ATTACHMENTS
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ATTACHMENTS

I. General Provisions

A. Introduction.

1. Attachment is an extraordinary remedy because it is an order to the sheriff to seize and hold defendant's property before any judgment is entered against the defendant. [*Knight v. Hatfield*, 129 N.C. 191, 39 S.E. 807 (1901).] (See section I.B below for nature of attachment.)

2. An order of attachment can only be issued in certain limited circumstances. If the allegation is based on defrauding creditors, the affidavit must include facts substantiating the grounds for attachment. (See section II.B at page 34.3 and section III.A.3.c at page 34.5 for grounds for attachment.)

3. **A clerk should use great caution in deciding whether to issue an order of attachment, and should make sure that sufficient grounds exist.** The clerk's act in deciding whether to issue an order of attachment is a judicial act.

4. If the clerk decides to issue an order of attachment, the clerk must set a bond that the plaintiff must make to protect the defendant from loss while his or her property is taken and held by the sheriff. **The clerk's act in setting the bond is ministerial, and therefore the clerk may be held liable for failing to set an adequate bond.** (See section III.B at page 34.7 for requirements of bond.)

5. The procedure for attachment is complicated and includes provisions for defendant or third party intervenors to put up a bond to keep the property pending the lawsuit, methods for defendant to seek to have the attachment dissolved or to have the amount of the bond increased, and a procedure for notice and a hearing for third parties who have property belonging to or owe money to the defendant (called garnishment). (See sections VI, VII, and VIII beginning at page 34.14.)

B. Nature of attachment.

1. The purpose of attachment is as a preliminary execution—to order the sheriff to seize a sufficient amount of defendant's property to satisfy the amount claimed by the plaintiff in the complaint and to hold the property seized pending the outcome of the lawsuit so that if plaintiff wins a judgment, the property will be available to be sold to satisfy the judgment. The order is to seize any of the defendant's property and is not an order to seize only property related to the principal action.

2. Attachment is a proceeding ancillary to a pending principal action. [G.S. § 1-440.1; *Ditmore v. Goins*, 128 N.C. 325, 39 S.E. 61 (1901).]

   a) A principal action must be commenced before the clerk can issue an order of attachment.

      (1) Principal action is commenced by the filing of a complaint or by the clerk's issuing an order extending time to file a complaint and a summons. [G.S. § 1A-1, Rule 3]

   b) An order of attachment may be issued before the summons in the principal action is served. [G.S. § 1-440.7]

   c) Frequently, the order of attachment is sought at the same time the complaint is filed.

3. Property reached. All of defendant's real or personal property in North Carolina that is subject to levy under an execution or which can be reached through a supplemental proceeding is subject to being attached. [G.S. § 1-440.4]

4. Attachment is a prejudgment remedy and not a post judgment remedy.

   a) **The clerk may not issue an order of attachment after judgment is rendered in the principal action**. [G.S. § 1-440.6(b)]

   b) Exception: G.S. § 1A-1, Rule 70 provides that if a judgment directs a party to convey land, to deliver a deed, or to perform any specific act and the party does not comply, the clerk issues a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment, upon motion of the other party. Practically, this remedy is never used because the judge can transfer title to the property. However, were it to be used, the attachment is for the purpose of forcing the party to perform, rather than to make the property available should a judgment be awarded. The sheriff would hold the property seized until the noncomplying party performs the act required by the judgment and then the property would be returned to the noncomplying party.

5. Attachment statutes must be strictly construed; the plaintiff must substantially comply with all of the statute's provisions. [*Bethell v. Lee*, 200 N.C. 755, 158 S.E. 493 (1931); *Carson v. Woodrow*, 160 N.C. 143, 75 S.E. 996 (1912).] The statute is constitutional. [*Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980); *Hutchinson v. Bank of N.C.*, 392 F. Supp. 888 (M.D.N.C. 1975).]

6. Before issuing any order of attachment, the clerk may want to caution the attorney for the plaintiff about the severe effects of attachment and the potential for liability to the client for any false allegations.

7. The clerk is a judicial officer, not a mere administrative functionary, when issuing an order of attachment. [*Northside Properties, Inc. v. Ko-Ko Mart, Inc*., 28 N.C.App. 532, 222 S.E.2d 267, *review denied,* 289 N.C. 615, 223 S.E.2d 392 (1976).] **However, setting the bond in an attachment is a ministerial, not judicial, act**.

8. The clerk has authority to fix necessary procedural details when the statute fails to make definite provision as to such procedure. [G.S. § 1-440.9]

C. Authority to issue order of attachment. [G.S. § 1-440.5] The clerk of court in which the action has been, or is being, filed or a judge of the appropriate trial division may issue an order of attachment.

D. **Attachment is not permitted in small claims action.** [G.S. § 7A-231]

II. Grounds for Attachment

A. Types of action in which attachment allowed. [G.S. § 1-440.2] Attachment is allowed only in an action the purpose of which, in whole or in part, is to secure:

1. A money judgment.

2. Alimony or post-separation support.

3. Child support.

B. Grounds for attachment. [G.S. § 1-440.3] The clerk may enter an order of attachment when it is made to appear by affidavit that defendant is one of the following:

1. A resident who, with intent to defraud his or her creditors or to avoid service of summons,

a) has departed or is about to depart the state; or

b) keeps himself or herself concealed.

(1) Court found defendant was concealing himself to avoid service when summons and complaint sent certified mail were returned and regular mail was not returned; one returned certified letter had defendant's return address on the top left corner; and address to which letters were sent was defendant's post office box where he received his business mail. [*Jimenez v. Brown*, 131 N.C.App. 818, 509 S.E.2d 241 (1998).]

2. A person or domestic corporation which, with intent to defraud creditors,

a) has removed or is about to remove property from N.C.; or

b) has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property.

3. A nonresident.

a) Residence (actual place of abode) not domicile (permanent abode to which, when absent, one intends to return) controls for purpose of attachment. [*Vinson Realty Co. v. Honig*, 88 N.C.App. 113, 362 S.E.2d 602 (1987) (defendant who was citizen of Holland but lived in North Carolina **was not** subject to attachment on ground of nonresidence).]

b) A defendant who is absent from the state for an indefinite period of time, with no intention of returning within a period reasonably definite, is a nonresident for purposes of attachment. [*Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927) (defendant who was domiciled in NC but resided in NY for period of time before attachment was subject to attachment on ground of nonresidence).]

4. A domestic corporation, whose president, vice president, secretary or treasurer cannot be found in the state after due diligence.

5. A foreign corporation.

III. Procedure to Secure Order of Attachment

A. Affidavit or verified complaint. [G.S. § 1-440.11]

1. The plaintiff or the plaintiff's agent or attorney initiates a request by filing an affidavit or verified complaint with the clerk in the county where the lawsuit has been or is being commenced.

