



UNC
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NORTH CAROLINA LAW REVIEW

Volume 29 | Number 2

Article 2

2-1-1951

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Recommended Citation

William B. Aycock, *Homestead Exemption in North Carolina*, 29 N.C. L. REV. 143 (1951).

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HOMESTEAD EXEMPTION IN NORTH CAROLINA*

WILLIAM B. AYCOCK**

I. HISTORY AND BACKGROUND

The Assembly of Colonial North Carolina enacted¹ legislation to protect certain personal property from claims of creditors and on numerous occasions² prior to 1868 the General Assembly increased the statutory list of exempt articles.

The policy of exempting real property was initiated in Texas³ and spread rapidly to other states. In 1867, the General Assembly of North Carolina passed its first homestead law.⁴ Citizens of the state owning a freehold within the state were permitted to claim a homestead (i.e., land not subject to be sold under execution) not exceeding one hundred acres in the country or one acre in city or town. This statute was short-lived for it, together with the personal property exemption laws, was superseded by provisions in the Constitution of 1868.⁵

The framers of the Constitution of 1868, in providing for exemptions of both real and personal property from sale under execution, departed from the prior practice of exempting specific acres of land or specified items of personal property and provided for exemptions based on monetary value. Personal property not exceeding \$500.00⁶ and real property not exceeding \$1,000.00⁷ were made exempt by the Constitution and these amounts remain unchanged today.

The Supreme Court of North Carolina considered the homestead law an enlargement of the purposes manifested in the earlier laws providing

* See generally Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950); Notes, 97 U. PA. L. REV. 677 (1949); 46 YALE L. J. 1023 (1937); Vance, *Homestead Exemption Laws*, 7 ENCYC. SOC. SCIENCES 441 (1932); Crosby and Miller, *Our Legal Chameleon, the Florida Homestead Exemption*, 2 FLA. L. REV. 12, 219, 346 (1949); Note, *The Illinois Homestead Exemption*, 1950 ILL. L. FORUM 99.

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¹ Revisal of the Acts of the Assembly of North Carolina, 1773, p. 538.

² MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE 875 n. 88 (1929).

³ Vance, *Homestead Exemption Laws*, 7 ENCYC. SOC. SCIENCES 441 (1932).

⁴ Laws of N. C. (1866-67) c. 61; *Earle v. Hardie*, 80 N. C. 177 (1879).

⁵ N. C. CONST. Art. X §2, "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. . . ."

⁶ N. C. CONST. Art. X §1.

⁷ N. C. CONST. Art. X §2.

personal property exemptions.⁸ In addition to protecting the "house-keeper" or his family from being deprived of immediate needs of food and clothing,⁹ it was the wish of the government "to see every man with a home for his wife and children." This was to be accomplished by permitting a certain part of the real property of a debtor to be set apart for his use and occupation "where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid. . . ."¹⁰

Homestead is a right secured by the Constitution and vests independent of legislation.¹¹ However, supplementary legislation was needed to implement the constitutional provisions and it was promptly supplied.¹² Apart from this legislation, there arose questions concerning the power of the General Assembly to increase or diminish the homestead provisions of the Constitution. In *Martin v. Hughes*,¹³ decided in 1872, it was stated that the General Assembly could not reduce what the Constitution provides but the court indicated there was nothing to forbid exemption of a larger homestead. In 1877 the General Assembly undertook to increase the duration of homestead beyond the period specified in the Constitution.¹⁴ The following year Justice Bynum speaking for the court commented:

"Exemption laws, without diminishing the need of credit, have naturally made credit more precarious and insecure, and as a result have proportionately increased the premium which must be paid for it; so that at few periods in our history has interest been higher and borrowed money less remunerative than now. . . ."¹⁵

This attitude may have influenced the court to set aside its dictum in *Martin v. Hughes* and specifically to overrule the Act of 1877. The court in 1883 declared that it was beyond the power of the legislature to enlarge constitutional provisions for personal property and homestead exemptions.¹⁶

II. NATURE AND CHARACTER

No precise definition of homestead appears in the Constitution; and the courts have been required to undertake this responsibility. Since homestead was not a common law development little, if any, assistance

⁸ *Citizens National Bank v. Green*, 78 N. C. 247 (1878).

⁹ *Dean v. King*, 35 N. C. 20 (1851).

¹⁰ *Jacobs v. Smallwood*, 63 N. C. 112, 116 (1869). For somewhat similar recent statement see *Williams v. Johnson*, 230 N. C. 338, 343, 53 S. E. 2d 277, 281 (1949).

¹¹ *Adrian v. Shaw*, 82 N. C. 474 (1880).

¹² Now N. C. GEN. STAT §§1-369 through 1-392 (1943).

¹³ 67 N. C. 293 (1872).

¹⁴ *Laws of N. C. (1876-77)* c. 253.

¹⁵ *Citizens National Bank v. Green*, 78 N. C. 247 (1878).

¹⁶ *Wharton v. Taylor*, 88 N. C. 230 (1883).

could be derived from that source.¹⁷ Moreover, because of important variations in the laws of other states, the North Carolina Court has been hesitant to look to them for guidance.¹⁸

Efforts to find a suitable definition for homestead have been unsuccessful. At various times it has been referred to as a "determinable fee,"¹⁹ a "mere determinable exemption,"²⁰ a "quality annexed to the land,"²¹ a "quality of exemption to an existing estate"²² and a "mere exemption right."²³ Recently, the North Carolina Court has simply used the language of the Constitution and said that homestead was a mere exemption from sale under execution or like process.²⁴

Justice Brown was prompted to say that the efforts of the court to define homestead revealed "much confusion of the judicial mind."²⁵ It was eventually agreed by the North Carolina Court that homestead was not an interest or estate in land.²⁶ Whatever the nature of the estate held by the debtor, it remains unchanged when homestead is allotted. Hence, there is no reversionary interest for the creditors to sell *during* the existence of the homestead²⁷ and the debtor's full interest in the exempt land is protected. From this standpoint the law is consistent with the idea that homestead is not an interest or estate in land. Yet, the judgment creditor may require reasonable use be made of the land leaving it substantially as it was when the exemption began except for ordinary depreciation.²⁸ Furthermore, the debtor may dispose of the reversion himself by conveying his land but expressly reserving homestead therein.²⁹ This is illustrative of many situations where homestead has varying characteristics and for this reason precise definition is impracticable. It is essential to examine the various situations in which homestead operates for an understanding of its nature and character.

¹⁷ Justice Burwell stated in *Vanstory v. Thornton*, 112 N. C. 197, 210, 17 S. E. 566, 569 (1893): "It may be that inadvertent expressions have been used in the effort to adapt the nomenclature of the common law to a matter unknown to that system of jurisprudence." Compare the following statement of Dean Mordecai: "It will be observed that this homestead law is a return, to a certain extent, to the original common law and feudal ideas of exempting lands from subjection to debt and other liabilities." II MORDECAI'S LAW LECTURES 1029 (2d ed. 1916).

¹⁸ *Hager v. Nixon*, 69 N. C. 108 (1873).

¹⁹ *Poe v. Hardie*, 65 N. C. 447 (1871).

²⁰ *Citizens National Bank v. Green*, 78 N. C. 247 (1878).

²¹ *Gheen v. Summey*, 80 N. C. 187 (1879).

²² *Markham v. Hicks*, 90 N. C. 204 (1884).

²³ *Fulp v. Brown*, 153 N. C. 531, 69 S. E. 612 (1910).

²⁴ *Sample v. Jackson*, 225 N. C. 380, 35 S. E. 2d 236 (1945).

²⁵ *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264 (1917).

²⁶ *Ibid.*

²⁷ *Markham v. Hicks*, 90 N. C. 204 (1884). At one time it was a misdemeanor to sell the reversionary interest under execution. Laws of N. C. (1869-70) c. 121.

²⁸ *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889).

²⁹ *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107 (1918); *Hinsdale v. Williams*, 75 N. C. 430 (1876).

III. ESSENTIAL REQUIREMENTS

A. *Persons Entitled.*

Any resident of North Carolina owning and occupying land in this state is entitled to homestead for the duration of his life. Such person may be a man or woman,³⁰ single³¹ or married,³² rich³³ or poor. Under some circumstances (discussed *infra*³⁴) a widow may enjoy the homestead of her husband but he is not entitled to succeed to hers. Minor children succeed to the homestead of their father to the exclusion of his widow.³⁵ No provision has been made for a minor child to take over the homestead which their mother held in her own right at her death.

