have been so jealous of such a claim that it is doubtful whether a degree of advereness, sufficient in an adverse possession situation, would stand up in a prescription case. In any event it is quite clear that the claimant of a prescriptive easement in North Carolina today has a tremendous burden to overcome.

JOHN G. ALDRIDGE

Real Property—Landlord and Tenant—Lessee’s Liability

For Sublessee’s Negligence

In Dixie Fire & Cas. Co. v. Esso Standard Oil Co., the fire insurer of a landlord sued insured’s lessee, Esso, for injuries done the demised premises by a fire allegedly caused by the negligence of Esso’s sublessee. In the trial court, plaintiff had been ordered to elect tort or contract and had proceeded on a negligence theory, although the original complaint had been based upon a covenant of the lease. The Superior Court sustained defendant’s demurrer and plaintiff appealed. The Supreme Court reversed, holding that a lessee is liable in tort for waste resulting from the negligence of a sublessee, thereby expanding the basis of liability of the tenant for injuries to the demised premises.

At one time, the liability of the tenant was almost absolute, making him virtually the insurer of his landlord, liable for waste upon injury to or destruction of the premises, even if the injury was the result of unavoidable accident or the act of a stranger. Like most states, North Carolina reduced this liability by a statute providing that the “tenant . . . shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract.” While the

1 265 N.C. 121, 143 S.E.2d 279 (1965).
2 The reasons for plaintiff’s choice are beyond the scope of this note. For discussion of the tort-contract borderline, see Prosser, Torts §§ 93-95 (3d ed. 1964).
3 Although the action of waste originally lay only against a guardian in chivalry, tenant in dower, or tenant by curtesy, the Statute of Marlborough, 1267, 52 Hen. 3, c. 23, created an action against all tenants for life or years.
4 1 WASHBURN, REAL PROPERTY 158 (5th ed. 1887). The tenant’s liability was compared to that of a common carrier in that “both are charged with the protection of property intrusted to them, against all but the acts of God and the king’s enemies. . . .” Attersol v. Stevens, 1 Taunt. 183, 198, 127 Eng. Rep. 802, 808 (C.P. 1808).
5 N.C. GEN. STAT. § 42-10 (1950).