2. The form is AFFIDAVIT IN ATTACHMENT PROCEEDING (AOC-CV-300).

3. The affidavit or verified complaint must include:

a) A statement that plaintiff has commenced or is about to begin (concurrently with the filing of a complaint or motion to extend time) an action to secure a judgment for money and the amount sought in the complaint.

b) The nature of the action.

(1) The affidavit must show the specific nature of the cause of action so the clerk may determine whether a cause of action exists. [*Bacon v. Johnson*, 110 N.C. 114, 14 S.E. 508 (1892).]

(2) The clerk may not issue an order if the affidavit fails to show a cause of action, for example, shows a contract that could not be enforced because of the statute of frauds. [*Knight v. Hatfield*, 129 N.C. 191, 39 S.E. 807 (1901) (judge dissolved attachment because complaint and affidavits of both parties indicated that the oral contract on which the action for breach of contract was based was unenforceable because it violated the statute of frauds).]

(3) If the action is for breach of contract, the affidavit must allege that plaintiff is entitled to recover the amount for which the judgment is sought over and above all counterclaims known to the plaintiff.

c) The ground or grounds for attachment. (See section II.B at page 34.3 for list of allowable grounds.

(1) If the attachment is sought on the grounds that the defendant is a nonresident, a foreign corporation, or domestic corporation whose officers cannot be found in the state after due diligence, the statute indicates that a statement of the grounds on which it is brought is sufficient. [*Branch v. Frank,* 81 N.C. 180 (1879) (affidavit stating that "defendants are nonresidents of this state" was sufficient).] However, federal cases dealing with due process requirements for prejudgment remedies have stressed the need for the affidavit to include specific allegations and supporting facts to ensure against arbitrary procedure. [*Mitchell v. W.T. Grant Co*., 416 U.S. 600 (1974); *Hutchinson v. Bank of N.C.,* 392 F. Supp. 888 (M.D.N.C. 1975).] Therefore, the safer practice is to require an affidavit indicating steps taken to determine that defendant is a nonresident, foreign corporation, or domestic corporation whose officer cannot be found.

(2) If the attachment is sought on grounds that the defendant has done, or is about to do, an act with intent to defraud creditors (in other words, is a resident avoiding service or leaving the state, or removing property from the state, or secretly disposing of property), in addition to alleging the ground, the affidavit must allege the facts and circumstances to support the allegation. **The most critical part of an affidavit on grounds alleging intent to defraud creditors is that it must state the specific facts and circumstances, not mere conclusions, supporting the ground on which the attachment is sought.**

(a) **Omission of underlying facts is fatal to the attachment.** [*First National Bank v. Tarboro Cotton Factory*, 179 N.C. 203, 102 S.E. 195 (1920); *Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980).]

(b) An affidavit that defendants "are now or about to sell, transfer, hide, encumber or otherwise dispose of assets of the above referenced corporation" is not sufficient

because it is unsupported by facts. [*Nelson v. Hayes*, 116 N.C.App. 632, 448 S.E.2d 848, *review denied*, 338 N.C. 519, 452 S.E.2d 814 (1994).]

(c) Affidavit made on information and belief must give the sources of information and recite positive facts reasonably supporting the belief.

(d) Plaintiff's mere suspicion that defendants committed an unrelated fraudulent act will not support issuance of an order of attachment to prevent another anticipated fraudulent act. In malicious prosecution lawsuit, affidavit that: "Defendants, Betty and Charles Sharpe, are believed to have destroyed a house belonging to them in Alexander County, by fire, one week after obtaining a $5,000 increase in insurance coverage on that property" was no more than a rumor with no evidence to support it. [*Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980).]

(e) Affidavit alleging "Defendant is about to assign, dispose of its property with intent to defraud plaintiff" is insufficient because it does not set forth the grounds upon which the belief is based. [*First Nat'l Bank v. Tarboro Cotton Factory*, 179 N.C. 203, 102 S.E. 195 (1920).]

(f) Fact that a resident debtor has written, or is about to write, checks to pay a portion of his indebtedness, and at the same time refuses to pay other creditors, does not constitute secreting or disposing of property with intent to defraud creditors. [*Stephens Howard Co. v. Baer*, 203 N.C. 355, 166 S.E. 77 (1932).]

4. The clerk, in his or her discretion, may allow an affidavit for attachment to be amended any time before judgment in principal action. [G.S. § 1-440.11(c)]

a) Amendment of an insufficient affidavit relates back to the beginning of the attachment proceeding.

(1) No rights based on the irregularity can be acquired by a third party by a subsequent attachment's intervening between the original affidavit and the amendment. [G.S. § 1-440.11(d)]

b) The clerk may allow an amendment even though the affidavit was wholly insufficient at beginning. [G.S. § 1-440.11(c); *Thrush v. Thrush*, 246 N.C. 114, 97 S.E.2d 472 (1957).]

B. Bond. [G.S. § 1-440.10]

1. If the clerk decides to issue an order of attachment, the plaintiff must furnish a bond before the clerk issues the order.

2. The bond is located on the backside of AFFIDAVIT IN ATTACHMENT PROCEEDING (AOC-CV-300).

3. A clerk who issues an order of attachment must set the amount of the bond.

4. **Failure to set an adequate amount of the bond may subject the clerk to liability because setting the bond is not a judicial act, but rather a ministerial one for which the clerk does not have judicial immunity.**

5. Considerations in determining the amount of the bond.

a) The bond must be set at an amount necessary to afford reasonable protection to defendant for the property to be taken. Thus, the clerk must consider all the potential harm to the defendant for the taking of his or her property during the period before judgment is entered.

b) The minimum amount of the bond is $200. **In most cases the minimum will be an insufficient amount.**

c) The bond should be set high enough to protect the defendant fully against loss of property seized, costs of the action, including storage of property, and any damages.

d) The clerk should not set the bond based solely on the amount of money sought in the complaint, but should consider the **kinds and value of property that is likely to be seized** by the sheriff under the order of attachment **and the effects of deprivation of the property on the defendant. For example, lost profits; seizing a business bank account that has the funds to make a payroll; or seizing equipment of a restaurant that will put the restaurant out of business.**

e) When real property may be seized, the clerk should inquire as to the circumstances regarding the property. For example, whether the property is scheduled for sale or the defendant has applied for a loan with the intention of using the property as collateral.