Since the adoption of the Uniform Partnership Act³⁶ in 1941 a partner is no longer entitled to claim homestead in the partnership property, although before this legislation, he was permitted to do so with the consent of the other partners.³⁷ A corporation cannot claim homestead.³⁸ A bankrupt does not lose his homestead rights but is entitled to the exemptions provided by state law³⁹ and title to exempt property remains in the bankrupt and is not vested in the trustee in bankruptcy.⁴⁰

B. *Residency.*

Homestead in North Carolina is available only to residents of this state⁴¹ and it terminates upon the owner's removal from the state.⁴² If a father or husband leaves this state and makes his home elsewhere his wife or children are not entitled to succeed to his homestead even though they remain.⁴³ It is sometimes difficult to determine what constitutes a loss of residency within the meaning of the homestead laws. A resi-

³⁰ N. C. CONST. Art X §2 says "owner." *Bailey v. Barron*, 112 N. C. 54, 16 S. E. 910 (1893); *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567 (1889).

³¹ *Gardner v. Betts*, 114 N. C. 496, 19 S. E. 794 (1894) (single man).

³² *Smith v. Eakes*, 212 N. C. 382, 193 S. E. 393 (1937); *Equitable Life Assurance Society v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936) (married women).

³³ "While the homestead may have real beneficial value only when the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition." *Williams v. Johnson*, 230 N. C. 338, 342, 53 S. E. 2d 277, 280 (1949).

³⁴ See section IV B. *infra*.

³⁵ See section IV A. *infra*.

³⁶ N. C. GEN. STAT. §59-55(2)(c) (1943).

³⁷ *Davis v. Smith*, 113 N. C. 94, 18 S. E. 53 (1893); *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764 (1891).

³⁸ *Sugg v. Pollars*, 184 N. C. 494, 115 S. E. 153 (1922).

³⁹ 30 STAT. 548 (1898), 11 U. S. C. §24 (1946); *Sample v. Jackson*, 226 N. C. 408, 38 S. E. 2d 155 (1946); *Simpson v. Houston*, 97 N. C. 344, 2 S. E. 651 (1887); *Windley v. Tankard*, 88 N. C. 223 (1883).

⁴⁰ 30 STAT. 565 (1898), as amended, 11 U. S. C. §110(a) (1946); *Watters v. Hedgpeth*, 172 N. C. 310, 90 S. E. 314 (1916).

⁴¹ N. C. CONST. Art. X §2. The same is true for personal property exemption. N. C. CONST. Art. X §1.

⁴² *Scott & Company v. Jones*, 230 N. C. 74, 52 S. E. 2d 219 (1949).

⁴³ *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516 (1887).

dent who moved to South Carolina for two years but intended to return to this state was held to have lost his homestead exemption⁴⁴ but a contrary result⁴⁵ was reached where the resident went to Georgia for the winter months for the purpose of trading. In *Chitty v. Chitty*⁴⁶ the court upheld the right of homestead of a person who left the state to avoid arrest but refused⁴⁷ to go so far when the absence was to avoid the serving of a criminal sentence. Once residency has been established it is presumed to continue and the burden of proving a change is upon the person who relies on such a change.⁴⁸

C. *Ownership.*

Homestead has not been confined to owners of the fee simple interest but has been given to owners of a life estate.⁴⁹ It is not certain whether the owner of an estate for years would be so entitled. Technical distinctions between freehold and non-freehold estates could be used to preclude the owner of an estate for years from enjoying homestead.⁵⁰ Otherwise, there would seem to be no objection to permitting homestead in an estate for years. There is nothing in the Constitution⁵¹ or the decisions to prevent it; in fact, the North Carolina Court has intimated that homestead in such an estate might be recognized.⁵²

D. *Occupancy.*

In addition to the requirements of residency and ownership it is specified in the Constitution that the land be occupied.⁵³ Occupancy, however, does not require the owner to reside actually on the property. One may occupy a plot of land by cultivating it or continuously procuring timber from it.⁵⁴ The test, according to Justice Ruffin, is that ". . . there can be no *homestead* without a home or the immediate possibility of a *home upon* the land itself."⁵⁵ Under this test, the owner of

⁴⁴ Lee v. Moseley, 101 N. C. 311, 7 S. E. 874 (1888).

⁴⁵ Fulton v. Roberts, 113 N. C. 422, 18 S. E. 510 (1893).

⁴⁶ 118 N. C. 647, 24 S. E. 517 (1896).

⁴⁷ Cromer v. Self, 149 N. C. 164, 62 S. E. 885 (1908). It was apparent that the court did not fully approve of the decision in *Chitty v. Chitty* but it preferred to distinguish rather than overrule.

⁴⁸ Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691 (1893).

⁴⁹ Virginia-Carolina Chemical Corporation v. Stuart, 200 N. C. 490, 157 S. E. 608 (1931); accord, Murchison v. Plyler, 87 N. C. 79 (1882).

⁵⁰ For many purposes an estate for years is treated as personal property in North Carolina. Note, 25 N. C. L. Rev. 516 (1947); I MORDECAI'S LAW LECTURES 529 (2d ed. 1916).

⁵¹ The Homestead Statute of 1867 used the word "freehold" but the language of the Constitution is not so confined.

⁵² Burton v. Spiers, 87 N. C. 87, 94 (1882); Markham v. Hicks, 90 N. C. 204 (1884).

⁵³ N. C. CONST. Art. X §2.

⁵⁴ Martin v. Hughes, 67 N. C. 293 (1873).

⁵⁵ Murchison v. Plyler, 87 N. C. 79, 81 (1882).

a remainder subject to a life estate is not entitled to homestead.⁵⁶ Moreover, the court has indicated that two separate homesteads could not exist in the same land at the same time.⁵⁷ On the other hand, should the particular estate be determined before the judgment creditor exercises his right to sell, the owner of the remainder may then claim homestead.⁵⁸ This result may be reached by the remainderman securing the release of the life estate after a judgment is docketed but before execution.⁵⁹

E. *In What Land?*

Is homestead restricted to owners of land who have a dwelling thereon? The first legislative enactment after the adoption of the Constitution of 1868 contained language, subsequently deleted, to the effect that homestead should apply to real estate which "may be occupied by the owner as an actual homestead."⁶⁰ The Supreme Court of North Carolina on several occasions⁶¹ has stated that the framers of the Constitution supposed that the debtor would take his homestead in the dwelling which he inhabited. When confronted with the question of granting homestead to a person who owned land but no dwelling, the court did not hesitate in giving an affirmative answer on the ground that to hold otherwise would exclude the poorest and most needy.⁶² Therefore, one who owns only vacant lots⁶³ or timber land⁶⁴ is entitled to homestead.

The General Assembly in 1868, anticipating that situations would arise where the value of the dwelling and contiguous land would be less than \$1,000.00, provided in such cases for homestead to exist in different tracts not contiguous.⁶⁵

Although there is some doubt that the owner of a dwelling worth \$1,000.00 or more in which he resides with his family, has an absolute choice to select homestead in other land,⁶⁶ nevertheless, the North Carolina Court has found it desirable to avoid a rigid rule making it mandatory for homestead to include the dwelling.⁶⁷ On two occasions when

⁵⁶ *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736 (1894); *Murchison v. Plyler*, 87 N. C. 79 (1882).

⁵⁷ *Murchison v. Plyler*, 87 N. C. 79 (1882).

⁵⁸ *Stern v. Lee*, 115 N. C. 426, 20 S. E. 736 (1894).

⁵⁹ *Wright v. Bond*, 127 N. C. 39, 37 S. E. 65 (1900).

⁶⁰ Pub. Laws of N. C. (1868-69) c. 137 §1.

⁶¹ *Flora v. Robbins*, 93 N. C. 38 (1885); *Mayho v. Cotton*, 69 N. C. 289 (1873); *Watts v. Leggett*, 66 N. C. 197 (1872).

⁶² *Allen v. Shields*, 72 N. C. 504 (1875).

⁶³ *Equitable Life Assurance Society v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936).

⁶⁴ *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889).

⁶⁵ N. C. GEN. STAT. §1-377 (1943).

⁶⁶ *Allen v. Shields*, 72 N. C. 504 (1875). Cf. *Gregory v. Ellis*, 86 N. C. 579 (1882).

⁶⁷ *Mayho v. Cotton*, 69 N. C. 289 (1873).

a debtor conveyed his dwelling in fraud of creditors and accepted homestead in other land, he was not permitted to claim homestead in the dwelling after the conveyance had been set aside.⁶⁸ And it made no difference that the value of the "other land" did not amount to \$1,000.00.⁶⁹ In *Flora v. Robbins*⁷⁰ the owner had mortgaged his dwelling for its full value but he held other land which was unincumbered. The court concluded that in this situation it would be in the spirit if not the letter of the Constitution for the debtor to have his homestead allotted in the unincumbered land.

F. *Homestead in Money?*

In *Oakley v. Van Noppen*⁷¹ the judgment creditor desired to sell the whole house of the debtor and to permit \$1,000.00 of the sale price to be used by the debtor as homestead. The court rejected this plan and adhered⁷² to its previously expressed view that the debtor was entitled to a specific and defined part of the property as homestead.