f) **Example 1:** Plaintiff files an action for money owed seeking $100,000 for assault by the defendant. He seeks an order of attachment alleging in the affidavit that the defendant has or is in the process of assigning his personal property to avoid

the claim. The plaintiff indicates that one week ago the defendant transferred title to his 2001 Lexus to his 30-year old son and he believes the defendant is about to transfer his stocks to this son. The stock certificates, which are held by a local stockbroker, have a fair market value of $250,000 and are the only assets that can be seized under the order now that the car has been transferred. The plaintiff asks that you issue an order of attachment. In setting the bond, the clerk should consider that the plaintiff is seeking a $100,000 judgment and that the sheriff will probably be able to seize assets valued at $100,000 to hold until judgment. In seizing the stock certificates, the defendant will lose the right to sell those assets or use them as collateral or for any other purpose until final judgment.

g) **Example 2:** Assuming the same facts as Example 1, but rather than stock certificates, the defendant owns a tract of land worth $250,000 that plaintiff indicates defendant is about to transfer to his son. In setting the bond, the clerk should consider that the plaintiff is seeking a $100,000 judgment and that the sheriff will levy on real property worth $250,000. Since the property levied on is real property, the defendant will be able to use the property until final judgment but loses the ability to sell the property or give it as collateral for a loan. But the amount of bond might be entirely different if the defendant were scheduled to close on the sale of the property in the next few days.

h) **Example 3:** Plaintiff files an action for money owed seeking $100,000 for assault by the defendant and seeks an order of attachment indicating that the ground for attachment is that the defendant lives in New York and therefore is a nonresident. The plaintiff is not aware of any property that the defendant owns in North Carolina but asks that you issue an order of attachment. In setting the bond, the clerk should consider that although the plaintiff is seeking a $100,000 judgment, the sheriff will probably not be able to seize any property under the order of attachment, and therefore this might be a case where the $200 minimum is adequate. However, usually a plaintiff does not seek attachment unless he or she knows of some property in North Carolina that the sheriff can reach.

6. A defendant who believes the plaintiff's bond is too low may object to the bond, and the clerk may require an increase if he or she determines that an increase is necessary to provide adequate protection to the defendant. See section VI.D at page 34.19.

7. The bond must be signed by the plaintiff and at least one surety. [G.S. § 1-440.8]

a) The surety may be a surety company licensed to do business in North Carolina or one or more individual sureties.

b) When the plaintiff is a corporation, the clerk should make sure a proper person signs the bond; i.e., an officer of the corporation or a person specifically authorized to sign bonds on behalf of the corporation. The person signing the bond on behalf of the corporation is not always the person who signed the attachment affidavit.

c) If individual sureties are used, the clerk may require more than one surety.

(1) Although the clerk can allow individual sureties, **the better practice is to require a corporate surety or cash bond. Because of potential liability some clerks refuse to accept individual sureties.** If an individual surety is used, the clerk should try to get the promise backed by an assignment of a certificate of deposit or some other security.

(2) Each individual surety must execute an affidavit that he or she is a resident of North Carolina and is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities. [G.S. § 1-440.8] The surety would be able to claim the full statutory exemptions under G.S. Chapter 1C in an action on the bond.

8. The condition of the bond is that the plaintiff pay all costs that may be awarded to defendant and all damages that defendant may sustain by reason of the attachment if the order is dissolved, dismissed, or set aside by the trial court, or if plaintiff fails to obtain judgment against defendant. [G.S. § 1-440.10(2)]

a) **If a cash bond is taken, the plaintiff must also sign a written bond** with this condition on it so conditions for forfeiture exist.

9. The clerk must approve the bond only if he or she determines that the amount of the bond is sufficient and that the surety can pay if called upon.

C. Issuance of order. [G.S. § 1-440.12]

1. If the clerk finds to his or her satisfaction that the allegations in the affidavit are true and the clerk approves the bond posted by plaintiff, the clerk must issue an order of attachment.

2. The clerk must look at the allegations in the affidavit to make sure that they are adequate. The questions for the clerk are: What factual allegations in the affidavit does the clerk find to be true, and are those allegations sufficient to support an order of attachment?

3. If the attachment is sought because debtor is leaving the state, keeping himself or herself concealed, disposing of or concealing property, or moving property out of the state, the plaintiff must allege sufficient facts to show that the act is being done with the intent to defraud creditors or to avoid service of process. See section III.A.3.c at page 34.5.

4. The form is ORDER OF ATTACHMENT (AOC-CV-301).

5. The order shall:

   a) Show the venue, the court in which action has been, or is being, commenced and the title of action.

   b) State that an affidavit has been filed, that a bond has been executed and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit are true.

   c) Run in the name of the State of North Carolina and be directed to the sheriff of a designated county.

   d) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county that is subject to attachment or so much as is necessary to satisfy the plaintiff's demand (the amount sought in the complaint), together with costs and expenses.

      (1) In most instances plaintiff has already identified which of defendant's property he or she wishes to have the sheriff seize. However, the clerk should not list specific property in the order. The plaintiff may communicate directly with the sheriff about specific property the plaintiff wishes to have seized.

   e) Show the date of issuance.

   f) Direct that the order be returned to the clerk in the county in which the action is pending.

6. The clerk may issue the attachment order at the time the summons is issued or any time thereafter until judgment in the principal action.

   a) Generally, an attachment is sought at the same time as the complaint in principal action is filed. Both the order of attachment and summons in principal action are issued at the same time.

   b) An order of attachment may <u>not</u> be issued after judgment in the principal action. After judgment only a writ of execution may issue. [G.S. § 1-440.6(b)]

7. At the request of the plaintiff, the clerk may issue separate orders of attachment to sheriffs of several different counties in which defendant may have property. [G.S. § 1-440.13]

8. At the same time an order is issued, upon request of the plaintiff, the clerk must issue a summons to a garnishee. [G.S. § 1-440.22] See section VIII at page 34.21 for a discussion of garnishment.

9. An order of attachment is valid for 10 days from issuance. [G.S. § 1-440.16.]

   a) If the sheriff is unable to levy on property within 10 days from issuance, the sheriff must return the order to the clerk.

   b) Levy on property more than 10 days after issuance of the order is invalid. [*Robinson v. Robinson*, 10 N.C.App. 463, 179 S.E.2d 144 (1971).]

10. The clerk may issue alias and pluries attachment orders after the original order is returned with no property found or, if in the opinion of the plaintiff, insufficient property was seized under earlier order. [G.S. § 1-440.13(b)] This is not the same as an alias and pluries summons because it can be issued any time after the return of the previous order of attachment without any effect on the action.

IV. Sheriff's Duties Under Order

A. Sheriff must levy on a sufficient amount of defendant's property to satisfy the attachment order.

B. All of defendant's property subject to levy under execution or that can be reached through supplemental proceedings is subject to levy under attachment including:

1. Real property.
2. Tangible personal property in hands of defendant.
3. Goods stored in warehouse.
4. Stock in a corporation.
5. Tangible personal property belonging to the defendant but in a third party's possession.
6. Intangible personal property, such as debts owed to the defendant.