Circumstances have arisen which leave no choice but to provide that the debtor take his homestead in money. Most often this occurs when there is a surplus after a mortgage foreclosure⁷³ or homestead is allowed in the proceeds from a sale for partition.⁷⁴ The difficult question in these situations is to determine the manner in which the debtor is to enjoy homestead. Earlier cases⁷⁵ suggested the possibility of giving the debtor the present cash value of homestead based on the tables of expectancy. In *Farris v. Hendricks*⁷⁶ the court was squarely faced with this question and rejected payment of present cash value on the ground that it would, in many cases, greatly impair the judgment lien. Instead, the debtor was permitted to enjoy the rents and profits in the form of interest. A similar result was reached in *Smith v. Eakes*⁷⁷ where the court permitted the debtor to receive the "net income" from homestead money which was allowed in the proceeds from a sale for partition until the termination of her homestead rights. Another possible solution in some of these exceptional cases would be for the court to permit the debtor to invest the surplus not exceeding the value of homestead in real property.

⁶⁸ *Whitehead v. Spivey*, 103 N. C. 66, 9 S. E. 319 (1899); *Spoon v. Reid*, 78 N. C. 244 (1878).

⁶⁹ *Whitehead v. Spivey*, 103 N. C. 66, 9 S. E. 319 (1899).

⁷⁰ 93 N. C. 38 (1885).

⁷¹ 96 N. C. 247, 2 S. E. 663 (1887).

⁷² *Campbell v. White*, 95 N. C. 491 (1886).

⁷³ *Miller v. Little*, 212 N. C. 612, 194 S. E. 92 (1937); *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1928); *Leak v. Gay*, 107 N. C. 468, 12 S. E. 251 (1890).

⁷⁴ *Smith v. Eakes*, 212 N. C. 382, 193 S. E. 393 (1937).

⁷⁵ *Leak v. Gay*, 107 N. C. 468, 12 S. E. 251 (1890); *Wilson v. Patton*, 87 N. C. 319 (1882).

⁷⁶ 196 N. C. 439, 146 S. E. 77 (1928).

⁷⁷ 212 N. C. 382, 193 S. E. 393 (1937).

IV. RIGHTS OF THE WIDOW AND CHILDREN OF A HOMESTEADER

A. *Children.*

Children⁷⁸ of a deceased debtor will succeed to his homestead whether allotted before or after his death⁷⁹ to the exclusion of his widow if two conditions are present: (1) their deceased father must have left creditors;⁸⁰ (2) the child or children must be under twenty-one years of age at the death of their father.⁸¹ Minor children alone are entitled to the homestead and it is not shared by adult children.⁸² The doctrine of survivorship prevails and if a minor dies or arrives at full age, the whole homestead survives and accrues to his brothers and sisters who are under age.⁸³ No inquiry is made into the financial condition of the minors⁸⁴ and where minor children had inherited land from their mother, it was held⁸⁵ they were entitled to homestead in preference to their stepmother. When the youngest minor reaches his majority the homestead terminates and does not go to the widow of the deceased homesteader.⁸⁶

B. *Widow.*

In order for a widow⁸⁷ to succeed to the homestead of her husband three prerequisites must be satisfied: (1) the widow must not own a homestead in her own right,⁸⁸ (2) her husband must have left creditors⁸⁹ (her homestead rights are not divested by payment of the creditors by the heirs at law of the deceased);⁹⁰ (3) there must be *no* children minor or adult of the deceased husband surviving him.⁹¹ This

⁷⁸ N. C. CONST. Art. X §3: "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any of them."

⁷⁹ N. C. GEN. STAT. §1-389 (1943).

⁸⁰ Hager v. Nixon, 69 N. C. 108 (1873).

⁸¹ N. C. CONST. Art. X §3; Saylor v. Powell, 90 N. C. 202 (1884).

⁸² Simpson v. Wallace, 83 N. C. 477 (1880).

⁸³ *Id.* at 481.

⁸⁴ Allen v. Shields, 72 N. C. 504 (1875).

⁸⁵ Spence v. Goodwin, 128 N. C. 273, 38 S. E. 859 (1901).

⁸⁶ Barnes v. Cherry, 190 N. C. 772, 130 S. E. 611 (1925). General statements such as those in *Jones v. Britton*, 102 N. C. 166, 168 (1889) are susceptible to a contrary construction.

⁸⁷ N. C. CONST. Art. X §5: "If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

⁸⁸ N. C. CONST. Art. X §5; *Equitable Life Assurance Society v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936); *Bailey v. Barron*, 112 N. C. 54, 16 S. E. 910 (1893). (Cases discuss the right of a married woman to her own homestead.)

⁸⁹ *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912); *Hager v. Nixon*, 69 N. C. 108 (1873). A widow is never entitled to her husband's personal property exemption. *Smith v. McDonald*, 95 N. C. 163 (1886).

⁹⁰ *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299 (1889).

⁹¹ *Barnes v. Cherry*, 190 N. C. 772, 130 S. E. 611 (1925); *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924 (1892); *Wharton v. Leggett*, 80 N. C. 169 (1879); N. C. GEN. STAT. §1-389 (1943).

latter point is emphasized in *Simmons v. Respass*.⁹² The debtor was survived by two adult children by his first wife and also by his widow by a second marriage. The widow was not entitled to homestead because her husband was survived by his children.

If these three requirements are met, the widow may succeed to her husband's homestead whether allotted before or after his death and she is entitled to enjoy the rents and profits. The homestead terminates if she remarries⁹³ but otherwise will last during her life.

V. EFFECT OF HOMESTEAD ON CREDITOR'S CLAIM

Judgment creditors do not lose their liens against the debtor's homestead but are prevented from enforcing them as long as the land retains the character of homestead. Since this usually lasts for the life of the debtor and in some cases for an additional time either for the minority of his children or the life of his widow, the creditor must have protection from the statute of limitations.

A. *Statute of Limitations.*

Since 1869,⁹⁴ with the exception of a two year period,⁹⁵ there has been a legislative provision suspending the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead.⁹⁶ The effect of this provision is to suspend the judgment *as a lien* on the homestead property only; it does not toll the statute in respect to the debt as such or the personal liability of the debtor.⁹⁷ The statute will not be suspended if the homestead is not allotted within ten years after the judgment is docketed⁹⁸ and the same is true if the allotment made is determined to be invalid.⁹⁹ Payment of a particular judgment under which a debtor's homestead is allotted will not extinguish the homestead and revive the running of the statute against other judgments then of record or thereafter docketed.¹⁰⁰

⁹² 151 N. C. 5, 65 S. E. 516 (1909).

⁹³ "Always bear in mind when about to marry a widow, that she loses her homestead in her former husband's estate as soon as she marries you. The widow will be on your hands and both of you will be off of your predecessor's lands. She may at times reflect on the question as to which is to be preferred, you that she has gained or the homestead that she has lost." I MORDECAI'S LAW LECTURES 607 (2d ed. 1916).

⁹⁴ Laws of N. C. (1869-70) c. 121.

⁹⁵ 1883-1885 (apparently inadvertently omitted by the Code Commissioners).

⁹⁶ N. C. GEN. STAT. §1-369 (1943).

⁹⁷ *Williams v. Johnson*, 230 N. C. 338, 53 S. E. 2d 277 (1949): "A money judgment is a biphonged, dual-natured instrument: (1) It is the evidence of a personal debt of the judgment debtor payable out of any assets he may possess, and (2) it is a lien against the real estate of the debtor as security for the payment of the debt." *Id.* at 344.

⁹⁸ *Wilson v. Beaufort County Lumber Company*, 131 N. C. 163, 42 S. E. 565 (1902); N. C. GEN. STAT. §1-369 . . . "the *allotment* [italics supplied] of the homestead shall . . . suspend. . ." Compare Act of 1885 and the construction given it in *Farrar v. Harper*, 133 N. C. 71, 45 S. E. 510 (1903).

⁹⁹ *Sansom v. Johnson*, 212 N. C. 383, 193 S. E. 272 (1937).

¹⁰⁰ *Williams v. Johnson*, 230 N. C. 338, 53 S. E. 2d 277 (1949).

B. *Effect of a Conveyance of Homestead on the Statute of Limitations.*

In *Bevan v. Ellis*¹⁰¹ it was held that a conveyance of homestead property did not revive the running of the statute. But this was overruled by the Act of 1905¹⁰² which provides that a conveyance of homestead terminates the exemption and it has the effect¹⁰³ of reviving the running of the statute on the conveyed property. Mere execution of a mortgage on the homestead property is not such a conveyance within the meaning of the statute.¹⁰⁴

C. *Claims Superior to Homestead.*

Homestead is not¹⁰⁵ exempt from sale under execution (1) for debts contracted prior to the adoption of the constitution; (2) for obligations contracted for the purchase of the premises; (3) for laborer's and mechanic's liens; (4) for taxes. Initially, it was held¹⁰⁶ by the North Carolina Court that homestead was effective against debts incurred prior to the adoption of the Constitution of 1868, but in *Edwards v. Kearsey*¹⁰⁷ the Supreme Court of the United States reversed this view on the ground that the application to such debts constitutes an impairment of the obligation of contracts.

(1) *Purchase Money Obligations.*

Article X, section 2 of the Constitution provides that no property shall be exempt from sale for payment of obligations contracted for the purchase of the premises. This provision does not have the effect of giving the vendor of real estate a lien for purchase money. The vendor is required to reduce his claim to judgment and at that time it becomes a lien as any other docketed judgment;¹⁰⁸ then where it is shown that the obligation was for purchase money, the judgment debtor is precluded from claiming homestead in this land.¹⁰⁹

In *Brodie v. Batchelor*¹¹⁰ it was held that a loan of money to the vendee to purchase certain land—which was done—did not subrogate the lender to the rights of the vendor, who had been paid, and the debt was not an obligation for purchase money. A contrary result was

¹⁰¹ 121 N. C. 224, 28 S. E. 471 (1897); *Brown v. Harding*, 171 N. C. 686, 690, 89 S. E. 222, 224 (1916).

¹⁰² N. C. GEN. STAT. §1-370 (1943).

¹⁰³ *Crouch v. Crouch*, 160 N. C. 447, 449, 76 S. E. 482, 483 (1912).

¹⁰⁴ *Cleve v. Adams*, 222 N. C. 211, 22 S. E. 2d 567 (1942).

¹⁰⁵ *Bynum v. Miller*, 89 N. C. 393 (1883).

¹⁰⁶ *Hill v. Kessler*, 63 N. C. 437 (1869); *Barrett v. Richardson*, 76 N. C. 429 (1877).

¹⁰⁷ *Smith v. High*, 85 N. C. 93 (1881).

¹⁰⁸ *Hardy v. Carr*, 104 N. C. 33, 10 S. E. 128 (1889).

¹⁰⁹ *Billings v. Joines*, 151 N. C. 363, 66 S. E. 307 (1909); *Durham v. Bostic*, 72 N. C. 353 (1874); *Jarrett v. Holland*, 213 N. C. 428, 431, 196 S. E. 314, 316 (1938).

¹¹⁰ 75 N. C. 51 (1876).

reached where the lender, in effect, paid the vendor directly.¹¹¹ The theory adopted by the court was the original indebtedness was not discharged but merely assigned to the lender. A vendee was not allowed homestead when the judgment against him was obtained on notes which he had transferred to the vendor by endorsement for purchase money¹¹² and the same result was reached where the vendee agreed, in paying for the land, to take up a note on which the vendor was bound but failed to do so.¹¹³

(2) *Mechanic's and Laborer's Liens.*

A laborer's or mechanic's lien is by constitutional provision superior to homestead.¹¹⁴ A laborer's lien is distinguished from the mechanic's lien in that the former is solely for labor performed whereas the latter is broader and includes the building built¹¹⁵ (i.e., labor and material). Thus, where the work done and the material furnished on a house were all in the same contract the contractor was entitled to a mechanic's lien for the whole amount.¹¹⁶

In 1869 the General Assembly in addition to making provision for laborer's and mechanic's liens also made it possible for those who furnish only material to have a lien.¹¹⁷ In *Cummings v. Bloodworth*¹¹⁸ it was held that a materialmen's lien being merely statutory was not superior to homestead because the latter was created by the Constitution.

(3) *Taxation.*

All property is subject to taxation unless an exemption is provided by law.¹¹⁹ Homestead property is not exempt and the Constitution specifically provides that the homestead may be sold to satisfy an obligation for taxes due on the land.¹²⁰ However, in 1936, Article V section

¹¹¹ *Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188 (1887).

¹¹² *Whitaker v. Elliott*, 75 N. C. 186 (1875).

¹¹³ *Fox v. Brooks*, 88 N. C. 234 (1883).

¹¹⁴ In *Whitaker v. Smith*, 81 N. C. 340, 341 (1879) the court said: "A very large proportion of the laboring population of the State has just recently been released from thralldom and thrown upon their own resources, perfectly ignorant of the common business transaction of social life, and this provision of the Constitution and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers."

¹¹⁵ *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

¹¹⁶ *Isler v. Dixon*, 140 N. C. 529, 53 S. E. 348 (1906).

¹¹⁷ N. C. GEN. STAT. §44-1 (1943). For discussion generally see Boyd, *Some Phases of Title Examination and Real Estate Practice*, 20 N. C. L. REV. 169, 173 (1942).

¹¹⁸ 87 N. C. 83 (1882); *Cameron v. McDonald*, 216 N. C. 712, 6 S. E. 2d 497 (1940).

¹¹⁹ *Piedmont Memorial Hospital v. Guilford County*, 221 N. C. 308, 20 S. E. 2d 332 (1942); *Coates, The Battle of Exemptions*, 19 N. C. L. REV. 154 (1941).

¹²⁰ N. C. CONST. ART. X §2. A widow succeeding to the homestead of her husband must pay taxes thereon. *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891), reversed on rehearing because the sale did not comply with statutory requirements. 110 N. C. 333, 14 S. E. 860 (1892).

5 of the North Carolina Constitution was amended¹²¹ to permit the General Assembly to exempt from taxation property "held and used as a place of *residence* of the owner" not to exceed \$1,000.00 in value. This provision is merely permissive and not self-executing.¹²² It applies only to homesteads used as a place of residence.¹²³ The General Assembly has not exercised its right under this amendment to provide for such exemption. Conceding that such legislation, if enacted, would encourage home ownership; yet it would have the undesirable result of diminishing the revenue of local governmental units.¹²⁴

(4) *Obligations Not Considered as Debts.*

Several types of obligations have been construed not to be ordinary debts within the meaning of the homestead provisions of the constitution. In *Walker v. Walker*¹²⁵ it was ordered, in connection with a decree for absolute divorce, that the husband should pay a monthly sum for the support of his minor daughter. When payments were in arrears the court decreed that the homestead (and personal property exemptions) should be specifically charged with this obligation. Alimony without divorce is not a debt within the meaning of the homestead law.¹²⁶ But where alimony continues after absolute divorce pursuant to G. S. §50-11¹²⁷ considerable doubt exists whether the court would deprive the husband of his exemptions; particularly, after he remarries.¹²⁸

Homestead cannot be claimed where the obligation is for drainage district assessments¹²⁹ or costs due from a partition proceeding¹³⁰ for these obligations are considered as charges against the land and not personal debts.

(5) *Arrest Against the Person—Debtor's Oath.*

In *Dellinger v. Tweed*¹³¹ it was held that homestead exemption was valid against a judgment in tort as well as in contract. Legislative enactments, however, have had the effect of limiting the scope of this

¹²¹ Last sentence in Art. V §5.

¹²² *Nash v. Comr's of St. Pauls*, 211 N. C. 301, 304, 190 S. E. 475, 477 (1937).

¹²³ Compare with Section III "E" *supra*.

¹²⁴ Note, 15 N. C. L. Rev. 211 (1937); Reynard, *Louisiana Homestead Tax Exemption—An Unlitigated Constitutional Provision*, 10 LA. L. REV. 405 (1950).

¹²⁵ 204 N. C. 210, 167 S. E. 818 (1933).

¹²⁶ *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863 (1922).

¹²⁷ ". . . a decree of absolute divorce upon the ground of separation for two successive years as provided in §50-5 or §50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce." See also N. C. GEN. STAT. §1-247 (1949 supp.).

¹²⁸ Note, 11 A. L. R. 123 (1921).

¹²⁹ *Middle Canal Company v. Whitley*, 172 N. C. 100, 90 S. E. 1 (1916).

¹³⁰ *Sansom v. Johnson*, 212 N. C. 383, 193 S. E. 272 (1937); *Hinnant v. Wilder*, 122 N. C. 149, 29 S. E. 221 (1898). Under N. C. GEN. STAT. §6-21(7) costs in a partition proceeding may be made against either party or apportioned.

¹³¹ 66 N. C. 206 (1872).

decision. Arrest against the person is authorized where fraud has been practiced in connection with a contractual obligation¹³² or in certain torts¹³³ where the injury was inflicted intentionally or maliciously or in wanton disregard of the plaintiff's rights.¹³⁴ In such cases a prisoner unable to give bond or pay a judgment may take the oath¹³⁵ of insolvent debtor's and be discharged from prison provided he surrenders all property whatsoever in excess of fifty dollars. The same is true of prisoners convicted in a criminal action who are unable to pay a fine or costs.¹³⁶ The effect of this procedure is to deprive the defendant of his homestead exemption and of personal property exemption above fifty dollars.¹³⁷

(6) *Rents and Profits.*

In *Citizens National Bank v. Green*¹³⁸ the debtor had his homestead allotted in property valued at \$1,000.00. Subsequently, he purchased additional land with money derived from the sale of crops grown on the homestead land. It was held that the judgment creditor was entitled to go against the additional land even though it was purchased with the rents and profits from the homestead land. This decision has been understood to mean that the rents and profits from homestead land would not inure to the benefit of the debtor beyond his personal property and homestead exemptions.¹³⁹ Justice Bynum predicted in *Citizens National Bank v. Green* that cases "will not be frequent where the excess over the maximum allowance will be so clear and palpable as to provoke litigation on the part of the creditor. . . ."¹⁴⁰ His prediction, aside from the mortgage foreclosure and partition cases discussed *infra*,¹⁴¹ appears to have been accurate. Distinguished from the debtor's rights in this situation is where his widow succeeds to his homestead. In such case the Constitution specifically provides that the rents and

¹³² N. C. CONST. Art. I §16: "There shall be no imprisonment for debt in this State, except in cases of fraud." This provision is confined to causes of action arising ex contractu. *Long v. McLean*, 88 N. C. 3 (1883).