C. Unlike a writ of execution, the sheriff is not required to levy upon personal property before real property under an order of attachment.

D. The sheriff serves an order on defendant by levying on property; he or she does not have to serve a copy of the order of attachment on the defendant.

1. However, the sheriff must serve a summons to garnishee by delivering to the garnishee a copy of the order of attachment, summons to garnishee and notice of levy. [G.S. § 1-440.25]

E. The sheriff levies on real property by listing the property on the return of the order of attachment.

1. Does not have to go upon land.

2. Description is sufficient if it will distinguish and identify the land. [*Grier v. Rhyne*, 67 N.C. 338 (1872).]

F. The sheriff levies on personal property by seizing it and placing it in his or her control.

G. After levying on property, the sheriff shall promptly make a written return to the clerk showing all property on which levied. [G.S. § 1-440.16]

H. The sheriff must store and keep safe the property on which the sheriff levied until judgment in the principal action. [G.S. § 1-440.35]

1. The sheriff may require the plaintiff to advance the amount required to care for property. If the plaintiff refuses to advance the amount required after the order of attachment has been issued, the sheriff may seek a hearing before the clerk to dissolve the attachment.

2. Expense in caring for property is taxed as costs in the principal action.

3. The sheriff may not allow the plaintiff to use personal property attached pending trial in the principal action. [*Saliba v. Mother M. Agnes*, 193 N.C. 251, 136 S.E. 706 (1927).]

4. Under certain circumstances, the sheriff may sell the property before judgment in the principal action. See section V.D at page 34.13.

V. Clerk's Responsibilities When Property Levied On By Sheriff

A. Real property. [G.S. § 1-440.33]

1. When an order of attachment is issued, the plaintiff may file a notice of issuance of the order with the clerk in the county in which the defendant may own real property (which may include the county in which the order of attachment was issued).

a) Upon receipt of notice of issuance of order, the clerk must promptly docket the notice as an order of attachment and index it.

2. When the sheriff returns an order of attachment that indicates levy on real property, the clerk must promptly clock in the return, note the levy on the judgment docket, and index it if no notice of issuance of order had been filed and indexed earlier. If abstracted, the note on the judgment docket should indicate: "Levy on real property (*describe property or state as described in (name of county) case file #.....)*."

3. The sheriff also sends a certification of levy (usually a copy of the attachment levy) to the clerk in the county where the land on which levied is located if different from county from which attachment issued. A clerk receiving the certificate must docket and index it.

4. The lien on the real property relates back to the time of placing the notice of issuance of an order on the judgment docket or, if no notice

was docketed, the lien attaches at the time the clerk indexes the sheriff's levy on the real property.

B. Personal property.

1. When the sheriff's return indicates personal property has been levied on, the clerk files the return in the case file. The notice of the levy is not indexed or abstracted.

2. The lien attaches upon levy.

C. If two or more orders of attachment are served simultaneously, the liens attach simultaneously. [G.S. § 1-440.33(e)]

1. If real property, the lien attaches as provided in section V.A.4 at page 34.12.

2. If personal property is sold after judgment and the funds are not sufficient to fully pay all of the judgments, the funds are prorated according to amount of indebtedness of the defendant to each of the creditors.

D. Order to sell property before judgment in the principal action. [G.S. § 1-440.44]

1. In certain circumstances, the sheriff may request that the clerk authorize the sale of the property seized before judgment in the principal action.

2. The clerk may order the sale if the property seized

a) Is perishable;

b) Will materially deteriorate in value pending litigation; or

c) Will likely cost more than one fifth of its value to keep pending final determination of the action.

3. Because the clerk may not order a sale if defendant was discharged from attachment by posting a bond within 10 days after seizure, the clerk cannot issue an order based on property that will deteriorate in value or that will cost more than one fifth of the value to store sooner than 10 days after seizure. However, the clerk can issue an order to sell perishable property sooner than 10 days after seizure.

4. The clerk sets procedural details of the sale. In the proper circumstances, the clerk may look at the statutes on Judicial Sales and Execution Sales for some guidance. See Articles 29A and 29B in Chapter 1 of the General Statutes.

5. The proceeds of the sale are held by the sheriff until judgment in the principal action.

6. Under authority to fix procedural rules, the clerk may stop sale and order new sale. [*North State Savings & Loan Corp. v. Carter Development Co.*, 80 N.C.App. 422, 350 S.E.2d 374 (1986), *review denied*, 319 N.C. 405, 354 S.E.2d 716 (1987).]

VI. Discharge, Dissolution or Modification of Order of Attachment

A. Defendant posts bond. The defendant may have the attachment discharged by giving a bond for property attached. [G.S. § 1-440.39]

1. The clerk should be careful when taking this bond. The bond must be a written bond in a certain amount. Because the condition is that the surety will pay any judgment entered against the defendant, a corporate surety is very unlikely to sign this bond. Usually the bond will have to be a cash bond.

2. The defendant must request discharge by motion before the clerk (or judge).

   a) Although the statute is silent regarding whether the motion can be heard ex parte, it should be heard without notice because the defendant has the absolute right to post the bond.

   b) Giving a bond to discharge the attachment constitutes a general appearance and waives requirement for service of summons in principal action. [G.S. § 1-440.39; *Mitchell v. Elizabeth River Lumber Co*., 169 N.C. 397, 86 S.E. 343 (1915).]

3. The form is DEFENDANT'S MOTION TO DISCHARGE ATTACHMENT (AOC-CV-902M).

4. The clerk requires a bond of the lesser of double the value of the judgment prayed for by plaintiff or double the value of the property attached.

   a) To determine the bond, the clerk first must determine the value of the property attached. Parties may submit affidavits as to value of property.

   b) If the value of the property attached is less than the amount sued for, the clerk sets the bond at double the value of the property attached.

   c) If the property attached is worth the same or more than the amount sued for, the clerk should set the bond at double the amount sought in the complaint.

5. The condition of bond is:

   a) If for double the amount of the judgment prayed for, that defendant will pay to plaintiff the amount of judgment rendered and costs.

   b) If for double the value of property seized, that defendant will pay to plaintiff the amount equal to the value of property if judgment is rendered against defendant.

6. **If a cash bond is taken, the defendant must also sign a written bond** with this condition on it so conditions for forfeiture exist.

7. Upon receiving the required bond, the clerk issues an order discharging the attachment.

   a) The clerk should order the defendant to serve a copy of the order on the plaintiff by a method authorized under Rule 5.

   b) The clerk when appropriate should note that the attachment has been canceled and when appropriate note on the judgment abstract that the defendant posted a bond discharging the attachment.

   c) If the sheriff of another county levied on real property, the clerk should send a copy of the order of discharge to the clerk of the other county thereby notifying that clerk that the attachment is cancelled because the defendant posted a bond discharging the attachment.

      (1) If the sheriff had levied on real property, the clerk in the county where the property is located should indicate on the judgment docket where the levy was recorded that "attachment discharged; defendant posted bond."

   d) The clerk should also direct the defendant to take a certified copy of the order of discharge to the sheriff of any county where property was levied on under the order of attachment.

      (1) Upon receipt of the order, the sheriff returns all personal property seized to defendant.

8. The plaintiff may except to the surety on the defendant's bond. [G.S. § 1-440.42(b)]

   a) Exception to the surety may be filed at any time before judgment in the principal action.

   b) The statute requires that the justification procedure under the arrest and bail statute [G.S. § 1-422] be followed in excepting to surety.

      (1) Within 10 days after plaintiff files exception to defendant's bond, the clerk notifies the surety and defendant of the time and place for them to appear for justification.

      (2) The clerk must set the time for justification between 5 and 10 days after the notice served.

      (3) The notice can be given to defendant or defendant's attorney by mail.

   c) The clerk examines each surety under oath as to whether the surety is a resident and freeholder (owns real property) within the State and is worth the amount specified in the bond exclusive of exempt property. [G.S. § 1-423]

(1) The justification is found on side two of DEFENDANT'S MOTION TO DISCHARGE ATTACHMENT (AOC-CV-902M).

(2) An individual surety is entitled to the full statutory exemptions.

d) The examination must be reduced to writing and signed by each surety if required by the plaintiff. [G.S. § 1-424]

e) If the clerk finds the surety sufficient, the bond stands.

f) If the clerk finds the surety insufficient, the clerk must order the defendant to give a new bond with a new surety.

(1) If defendant does not post a new bond, the clerk issues a new order of attachment for sheriff to re-seize property released on giving of previous bond.

9. Plaintiff may move to require defendant to increase the amount of the bond. [G.S. § 1-440.40(a)]

a) The clerk may increase the bond if necessary to provide adequate protection to the plaintiff.

b) Although the statute does not specify, the motion to determine whether to increase the bond should not be heard ex parte. The plaintiff must serve a copy of the motion on the defendant under Rule 5 service.

c) If the clerk orders an increase, the clerk in the order setting the new amount of the bond should also set the specific period of time by which the increased bond must be posted.

d) If a new bond is not given within the time set, the clerk must issue an order of attachment for sheriff to reseize the property released on defendant's posting the previous bond.

10. The filing of a bond does not bar the defendant from challenging the validity of the order of attachment. [*Armstrong v. Aetna Insurance Co.*, 249 N.C. 352, 106 S.E.2d 515 (1959).] But it does stop a defendant from challenging any procedural defects in the process. [*Main Street Shops, Inc., v. Esquire Collections, Ltd.*, 115 N.C.App. 510, 445 S.E.2d 420 (1994).]

B. Defendant moves to dissolve order of attachment. [G.S. § 1-440.36]

1. The defendant may move to dissolve the order of attachment at any time before judgment in the principal action.

2. Although the statute does not specify, the motion to determine whether to increase the bond should not be heard ex parte. The plaintiff must serve a copy of the motion on the defendant under Rule 5.

3. Examples of reasons for dissolving order of attachment are:

a) Failure to get personal service of the summons within 30 days after issuance of order of attachment (when an order of attachment is issued before the summons is served in the principal action); failure to begin service by publication within 31 days after issuance of the order of attachment; or failure to complete service by publication as required by Rule 4(j)(9)c. [G.S. § 1-440.7; *Accident Indemnity Insurance Co. v. Johnson*, 261 N.C. 778, 136 S.E.2d 95 (1964).] (Although Rule 4 was amended in 2002 to allow 60 days for service of a summons, G.S. § 1-440.7 was not amended.)

b) The sheriff levied on property more than 10 days after issuance of the order. [*Robinson v. Robinson*, 10 N.C.App. 463, 179 S.E.2d 144 (1971).]

(1) If the attachment is dissolved because of failure to serve in time, the plaintiff can request the clerk to issue another (alias and pluries) order of attachment.

(2) The clerk need not require a new affidavit if the grounds alleged in the original affidavit are still relevant.

c) Defendant filed bankruptcy petition before attachment. [*Ward v. Hargett*, 151 N.C. 365, 66 S.E. 340 (1909).]

d) It is apparent on the face of the affidavit that plaintiff cannot recover in the action. [*Knight v. Hatfield*, 129 N.C. 191, 39 S.E. 807 (1901) (complaint indicated contract for sale of land was not in writing and therefore in violation of statute of frauds).]

e) The attachment is based on the ground of fraud and the affidavit does not give sufficient facts on which to conclude fraud. [*Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980).]

f) If defenses relate to issues in the principal case, such as lack of personal jurisdiction, the judge must hear the matter and decide whether to dissolve the attachment when ruling on the motion to dismiss for lack of jurisdiction.

4. When the defect alleged as grounds for dissolution appears on the face of the record, no issues of fact arise and the clerk may determine on the record whether to dissolve the attachment.

a) Clerk to find facts on which ruling made. [*Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980).]

5. When the defect does not appear on the face of the record and no jury trial is demanded before the hearing, the clerk may determine, based upon affidavits filed, whether to dissolve the attachment.

a) Clerk to find facts on which ruling made. [G.S. § 1-440.36(c); *Connolly v. Sharpe*, 49 N.C.App. 152, 270 S.E.2d 564 (1980).]

6. When the defect does not appear on face of record and a party demands a jury trial, the issues are determined by a judge, not clerk, at the same time as principal action unless a judge, on motion of party, for good cause shown, orders an earlier or separate trial. [G.S. § 1-440.36(c)]

7. Appeal from order dissolving an attachment is to a judge of district or superior court having jurisdiction of the principal action.

a) Appeal is de novo. [G.S. § 1-301.1; *Hiscox v. Shea*, 8 N.C.App. 90, 173 S.E.2d 591 (1970).]

8. If the plaintiff appeals an order of dissolution, the order is stayed until the appeal is disposed of, which means the attachment stands until the appeal resolves it. [G.S. § 1-440.38]

a) The clerk may require the plaintiff to execute an additional bond if necessary to protect defendant.

9. If the attachment is finally dissolved, the clerk should note that the attachment has been canceled and note on the judgment abstract that the attachment was dissolved.

10. If the sheriff of another county levied on real property, the clerk should send a copy of the order of dissolution to the clerk of the other county thereby notifying that clerk that the attachment is cancelled because the attachment was dissolved.

a) If the sheriff had levied on real property, the clerk in the county where the property is located should indicate on the judgment docket where the levy was recorded that "attachment dissolved."