¹³³ N. C. GEN. STAT. §1-410 (1943). Justice Clark stated these provisions were passed in consequence of the decision in *Dellinger v. Tweed*. *State v. Grigg*, 104 N. C. 882, 10 S. E. 684 (1889).

¹³⁴ *Coble v. Medley*, 186 N. C. 479, 119 S. E. 892 (1923); *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063 (1916).

¹³⁵ N. C. GEN. STAT. §23-23 (1943). For manner in which prisoner discharged see the *Raisin Fertilizer Company v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894).

¹³⁶ N. C. GEN. STAT. §23-24 (1943). The statute formerly permitted such prisoners to retain their exemptions. *State v. Davis*, 82 N. C. 610 (1880). Amendment in 1881 required all but fifty dollars to be surrendered. *State v. Williams*, 97 N. C. 414, 2 S. E. 370 (1887).

¹³⁷ *The Raisin Fertilizer Company v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894).

¹³⁸ 78 N. C. 247 (1878).

¹³⁹ *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891).

¹⁴⁰ *Citizens National Bank v. Green*, 78 N. C. 247 (1878).

¹⁴¹ See section VIII *infra* for a discussion and note the result is contrary to the rule of *Citizens National Bank v. Green*.

profits shall inure to her benefit.¹⁴² In this respect she enjoys homestead of her husband more fully than he was permitted to do so.¹⁴³

VI. HOMESTEAD AND DOWER

If a husband dies leaving debts and no children his widow has two concurrent rights—dower¹⁴⁴ and homestead.¹⁴⁵ A provision in the Act of 1886-7¹⁴⁶ giving the widow an election between her husband's homestead and dower was not included in the Constitution of 1868 and it does not appear in subsequent legislation. If the husband leaves only homestead, dower being the lesser interest in this particular land would be merged in the homestead and there is no problem in determining the extent of the widow's interest in this situation. She is clearly entitled to homestead—the greater of the two rights.¹⁴⁷

In *McAfee v. Bettis*¹⁴⁸ a husband, with the joinder of his wife, conveyed his homestead during his lifetime and on the husband's death the court held that the widow was entitled to dower in other land of which her husband was seized. The homestead acreage was excluded in computing the extent of her dower interest. The court pointed out that if the husband died leaving homestead and other land it saw no objection to the widow's taking the homestead and then dower in the land outside of the homestead.

If the minor children succeed to their father's homestead, the relationship between dower and homestead must be considered. Beginning with *Watts v. Leggett*¹⁴⁹ in 1872 it has been consistently held¹⁵⁰ that homestead of the children must be allotted in the dower land even though other land is available. The children's enjoyment of homestead is subject to the dower of their mother. These decisions may have been influenced by the fact that prior to 1908 it was mandatory that dower be allotted in the "dwelling house in which her husband usually resided" and moreover, it was clearly contemplated that where there is a dwelling it should constitute a part or all of the homestead. But under present¹⁵¹ law it is possible for the jury, at the request of the widow, to allot dower in land other than the dwelling. Should the dictum of *McAfee v.*

¹⁴² N. C. CONST. Art. X §5. No such provision is made for minor children and whether or not they are entitled to rents and profits of their father's homestead is uncertain.

¹⁴³ *Tucker v. Tucker*, 108 N. C. 235, 13 S. E. 5 (1891).

¹⁴⁴ Dower is not subject to payment of husband's debts. N. C. GEN. STAT. §30-3 (1943).

¹⁴⁵ *McAfee v. Bettis*, 72 N. C. 28 (1875).

¹⁴⁶ Laws of (1866-67) c. 61 §8.

¹⁴⁷ *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299 (1889) (homestead greater than the dower interest).

¹⁴⁸ 72 N. C. 28 (1875).

¹⁴⁹ 66 N. C. 197 (1872).

¹⁵⁰ *Graves v. Hines*, 108 N. C. 262, 13 S. E. 15 (1891); *Gregory v. Ellis*, 86 N. C. 579 (1882); *Morrisett v. Ferebee*, 120 N. C. 6, 8, 26 S. E. 628 (1897).

¹⁵¹ N. C. GEN. STAT. §30-5 (1943).

Bettis be followed to permit the widow to enjoy both dower and homestead where there is sufficient land for an allotment of each in separate tracts, *Watts v. Leggett* should be overruled and the widow and children should have their dower and homestead in different tracts. Otherwise, a widow with no children would be entitled to dower and homestead in separate tracts but a widow with minor children would have only dower; and the homestead of the children would afford little, if any, additional protection inasmuch as *Watts v. Leggett* requires that both rights be asserted in the same land.

VII. CONVEYANCE

A. Joinder of Wife.

Article X section 8 of the Constitution permits the owner of a homestead to dispose of it by deed provided it is signed and acknowledged by his wife.¹⁵² In *Mayho v. Cotton*¹⁵³ this section was interpreted to mean that the wife's joinder was required only in a conveyance of an allotted homestead. *Hughes v. Hodges*¹⁵⁴ modified this interpretation by requiring the wife's joinder where the homestead had not been laid off if there were judgments docketed which might make it necessary to have the homestead allotted. Although this modification was not fully accepted in some of the early cases,¹⁵⁵ it was accorded full recognition in *Hall v. Dixon*¹⁵⁶ where it was stated: "*Hughes v. Hodges* has been cited in many cases and acted upon to such an extent that it has practically become a rule of property." Therefore, it may be stated that today the wife's joinder is necessary when the homestead has been allotted or where there is a judgment docketed and in force which constitutes a lien on the land.¹⁵⁷ Homestead may be conveyed by the husband and wife joining with the sheriff in a deed to the purchaser at an execution sale.¹⁵⁸

¹⁵² Privy examination was eliminated by constitutional amendment November 7, 1944.

¹⁵³ 69 N. C. 289 (1873).

¹⁵⁴ 102 N. C. 236, 9 S. E. 437 (1889). This opinion also stated that a conveyance of homestead without joinder of his wife after a mortgage had been executed in which homestead had been reserved was void. It is somewhat analogous to an outstanding judgment because homestead would have to be allotted on foreclosure.

¹⁵⁵ *Dixon v. Robbins*, 114 N. C. 102, 19 S. E. 239 (1894); *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915); *Id.*, 181 N. C. 285, 107 S. E. 4 (1921).

¹⁵⁶ 174 N. C. 319, 93 S. E. 837 (1917).

¹⁵⁷ In *Cawfield v. Owens*, 130 N. C. 641, 41 S. E. 891 (1902) it was held that a mortgage made by a husband without his wife's joinder was void if there were judgments outstanding against the husband. Compare with *Cleve v. Adams*, *infra* footnote 169. N. C. GEN. STAT. §30-9 (1943) (Husband cannot convey homestead alone even though his wife is insane.). *Simmons v. McCullin*, 163 N. C. 409, 79 S. E. 625 (1913) (Consent judgment does not require wife's joinder.).

¹⁵⁸ *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. 2d 30 (1949).

The "Homesite" Statute¹⁵⁹ enacted in 1919 is not to be confused with homestead but it has some relationship here because it prohibits a husband, without the joinder of his wife, from passing title and possession of the residence during the joint lives of the husband and wife.¹⁶⁰ It is not required that the residence be actually occupied by the owner to come within the purview of this restriction. Purchase money obligations for the residence are excepted. The "Homesite" Statute, as construed, has the effect of enabling the wife to interfere with efforts on the part of her husband to presently pass title to the "residence" in situations where no homestead has been allotted and there are no judgments outstanding against him.

B. Effect of Conveyance.

Difficult problems have been encountered in determining the effect of a conveyance of homestead on the rights of the homesteader, purchaser and judgment creditors. After twice considering the question in *Adrian v. Shaw*,¹⁶¹ the court concluded the debtor could still claim homestead in the conveyed land even though it inured to the benefit of the purchaser and the judgment creditor could not enforce his lien against the conveyed land until the homestead of the debtor expired. This view was reversed in *Fleming v. Graham*¹⁶² and it was held that a conveyance constituted a waiver of homestead. But the next year the rule in *Adrian v. Shaw* was restored¹⁶³ and continued in effect both as to allotted¹⁶⁴ and unallotted¹⁶⁵ homesteads until 1905. The Act of 1905¹⁶⁶ provided that a conveyance of an allotted homestead terminated the exemption in the conveyed land, but the debtor was permitted to claim another homestead in other land he then owned or subsequently acquired. Although the language of the Act of 1905 referred only to *allotted* homesteads, it was construed in *Chadbourne Sash, etc. Company v. Parker*¹⁶⁷ also to apply to unallotted homesteads. As soon as the debtor conveys his land, the judgment creditor is free to enforce his lien against the conveyed land and it is necessary for the judgment creditor to be diligent in exercising his rights for the statute of limitations¹⁶⁸ is no longer tolled.