11. The clerk should also direct the defendant to take a certified copy of the order of discharge to the sheriff of any county where property was levied on under the order of attachment.

a) Upon receipt of the order, the sheriff returns all personal property seized to defendant.

C. Defendant moves to modify original order of attachment. [G.S. § 1-440.37]

1. Defendant may move for order to modify original order of attachment.

a) The motion may be heard on affidavits.

b) Although the statute does not specify, the motion to determine whether to increase the bond should not be heard ex parte. The plaintiff must serve a copy of the motion on the defendant under Rule 5.

2. Examples of reasons for modification are defendant needs the property seized to operate his business and wishes to substitute other property for the property seized or defendant argues that sheriff seized too much property and wants some of it released.

3. A clerk who modifies the attachment must make provisions about bonds as necessary to protect rights of the parties.

4. If the plaintiff appeals an order modifying the attachment order, the modification order is stayed until the appeal is resolved. [G.S. § 1-440.38]

   a) If necessary to protect the defendant, the clerk may order the plaintiff to post an additional bond to indemnify the defendant against losses suffered because of continuation of the lien pending appeal.

D. Defendant moves to increase amount of plaintiff's bond. [G.S. § 1-440.40(a)]

1. Upon motion by the defendant, the clerk may increase the amount of the bond if necessary to provide adequate protection to defendant.

2. Although the statute does not specify, the motion to determine whether to increase the bond should not be heard ex parte. The plaintiff must serve a copy of the motion on the defendant under Rule 5.

3. The motion may be made any time before judgment in the principal action.

4. The plaintiff cannot request a jury trial on this motion. [*Palmer v. M.R.S. Development Corp.*, 9 N.C.App. 668, 177 S.E.2d 328 (1970).]

5. The clerk is not required to make findings of fact. [*Collins v. Talley*, 135 N.C.App. 758, 522 S.E.2d 794 (1998).]

E. Defendant excepts to surety on plaintiff's bond. [G.S. § 1-440.40(b)]

1. May except at time before judgment in the principal action.

2. Follow same justification process under arrest and bail statutes as set out in section VI.A.8 at page 34.15 for excepting to defendant's bond.

F. Plaintiff moves to dissolve or set aside the order of attachment.

1. The statute does not set out a procedure for plaintiff to set aside the order of attachment, but plaintiffs sometimes file this motion. The clerk must set the procedural details under the authority given by G.S. § 1-440.9.

2. Although the statute does not specify, the motion to determine whether to increase the bond should not be heard ex parte. The plaintiff must serve a copy of the motion on the defendant under Rule 5.

3. If the order of attachment is dissolved, the issue is what happens with the bond.

4. The statute provides that if the order of attachment is for any reason set aside, all bonds shall be delivered to the defendant. [G.S. § 1-440.45] But the statute seems to assume that there is a written surety bond that is delivered to the defendant, who then initiates a proceeding to determine damages under a bond.

   a) The defendant must either file a motion in the cause or bring an independent action to determine the damages. [*Godwin v. Vinson*, 254 N.C. 582, 119 S.E.2d 616 (1961); *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).]

   b) Because the determination of damages is a civil controversy, a motion in the cause to determine the damages should be set before a judge in the division in which the principal action is pending or was filed.

   c) If all parties (including the surety) consent in writing to entry of an order disposing of the bond, the clerk, under the authority to enter consent judgments, could enter the judgment.

   d) **If the plaintiff posted a cash bond, the clerk should hold the money until the damages have been determined.**

VII. Property Claimed by Intervening Third Party [G.S. § 1-440.43]

A. Third person who claims the property or an interest in the property that has been attached may apply to the clerk to have the order dissolved or modified or the bond increased, on the same conditions and methods available to defendant discussed above.

B. A third party claiming that property belongs to him or her may intervene and secure the property by filing an affidavit of his or her right to possession of the property.

C. Procedure for intervention is that set out for claim and delivery. [G.S. §§ 1-482 to -484]

1. The third party intervenor files a written bond of double the value of the property with the sheriff.

   a) The bond is for the delivery of the property to the party entitled to it and for costs and damages awarded and payable to the plaintiff and defendant.

   b) The bond must be executed by one or more sureties.

      (1) The claim and delivery statute, like the attachment statute, authorizes the clerk to take individual sureties. However, as indicated earlier, most clerks require corporate sureties in attachments.

      (2) Sureties must sign an affidavit that they each are worth double the value of the property. This statute prohibits "splitting" the bond. [G.S. § 1-482]

c) Third party may intervene without giving a bond if the third party does not ask for possession pending trial.

2. The sheriff serves a copy of affidavit and bond on plaintiff and defendant.

3. Determination of who is rightfully entitled to the property is decided in the main action.

4. When a third party files a bond, the sheriff delivers property to the third party unless the plaintiff executes another bond similar to that made by third party.

a) Plaintiff's bond should be same as original bond except that it should promise to return property to the person entitled to it with payment of any damages.

D. Motion to intervene must be made upon timely application. [*Loman Garrett, Inc. v. Timco Mechanical, Inc.*, 93 N.C.App. 500, 378 S.E.2d 194 (1989) (bank's motion to intervene was not timely when bank had notice of proceeding from the time complaint was filed but waited to file motion to intervene until hearing for summary judgment on the underlying action).]

E. A third person claimant is not compelled to intervene; any judgment between plaintiff and defendant would not affect the third person. [McIntosh, NORTH CAROLINA PRACTICE AND PROCEDURE West Publishing Co., St. Paul, Minn. § 2128.]

VIII. Garnishment [G.S. § 1-440.21]

A. Garnishment under an attachment is an entirely separate procedure from garnishment for child support set out in G.S. § 110-136.

B. Garnishment is the procedure used in an attachment to reach tangible personal property owned by defendant but in a third party's (garnishee's) hands or intangible personal property or indebtedness which the third party owes to the defendant.

1. Bank accounts are debts owed by bank (the debtor) to the depositor (the creditor) and are subject to garnishment. [*Merchants Bank v. Weaver*, 213 N.C. 767, 197 S.E. 551 (1938).]

2. Criminal defendant's cash appearance bond in hands of clerk is subject to garnishment but liability for garnishment is limited to the residual money to be returned to defendant upon compliance with appearance bond. Clerk would be liable for returning the bond to defendant when defendant has fully satisfied conditions of the bond if notice of levy has been served on the clerk. [*White v. Ordille*, 229 N.C. 490, 50 S.E.2d 499 (1948).]

C. Garnishment is a proceeding ancillary to attachment and may be used only when an order for attachment is issued.

D. In addition to order of attachment, upon request of the plaintiff, the clerk must issue a summons to garnishee.

1. The form is SUMMONS TO GARNISHEE AND NOTICE OF LEVY (AOC-CV-302).

2. The clerk must also make an additional copy of the order of attachment and the sheriff must serve a copy of the order of attachment along with the summons to garnishee and notice of levy on each garnishee.