Homestead rights are not lost in particular land when a tenant in common joins in a petition for a sale for partition¹⁶⁹ or when the debtor

¹⁵⁹ N. C. GEN. STAT. §30-8 (1943).

¹⁶⁰ *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

¹⁶¹ 82 N. C. 474 (1880); 84 N. C. 832 (1881).

¹⁶² 110 N. C. 374, 14 S. E. 922 (1892).

¹⁶³ *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 566 (1893).

¹⁶⁴ *Blythe v. Gash*, 114 N. C. 659, 19 S. E. 640 (1894).

¹⁶⁵ *Gardner v. Batts*, 114 N. C. 496, 19 S. E. 794 (1894).

¹⁶⁶ N. C. GEN. STAT. §1-370 (1943).

¹⁶⁷ 153 N. C. 130, 69 S. E. 1 (1910) (unallotted homestead). Cf. *Equitable Life Assurance Society v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936).

¹⁶⁸ *Crouch v. Crouch*, 160 N. C. 447, 449, 76 S. E. 482 (1912).

¹⁶⁹ *Smith v. Eakes*, 212 N. C. 382, 193 S. E. 393 (1937).

executes a mortgage¹⁷⁰ because these acts do not constitute a conveyance within the meaning of the Act of 1905.

C. *Fraudulent Conveyance.*

If a debtor makes a conveyance which is set aside as fraudulent against creditors, he is not precluded from claiming homestead in the land fraudulently conveyed.¹⁷¹ This result is predicated on the reasoning that the fraud did not consist in conveying the homestead; for the creditor could not have reached it by his execution had the debtor retained his homestead.¹⁷² The fraud was in conveying the other part of the land. In *Marshburn v. Lashlie*¹⁷³ a limitation was placed on this rule. The debtor had two tracts of land. Homestead was allotted in one tract which was alleged to be worth only forty dollars. The debtor conveyed the other tract in fraud of creditors and when it was set aside, his request for the balance of his homestead in this tract was rejected on the theory of an estoppel.

A proviso in section 6 of the Bankruptcy Act is to the effect that exemptions allowed by state law, ordinarily given to bankrupts under the Act, will be lost in property which is fraudulently transferred and which transfer is subsequently avoided for the benefit of the estate.¹⁷⁴ Whether or not this section will preclude homestead has not yet been determined but inasmuch as title to the homestead property does not vest in the trustee¹⁷⁵ it would seem appropriate to adopt the view of the North Carolina Court that in this situation there is no fraud.¹⁷⁶

D. *Waiver and Estoppel.*

Several early cases¹⁷⁷ took the position that inasmuch as homestead was conferred by the Constitution it could not be lost by waiver and estoppel. Subsequent cases have not adhered to this strict view and it

¹⁷⁰ *Cleve v. Adams*, 222 N. C. 211, 22 S. E. 2d 437 (1942).

¹⁷¹ *New Amsterdam Casualty Company v. Dunn*, 209 N. C. 736, 184 S. E. 488 (1936); *Rose v. Bryan*, 157 N. C. 173, 72 S. E. 960 (1911); *Crummen v. Bennett*, 68 N. C. 494 (1873).

¹⁷² *Crummen v. Bennett*, 68 N. C. 494 (1873).

¹⁷³ 122 N. C. 237, 29 S. E. 371 (1898).

¹⁷⁴ 52 STAT. 847 (1938), 11 U. S. C. §24 (1946). An exception is made where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby. Allowance may be made out of such excess. This exception was ignored in *In re Grisanti*, 58 F. Supp. 646 (W. D. Ky. 1945).

¹⁷⁵ 30 STAT. 565 (1898), as amended, 11 U. S. C. §110(a) (1946).

¹⁷⁶ See generally, Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1315 (1950).

¹⁷⁷ *Bevan v. Speed*, 74 N. C. 544 (1876) (debtor gave note in which he undertook to waive homestead); *Lambert v. Kinnery*, 74 N. C. 348 (1878) (no waiver where debtor told sheriff he did not own land and go ahead and sell it); *Littlejohn v. Egerton*, 76 N. C. 468 (1877) (no estoppel by parol); *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859 (1901).

is now well established in many situations homestead can be waived in ways other than by a proper conveyance.

In an action to recover land a defendant desiring to assert his homestead rights must do so in the answer or else there is a waiver.¹⁷⁸ Likewise, a mortgagor in a foreclosure proceeding who desires homestead in any surplus is required to make his request in that proceeding.¹⁷⁹ If the judgment of the trial court incorrectly states that the land is to be sold free of homestead, the debtor must appeal from such judgment or otherwise be bound.¹⁸⁰ Such a judgment is not void but merely erroneous and must be corrected on appeal.¹⁸¹ If a husband and wife advise the sheriff in writing to sell without allotting homestead, it may be sufficient to constitute a waiver.¹⁸²

E. Waiver of Rights of Infants and Widows.

In an action to sell land to make assets the court in *Allen v. Shields*¹⁸³ indicated that the administrator had the duty of protecting the homestead interests of the minor defendants even though they were represented by a guardian ad litem. But in *Morrisett v. Ferebee*¹⁸⁴ a request for homestead was made after sale but before confirmation and the request was denied on the ground that interests of third parties had intervened; and therefore, homestead rights of the infants had been waived. A contrary result¹⁸⁵ was reached where the request for homestead was made before sale—the court stated that the law did not favor the implied waiver of homestead exemptions, especially by infant defendants.

Legislation¹⁸⁶ now adequately protects the homestead interests of infants and widows in actions to sell realty to make assets by imposing on the court a duty to appoint three disinterested freeholders to set

¹⁷⁸ *Cadle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912); *Wilson v. Taylor*, 98 N. C. 275, 8 S. E. 492 (1887). Cf. *Cawfield v. Morris*, 130 N. C. 641, 41 S. E. 891 (1902).

¹⁷⁹ *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928); *Henson v. Adrian*, 92 N. C. 121 (1885). The court said where claim was first made between sale and confirmation that debtor was not entitled to homestead in metes and bounds; and indicated he might not have been entitled to any in the surplus money after sale if the creditors had objected.

¹⁸⁰ *Cameron v. McDonald*, 216 N. C. 712, 6 S. E. 2d 497 (1939). Court ignored decisions to the effect that a sale under execution without allotment of homestead is void. See footnote 230 *infra*. *Pence v. Price*, 211 N. C. 707, 192 S. E. 99 (1937).

¹⁸¹ *Cameron v. McDonald*, 216 N. C. 712, 6 S. E. 2d 497 (1939). Compare *Johnson v. Sink*, 217 N. C. 702, 9 S. E. 2d 371 (1940). The court suggested the latter case might be controlled by *Cumming v. Bloodworth*, 87 N. C. 83 (1882) rather than by *Cameron v. McDonald*.

¹⁸² *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. 2d 30 (1949).

¹⁸³ 72 N. C. 504 (1875).

¹⁸⁴ 120 N. C. 6, 26 S. E. 628 (1897).

¹⁸⁵ *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859 (1901).

¹⁸⁶ N. C. GEN. STAT. §1-389 (1943).

apart by metes and bounds the homestead of a widow or children. In *Fulp v. Brown*¹⁸⁷ it was held that a widow was entitled to homestead in an action to sell land to make assets even though she had failed to dissent from the will in the time allowed by statute.

VIII. HOMESTEAD AND MORTGAGES

Certain recognized principles are useful in working out the interests of the parties where there are judgment creditors, mortgagees and a judgment-debtor-mortgagor. Priority among judgment creditors is to be determined as they exist at the death of the debtor.¹⁸⁸ A judgment docketed before registration of a mortgage is the superior lien.¹⁸⁹ In this state a mortgage passes the legal title to the mortgagee, subject to the equitable principle that the passage of legal title is primarily by way of security for the debt. For all other purposes, and as against all persons other than the mortgagee, the mortgagor is regarded as owner of the land.¹⁹⁰ A mortgagor is not entitled to homestead in the mortgaged land against the interest of the mortgagee¹⁹¹ but he is clearly entitled to homestead in his equity of redemption.¹⁹² When there is homestead in the equity of redemption, the mortgage debt is disregarded for purposes of appraisal and the homestead is evaluated as if the debtor owned the land unincumbered by a mortgage.¹⁹³ The foreclosure of a prior mortgage will terminate homestead in the equity of redemption.

Problem One.