E. The garnishee must file an answer with the clerk within 20 days after being served with the summons.

1. The answer must be verified.

2. The answer must indicate whether the garnishee is indebted to defendant or had any property of defendant at the time of service of the summons or at any time between service and the date of the answer; and whether the garnishee knows of anyone else indebted to defendant or holding the defendant's property. [G.S. § 1-440.23]

F. Garnishee fails to answer. If the garnishee fails to file a verified answer after being properly summoned, the clerk enters a conditional judgment for plaintiff against garnishee for the full amount plaintiff sought from defendant together with an amount sufficient to cover plaintiff's costs. [G.S. § 1-440.27]

1. The clerk must issue notice to the garnishee to appear not later than 10 days after service of the notice and show cause why the conditional judgment should not be made final.

a) Appearance is by filing a verified answer.

2. If the garnishee fails to appear and file a verified answer after notice from the clerk or if notice cannot be served because the garnishee cannot be found within the county (original summons to garnishee must have been served), the clerk makes the conditional judgment final.

3. The clerk dockets the judgment against the garnishee.

4. Upon request of the plaintiff, the clerk issues notice of rights, if appropriate, and a special writ of execution.

a) Property seized to be held until judgment in principal action. [G.S. § 1-440.32]

(1) A special execution should be issued since sheriff is ordered to seize **and hold the property**, but not to sell it. Do not use AOC-CV-400.

(2) The clerk may permit garnishee to hold property until judgment in principal action if garnishee puts up bond in same manner on same conditions as defendant's bond. (See section VI.A at page 34.14 for discussion of defendant's bond.)

G. Garnishee admits indebtedness to defendant.

1. If garnishee admits in the answer that he or she was indebted to defendant at time of service of garnishment process or at some date thereafter, the clerk enters judgment for plaintiff against garnishee for the smaller of:

   a) Amount garnishee admits he or she owes to defendant (or has owed at any time from the date of service until answer); or

   b) Full amount for which the plaintiff prayed judgment against defendant, together with plaintiff's costs.

2. The garnishee may assert any right of set off or defense that the garnishee may have against the defendant in the principal action. [*Cannon-Torrence Co. v. Marlott*, 163 N.C. 549, 79 S.E. 1109 (1913).]

3. Garnishee who pays defendant after being served with a summons is liable to the plaintiff for that amount. [*Newberry v. Meadows Fertilizer Co*., 203 N.C. 330, 166 S.E. 79 (1932).]

4. If the debt owed is wages accrued within 60 days of service of the summons to garnishee, the wages are exempt from seizure under garnishment. [G.S. § 1-362; *Goodwin v. Claytor*, 137 NC. 224, 49 S.E. 173 (1904); *Harris v. Hinson*, 87 N.C.App. 148, 360 S.E.2d 118 (1987).] Based on debtor's affidavit or other evidence, the clerk must find that the debt levied upon is wages needed for the support of the debtor's family.

5. The garnishee may appeal a judgment only on the grounds that the garnishee is not indebted to the defendant. [*Baker v. Belvin*, 122 N.C. 190, 30 S.E. 337 (1898).]

H. Garnishee admits possession of defendant's property. [G.S. § 1-440.28]

1. If the garnishee admits that he or she has possession of personal property that belongs to the defendant and the garnishee does not claim a lien or other interest in the property, the clerk must enter judgment against the garnishee requiring the garnishee to deliver the property to the sheriff.

2. Upon request of the plaintiff, when the garnishee fails to deliver the property to the sheriff, the clerk may issue a writ of possession of personal property.

3. If the sheriff is unable to seize the property, the clerk schedules a hearing as provided under section VIII.I at page 34.24.

4. The garnishee may assert any right of set off or defense that the garnishee may have against the defendant in the principal action.

   a) **Example.** Sheriff serves an order of attachment, summons to garnishee and notice of levy on Bank of America for potential judgment of $12,000 against its depositor, James Jefferson, who is the defendant. James Jefferson also has a loan from Bank of America for $8,000, which is in default.

Bank can withhold $8,000 from Jefferson's account as a set off for money due to it.

5. If the garnishee asserts a lien or other valid interest in defendant's property in the garnishee's possession that was acquired before the summons was served on garnishee, the clerk may not require the garnishee to surrender property. [G.S. § 1-440.28(g)]

   a) Such property may only be sold subject to garnishee's lien or interest.

   b) The clerk may issue an order to garnishee that if the lien is satisfied, at that point the garnishee must turn the property over to the sheriff.

   c) **Example**. Sheriff serves an order of attachment, notice of garnishment and levy against Foreign Cars Repair, Inc. for a potential judgment of $12,000 against Robert Smith. Foreign Cars is repairing Mr. Smith's 2006 Jaguar. Foreign Cars can reply that it has possession of Mr. Smith's car but that it has a lien against the car under G.S. § 44A-2 for repairing the car.

I. Garnishee transfers property to defendant after service of summons and levy. If garnishee admits that at, or after, the date of service of the garnishment process, the garnishee possessed property belonging to defendant (in which the garnishee did not claim a lien) but that he or she does not now have the property, the clerk sets a hearing to determine the value of the property.

   1. The clerk must give parties notice of the hearing as the clerk deems reasonable and by such means as he or she deems best.

      a) G.S. § 1A-1, Rule 6(d) requires notice of hearing to be served not later than 5 days before the time specified for the hearing.

   2. A hearing is not required if the plaintiff, defendant and garnishee agree upon the value of the property.

   3. If one of the parties requests a jury trial, there is no hearing before the clerk.

   4. At the hearing, the clerk determines value of property and enters judgment against garnishee for the <u>smaller</u> of:

      a) An amount equal to the value of the property in question: or

      b) The full amount plaintiff sought from defendant together with an amount the clerk thinks will cover plaintiff's costs.

   5. Value of the property may be determined based on affidavits.

   6. The clerk dockets the judgment.

      a) Upon request of plaintiff, the clerk begins collection proceedings by issuing a notice of rights, if appropriate, and writ of execution.

(1) Property seized by the sheriff is held until judgment in the principal action. [G.S. § 1-440.32]

(2) The clerk should use a special execution ordering the sheriff to seize **and hold the property** but not to sell it. Do not use AOC-CV-400.

7. The garnishee may assert any right of set off or defense that he or she may have against the defendant in the principal action.

J. Garnishee's debt not yet due. If the garnishee answers that the debt or the personal property due to be delivered to defendant will become payable or deliverable at a future date, the clerk enters judgment against the garnishee requiring him or her at the date the debt is due to pay the plaintiff the smaller of the amount owed by garnishee to defendant or the full amount plaintiff is seeking from defendant plus plaintiff's costs or to enter judgment requiring garnishee to deliver personal property to the sheriff on the date it is deliverable to defendant. [G.S. § 1-440.28(e)]

1. Within 20 days after the garnishee files an answer that the debt is due in the future or that property is deliverable in the future, the plaintiff may file a reply denying that allegation.

2. The filing of a reply raises an issue of fact and requires the question to be determined by jury. See section VIII.K below.

3. Garnishee may assert any right of set off or defense that he or she may have against the defendant in the principal action.

4. Cannot sue garnishee for future military retirement pay not due and owing; could only sue for obligation presently fixed such as unmatured note. Accumulated unpaid military retirement is subject to garnishment. [*Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).]

K. Issue of fact raised, garnishment must be transferred. [G.S. § 1-440.29]

1. Whenever an issue of fact arises in garnishment and a jury trial is demanded, the issues are determined at the trial on the principal action unless judge orders earlier or separate trial. [G.S. § 1-440.30]

2. Issues of fact arise:

a) When garnishee's answer alleges the debt is not due or property is not deliverable until a future date and plaintiff files a reply denying that allegation.

b) When garnishee files an answer denying that he or she owes defendant money or has possession of any property belonging to the defendant, or was indebted to or had in his or her possession at time of the summons is served or thereafter, any property belonging to defendant and plaintiff files a reply within 20 days after the answer is filed alleging the contrary.

3. When the garnishee files an answer from which the clerk cannot determine whether garnishee owes money to defendant or has possession of defendant's property.

L. More than one order served on garnishee. If more than one order of attachment is served on a garnishee, the garnishee may move that the court from which the first order of attachment was issued make all attaching creditors parties to that action to allow questions of priority among the attaching creditors to be determined in that action and in that court. [G.S. § 1-440.33(g); *Hambley & Co. v. H. W. White & Co*., 192 N.C. 31, 133 S.E. 399 (1926).]

IX. Procedure After Judgment

A. When defendant prevails in the principal action, when the attachment is dissolved, dismissed or set aside (the attachment statute does not set out any specific procedure for dismissing or setting aside an attachment), or when the order of attachment is served before the summons and the defendant is not served in the principal action as provided in G.S. § 1-440.7. [G.S. § 1-440.45.]

1. The sheriff must return all money and attached property to the defendant.

2. The clerk delivers the written bond to the defendant so the defendant can file a proceeding to determine damages under the bond. See section IX.B below.

3. If any judgment was taken against a garnishee, the clerk must vacate judgment automatically; no motion need be filed. (For discussion of garnishment see section VIII at page 34.21.)

4. The clerk upon motion of defendant or garnishee may issue orders as necessary to carry out these provisions.

B. When defendant prevails in the principal action, recovery on plaintiff's bond.

1. When defendant prevails in the principal action, he or she may recover on plaintiff's bond by motion in the cause or by bringing an independent action. [*Godwin v. Vinson*, 254 N.C. 582, 119 S.E.2d 616 (1961); *Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).]

a) Because the determination of damages is a civil controversy, a motion in the cause to determine the damages must be filed for hearing before a judge in the division in which the principal action was filed.

b) The motion cannot be heard at the same time as the principal action because defendant's cause of action for damages does not arise until judgment is entered for defendant or until the order of attachment is dissolved or set aside. [*Whitaker v. Wade*, 229 N.C. 327, 49 S.E.2d 627 (1948).]

c) However, if all parties (including the surety on the bond) consent in writing to entry of an order disposing of the bond,

the clerk, under the authority to enter consent judgments, could enter the judgment.

d) **If the plaintiff posted a cash bond, the clerk should hold the money until the damages have been determined.**

2. Independent action would be before a judge.

C. When plaintiff prevails in principal action. [G.S. § 1-440.46]

1. Sheriff to satisfy judgment out of money collected under the attachment.

2. If sufficient money was not collected, sheriff sells the property seized only after a writ of execution is issued by the clerk. The only difference for the sheriff upon receiving the writ of execution is that debtor's property has already been levied upon.

a) Clerk to issue execution (preceded by notice of rights if defendant is individual and resident of North Carolina) on request of plaintiff.

b) Defendant has right to claim exemptions before execution is issued except if the action is one for which no exemptions are authorized such as for child support. [*Gamble v. Rhyne*, 80 N.C. 183 (1879).]

c) If the property to be sold has been levied upon in a county other than the county where the judgment is entered, the clerk must transcribe the judgment to the county where the property is located before issuing an execution to the sheriff of that county.

3. By collecting all evidences of indebtedness held by the sheriff, such as monies due on promissory notes or accounts receivable.

4. If the judgment is not fully satisfied within 6 months after docketing and if the sheriff has evidences of indebtedness that have not been paid, the plaintiff may move for clerk to issue an order to sell those debts.

a) The plaintiff files an affidavit indicating the proceedings followed by the sheriff and disposition of property held by sheriff.

b) The plaintiff also must file an affidavit by the sheriff indicating that the sheriff has tried to collect the debts or evidences of indebtedness but that some remain uncollected.

c) The clerk must give defendant notice of a hearing on the motion by means and such time as clerk deems best.

d) At the hearing the clerk may order the sheriff to sell the debts or may issue any other order.

5. The sheriff returns to defendant any property left after satisfying the judgment.

6. Sometimes plaintiff who prevails in the principal action will seek to have the clerk mark the plaintiff's bond cancelled in order to stop having to pay premiums on the bond. The clerk should not deal with this issue; rather the judge who hears the principal action should handle the issue as part of the judgment in the principal action.

D. If the sheriff has surplus funds under the writ of execution, a third party other than the IRS who claims a superior interest must file a special proceeding to determine who is entitled to proceeds and issue notice of hearing to all parties involved and hold a hearing to determine who has priority. [G.S. § 1-339.71] The IRS may enforce its tax lien on the surplus funds by administrative levy and, in that event, the federal government does not have to institute a special proceeding to determine ownership of the surplus funds or to recover the funds belonging to taxpayer. [*U.S. v. Mauney*, 642 F. Supp. 1097 (W.D.N.C. 1986) (surplus foreclosure funds).] For a fuller discussion of this issue, see discussion in Writs of Execution, Civil Proceedings, Chapter 38.

E. When plaintiff prevails and defendant had put up bond. [G.S. § 1-440.46(d)]

1. If the plaintiff prevails and defendant has posted a bond, the plaintiff is entitled to judgment on bond.

2. Judgment is against both defendant and surety. [*Beck Distributing Corp. v. Imported Parts, Inc.*, 10 N.C.App. 737, 179 S.E.2d 793 (1971).]

3. Judgment on bond should be issued by trial judge as part of judgment in the principal action.