The debtor executes a mortgage which is registered before judgments are docketed against him. The mortgagee forecloses before there is execution on the subsequent judgment(s).

In this situation if it appears there is sufficient land outside homestead to satisfy the mortgage debt, some indication has been given by the court that it would, on timely request by the debtor, require the

¹⁸⁷ 153 N. C. 531, 69 S. E. 612 (1910); N. C. GEN. STAT. §30-3 (1943) protects dower in the same situation.

¹⁸⁸ *Tarboro v. Pender*, 153 N. C. 427, 69 S. E. 636 (1910).

¹⁸⁹ *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1928); *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. 556 (1893) (overruling *Leak v. Gay*, 107 N. C. 468, 12 S. E. 251 (1890) insofar as it seemed to decide that a lien of a prior judgment could be displaced by a junior mortgage).

¹⁹⁰ *Cleve v. Adams*, 222 N. C. 211, 22 S. E. 2d 567 (1942).

¹⁹¹ *Miller v. Little*, 212 N. C. 612, 194 S. E. 92 (1937); *Burton v. Spiers*, 87 N. C. 89 (1882) (deed of trust).

¹⁹² *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936); *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928); *Cheatham v. Jones*, 68 N. C. 153 (1873).

¹⁹³ *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936); *Virginia-Carolina Chemical Corporation v. Stuart*, 200 N. C. 490, 157 S. E. 608 (1931). If otherwise, a discharge of the mortgage by payment would leave the homestead embracing too much land and a reallotment would be necessary. *Burton v. Spiers*, 87 N. C. 87, 93 (1882); but see *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).

mortgagee to go against the land outside homestead first.¹⁹⁴ This is analogous to the procedure available to a widow for the protection of her dower where she has joined in a mortgage with her husband and there is a foreclosure after his death.¹⁹⁵ Should the debtor neglect to make such a request¹⁹⁶ or should it be denied, it is appropriate for him to ask that homestead be allotted in any surplus money (regarded as realty) after foreclosure.¹⁹⁷ Failure to make timely request for homestead in the surplus will be deemed a waiver.¹⁹⁸

The rights of all the parties appear to be adequately protected should homestead be allotted by metes and bounds before foreclosure where there is other land sufficient to satisfy the mortgage debt. Adoption of this procedure where practicable would eliminate difficulties encountered in cases where homestead is given in the surplus money after a foreclosure proceeding.¹⁹⁹

Problem Two.

The debtor executes a mortgage which is registered before judgments are docketed against him. There is a sale under execution to satisfy the judgment *before* the mortgage is foreclosed.

The debtor is entitled to have homestead allotted in the equity of redemption. The judgment creditor (i.e., sheriff) must sell exclusive of homestead. But what is the relationship between the purchaser at the execution sale and the homesteader and between both these parties and the mortgagee? The mortgagee has a lien on the homestead land as well as that in the hands of the purchaser at the execution sale and the mortgagee may foreclose on *both* tracts. The homesteader has no greater rights in the homestead land in respect to the mortgage than the purchaser at the execution sale has in respect to the land he purchased at the sale. Therefore, in this situation the homesteader should not be permitted to require the mortgagee to foreclose on the land in the hands of the purchaser at the execution sale before selling homestead. This principle was fully recognized in *Miller v. Little*²⁰⁰ where there was a surplus after the mortgagee had foreclosed on all the land, i.e., homestead land and land held by the purchaser at the execution sale. The court held that the surplus of \$800.00 must be shared by the

¹⁹⁴ *Hinson v. Adrian*, 92 N. C. 121 (1885); *Cheatham v. Jones*, 68 N. C. 153 (1873).

¹⁹⁵ *Holt v. Lynch*, 201 N. C. 404, 160 S. E. 469 (1931).

¹⁹⁶ *Miller v. Little*, 212 N. C. 612, 615, 194 S. E. 92, 94 (1937). It is doubtful if the court would have granted such a request, if made, under the facts of the case.

¹⁹⁷ *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1928); *Hinson v. Adrian*, 92 N. C. 121 (1885).

¹⁹⁸ *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928).

¹⁹⁹ See section III "F" *supra*.

²⁰⁰ 212 N. C. 612, 194 S. E. 92 (1937).

homesteader and the purchaser at the execution sale in accordance with the value of the land each held at the time of foreclosure.

Problem Three.

Judgment(s) is docketed against the debtor before a mortgage is registered. There is a sale under execution to satisfy the judgment before the mortgage is foreclosed.

The debtor is entitled to have his homestead allotted in his equity of redemption.²⁰¹ But what happens when the mortgagee forecloses? One possible answer may be found in *Vanstory v. Thornton*²⁰² where the court held that the mortgagee would be entitled to the rents and profits (i.e., interest on homestead money) for the duration of the debtor's homestead. This decision may not be sound since the Act of 1905²⁰³ terminating homestead upon conveyance. Although it is clear that the mere execution of a mortgage is not a conveyance within the meaning of this Act,²⁰⁴ it does not follow that a *foreclosure sale* under a mortgage which is inferior to a prior judgment should not be considered a conveyance. If such sale is treated as a conveyance²⁰⁵ and thus terminating homestead, the judgment creditor *then* would be entitled to claim sufficient proceeds from the sale to satisfy his lien rather than having to wait while an inferior lien holder enjoys the homestead of a debtor who has voluntarily parted with his homestead by executing a mortgage which resulted in a foreclosure sale.

Problem Four.

Judgment(s) is docketed against the debtor before a mortgage is registered. The mortgagee forecloses before there is execution on the judgment.

In *Farris v. Hendricks*²⁰⁶ the parties had an opportunity but failed to present squarely to the court the question as to whether or not the foreclosure by a subsequent lien holder constituted a conveyance which would entitle the prior judgment holder to satisfy his lien free of homestead. Nevertheless, the court felt compelled to remind the prior judgment creditor that his lien was superior and that the sum in the foreclosure sale was sufficient to satisfy the judgment. Due to the unusual²⁰⁷ facts of the case this statement is susceptible to another

²⁰¹ Cheek v. Walden, 195 N. C. 752, 143 S. E. 465 (1928).

²⁰² 112 N. C. 196, 17 S. E. 566 (1893); same case 114 N. C. 377, 19 S. E. 359 (1894).

²⁰³ N. C. GEN. STAT. §1-370 (1943).

²⁰⁴ Cleve v. Adams, 222 N. C. 211, 22 S. E. 2d 567 (1942).

²⁰⁵ See discussion in problem four of this section.

²⁰⁶ 196 N. C. 439, 146 S. E. 77 (1928).

²⁰⁷ The claim of the judgment creditor was for \$208.11 and that of the mortgagee \$700.00. In the foreclosure sale the land brought \$1,296.75. Taking the view that the debtor relinquished \$700.00 of his homestead to the mortgagee by execut-

interpretation; but it is the nearest the court has come to dealing with this important question.²⁰⁸ Should it be finally determined that the Act of 1905 has no application in this situation, the rule of *Vanstory v. Thornton*²⁰⁹ would apparently prevail and the mortgagee would enjoy the homestead of the debtor and the judgment creditor must await the normal expiration of homestead before enforcing his lien against the homestead land.

IX. CONCURRENT OWNERSHIP

A. *Tenants in Common.*

A judgment lien on the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce a partition; and when it is made, the judgment lien is transferred to the portion assigned to the debtor in severalty²¹⁰ (or to his share of the proceeds of sale). The debtor is entitled to homestead in the land assigned him in severalty or if there was a sale, he is entitled to the net income of a sum not exceeding \$1,000.00 for the duration of homestead.²¹¹ If a tenant in common initiates the partition proceedings and a sale results, it does not constitute a waiver of homestead rights.²¹²

A judgment creditor, who has a lien against either a tenant in common or a joint tenant, may institute a special proceeding before the clerk for a partition.²¹³ After the actual partition, the judgment creditor may proceed to sue out execution and after homestead is allotted the excess may be sold in satisfaction of the lien. Although there is no specific statutory provision for a sale where the property cannot be fairly divided, it seems likely that the clerk will be permitted to exercise his discretion as in other partition proceedings.²¹⁴

Ordinarily a tenant in common cannot have his homestead allotted until his property has been assigned in severalty;²¹⁵ but if it is done without objection of the cotenants the allotment is not void but merely irregular.²¹⁶

ing the mortgage there is sufficient money to pay the mortgagee his full \$700.00 and also pay the full amount of the judgment and there is still \$300.00 left for homestead which under this theory is all the homesteader is entitled to claim.

²⁰⁸ In *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928) some language of the court may be construed as an indication the court might conclude there is a conveyance but no decision was reached because a waiver was found.

²⁰⁹ 112 N. C. 196, 17 S. E. 566 (1893).

²¹⁰ *Edmonds v. Wood*, 222 N. C. 118, 22 S. E. 2d 237 (1942). *Holly v. White*, 172 N. C. 77, 89 S. E. 1061 (1916) states that if the judgment creditors are not parties, the purchaser buys subject to such liens. On the other hand, Justice Seawell in *Edmonds v. Wood* cites with approval a statement that the purchaser takes title free from the lien whether the judgment creditor is a party or not leaving the judgment creditor to go against the proceeds of the sale.

²¹¹ *Smith v. Eakes*, 212 N. C. 382, 193 S. E. 393 (1937).

²¹² *Ibid.*

²¹³ N. C. GEN. STAT. §46-5 (1943).

²¹⁴ *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911).

²¹⁵ *Hinnant v. Wilder*, 122 N. C. 149, 152, 29 S. E. 221, 222 (1911).

²¹⁶ *Kelly v. McLeod*, 165 N. C. 382, 81 S. E. 455 (1914).

B. *Tenancy by the Entirety.*

When husband and wife own land as tenants by the entirety, they are each deemed to be seized of the whole and not of a moiety of an undivided portion thereof.²¹⁷ During their joint lives a judgment against either of them severally does not render the land subject to sale under execution on such judgment.²¹⁸ On the other hand, where the judgment is upon a joint contract or obligation against husband and wife, a lien is created on land held by them as tenants by the entirety.²¹⁹ In *Martin v. Lewis*²²⁰ there was such a judgment and the sheriff laid off two homesteads. Chief Justice Clark noting this fact made the following comment:

"It would seem that if homestead should be allowed, there could be only one, seeing that in no event could the survivor have more than one homestead. This exemption should be the husband's homestead and held on the same terms, i.e., by entireties, for his life, and if he should not be the longest liver, then for the life of his wife. We make, however, no decision on this point, for it would be merely *obiter dictum*, not being necessary in this instance."²²¹

Tenants by the entirety are not entitled to homestead where they have entered into a joint obligation for the purchase of the premises.²²²

X. ALLOTMENT

When homestead is once allotted, the only way the property embraced therein may lose its homestead character is by "death, abandonment or alienation."²²³ The Constitution does not define the procedure for the allotment of a homestead. Detailed procedures, however, have been established by legislation.²²⁴ A resident owner may be allotted homestead on his own application made to a justice of the peace of the county in which he resides. It is not essential that the applicant be insolvent for the reason that homestead ". . . is not the offspring of and does not draw its life blood from a judgment debt."²²⁵ Instead, it is a right which stems from the Constitution.

²¹⁷ *Winchester-Simmons Company v. Cutler*, 199 N. C. 709, 155 S. E. 611 (1930). See generally on tenancy by the entirety, *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924); *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490 (1924).

²¹⁸ *Winchester-Simmons Company v. Cutler*, *supra* note 217; *Southern Distributing Company v. Carraway*, 189 N. C. 420, 127 S. E. 427 (1925); *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490 (1924).

²¹⁹ *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180 (1924).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Johnson v. Leavitt*, 188 N. C. 682, 686, 125 S. E. 490, 492 (1924).

²²³ *Williams v. Johnson*, 230 N. C. 338, 53 S. E. 2d 277 (1949).

²²⁴ N. C. GEN. STAT. §§1-369 through 1-392 (1943). *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* 887 (1929). The subjects of allotment, revaluation and reallocation will not be fully treated here because of the detail provided in the statutes and the excellent discussion in *McINTOSH*.

²²⁵ *Williams v. Johnson*, 230 N. C. 338, 342, 53 S. E. 2d 277, 280 (1949).

Homestead is frequently allotted by the sheriff and when a sheriff is seeking to collect a judgment under execution issued to him, he must, before levying upon the real property of the debtor, proceed to have the debtor's homestead allotted.²²⁶ He is directed by statute to summon "three discreet persons qualified to act as jurors" to act as appraisers.²²⁷ The purpose of allotment under these circumstances is to ascertain whether there is any excess property over the homestead on which a sale can be had.

Whether the allotment is by the sheriff under execution or on petition of the owner, the owner is entitled to an opportunity to make a selection of the exact land not exceeding in value the sum of \$1,000.00.²²⁸ If the appraisal is on execution and the owner is not given an opportunity to be present, the appraisal and allotment are void.²²⁹ G. S. §1-372 (as amended in 1945) requires that a certified copy of the return of the appraisers be registered in the office of the register of deeds and without registration the return is void as to third persons not a party to the proceeding.

A sale under execution without first ascertaining and setting apart homestead is void²³⁰ unless waived²³¹ by the debtor or unless the sale was for an obligation superior to homestead.²³² Ordinarily the debtor and judgment creditor are bound by the *valuation* of the appraisers unless exceptions are taken thereto in accordance with statutory requirements.²³³ But in *Springer v. Colwell*²³⁴ the debtor owned land in two counties and the value of the homestead in the county of the levy did not amount to \$1,000.00. It was held sufficient that the debtor sent a transcript of the allotment to the clerk and the sheriff of the other county

²²⁶ N. C. GEN. STAT. §1-371 (1943).

²²⁷ *Ibid.* Same requirement as regular jurors and not those of tales jurors. *Hale Brothers v. Whitehead*, 115 N. C. 28, 20 S. E. 166 (1894).

²²⁸ This is not necessarily inconsistent with the idea that homestead must be allotted in the dwelling, if any. The choice could have reference to particular land to go with the dwelling where appropriate. *Citizens Bank v. Robinson*, 201 N. C. 796, 161 S. E. 487 (1931).

²²⁹ *McKeithan v. Blue*, 142 N. C. 360, 55 S. E. 285 (1906). If the owner makes no selection, the appraisers may make it for him, "including always the dwelling and buildings used therewith." N. C. GEN. STAT. §1-376 (1943).

²³⁰ *Fulton v. Roberts*, 113 N. C. 421, 18 S. E. 510 (1893); *McCracken v. Adler*, 98 N. C. 400, 4 S. E. 138 (1887); *Mitchell v. Mitchell*, 211 N. C. 308, 310, 190 S. E. 487, 488 (1937).

²³¹ *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. 2d 30 (1949).

²³² *Miller v. Miller*, 89 N. C. 402 (1883). See section V "C" *supra*.

²³³ N. C. GEN. STAT. §1-381 (1943); *Whitehead v. Spivey*, 103 N. C. 66, 9 S. E. 319 (1889); *Spoon v. Reid*, 78 N. C. 244 (1878). If exceptions are filed under G. S. 1-381, the final evaluation is made by the trial jury in accordance with G. S. 1-382. The purpose of this procedure is to end litigation on the matter of evaluation. *Shoaf v. Frost*, 116 N. C. 675, 21 S. E. 409 (1895). (Also points out if homestead land greatly depreciates in value, the debtor may resort to equity.)

²³⁴ 116 N. C. 520, 21 S. E. 301 (1895).

with a request to allot sufficient land to make up the full exemption notwithstanding no exception had been made to the original allotment.

The mortgage foreclosure cases excepted,²³⁵ the courts have taken the position that a debtor is entitled to an allotment of a specific and defined portion of land in severalty²³⁶ for homestead. A judgment creditor was denied the privilege of selling the whole house and allotting homestead in money from the sale.²³⁷ If the debtor owns a single dwelling valued at more than homestead and no other property, the court has suggested that a portion of the house, containing rooms of sufficient value, be set apart as in the allotment of dower.²³⁸

In certain cases where the right of homestead is in issue before the court, the court itself has appointed commissioners to lay off homestead²³⁹ and it is under a duty to do so to protect the interests of a widow or children where there is a sale of realty to make assets.²⁴⁰

Reallotment for Increase in Value.

Prior²⁴¹ to the legislation enacted in 1893 if the homestead increased in value, the sole remedy available to a creditor was to proceed in the nature of an equitable action to subject the excess to the satisfaction of his claim. G. S. §1-373 makes provision for a reallotment upon application by a judgment creditor accompanied by the affidavits of three disinterested freeholders of the county setting forth that, in their opinion, the homestead property has increased in value fifty per centum or more since the last allotment. Upon due notice and hearing as specified in this statute, the clerk makes his finding and has the authority to command the sheriff to reallot the homestead in the same manner as if no homestead had been allotted. If the increase is less than fifty percent the judgment creditor may still resort to equity.²⁴² It is immaterial whether the increase in value is due to improvements made by the debtor or to other factors such as the development of a nearby town.²⁴³

²³⁵ Section III "F" *supra*.

²³⁶ *Campbell v. White*, 95 N. C. 491 (1886).

²³⁷ *Oakley v. Van Noppen*, 96 N. C. 247, 2 S. E. 663 (1887).

²³⁸ *Campbell v. White*, 95 N. C. 491 (1886).

²³⁹ *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242 (1899); *Littlejohn v. Egerton*, 77 N. C. 379 (1877).

²⁴⁰ N. C. GEN. STAT. §1-389 (1943).

²⁴¹ *Gulley v. Cole*, 102 N. C. 333, 9 S. E. 196 (1889).

²⁴² N. C. GEN. STAT. §1-373 (1943).

²⁴³ *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).