

Article 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

The plaintiff in an action to recover the possession of personal property may claim the immediate delivery of the property as provided in this Article at any time before the judgment in the principal action. (C.C.P., s. 176; Code, s. 321; Rev., s. 790; C.S., s. 830; 1977, c. 753.)

§ 1-473. Affidavit and requisites.

Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or someone in his behalf, showing –

- (1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.
- (2) That the property is wrongfully detained by the defendant.
- (3) The alleged cause of the detention, according to his best knowledge, information and belief.
- (4) That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,
- (5) The actual value of the property. (C.C.P., s. 177; 1881, c. 134; Code, s. 322; Rev., s. 791; C.S., s. 831.)

§ 1-474. Order of seizure and delivery to plaintiff.

(a) Order. – The clerk of court may, upon notice and hearing as provided in G.S. 1-474.1 and upon the giving by the plaintiff of the undertaking prescribed in G.S. 1-475, require the sheriff of the county where the property claimed is located to take the property from the defendant and deliver it to the plaintiff. The act of the clerk in issuing or refusing to issue the order to the sheriff is a judicial act and may be appealed pursuant to G.S. 1-301.1 to the judge of the district or superior court having jurisdiction of the principal action.

(b) Expiration of Certain Orders. – When delivery of property is claimed from a debtor who allegedly defaulted on his payments for personal property purchased under a conditional sale contract, a purchase money security agreement or on a loan secured by personal property, an order of seizure and delivery to the plaintiff for that property expires 60 days after it is issued.

(c) Fee Deposit. – Upon issuance of the order described in subsection (a) of this section, a fee deposit shall be collected by the sheriff from the plaintiff to offset the reasonable and necessary fees and expenses for taking and storing the property seized pursuant to this Article. (C.C.P., s. 178; Code, s. 323; Rev., s. 792; C.S., s. 832; 1973, c. 472, s. 1; 1985, c. 736; 1999-216, s. 6; 2015-55, s. 3(a).)

§ 1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.

(a) The clerk of court, upon the request of the plaintiff, shall issue a notice to the defendant setting a time and place for a hearing before the clerk which shall not be less than 10 days from the date of service of said notice upon the defendant. The notice shall be served on the defendant in any manner provided by the Rules of Civil Procedure for the service of summons. Upon the request of the plaintiff the notice shall contain an order enjoining the defendant from willfully

disposing of the property in any manner, from removing or permitting the removal of the property from the State of North Carolina, or from causing or permitting willful damage or destruction of the property. If in a trial on the merits it is determined that the plaintiff was entitled to the possession of the property, and the defendant after service of notice of the hearing shall have willfully disposed of the property, removed or permitted the removal of the property from the State of North Carolina, or caused or permitted its willful damage or destruction, the defendant may be found in contempt of court and may be fined or imprisoned by the court as provided by law.

(b) Waiver of the rights to notice and hearing shall not be permitted except as set forth herein. At any time subsequent to service of the notice of hearing provided in subsection (a), the clerk of court, upon the request of the plaintiff, shall mail to the defendant at his last known address a form by which the defendant may waive his right to the hearing. Upon the return of the form to the clerk of court, bearing the signature of the defendant and that of a witness to the defendant's signature (which witness shall not be a party to the action or an agent or employee of a party to the action), the clerk in his discretion may dispense with the necessity of a hearing and may proceed to issue the order of seizure prescribed by G.S. 1-474.

(c) In addition to any other forms substantially complying with the requirements of the preceding subsections, form (1) below may be used to give the notice provided for in subsection (a) above and form (2) below may be used to waive the hearing as provided in subsection (b) above:

(1) READ THIS NOTICE.

WARNING: DO NOT WILLFULLY DISPOSE OF, REMOVE OR PERMIT THE REMOVAL FROM THE STATE OF NORTH CAROLINA, OR CAUSE OR PERMIT WILLFUL DAMAGE OR DESTRUCTION OF THE PROPERTY DESCRIBED BELOW BECAUSE YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE FINED AND IMPRISONED.

To: _____(Defendant).

If you want to present reasons why you should not have the property described below taken from you, then you should appear at a hearing to be held before the undersigned clerk of court at _____ o'clock ____ .M. on the _____ day of _____, _____, at the _____ County Courthouse because _____ (Plaintiff) has sworn that you wrongfully hold the following property and that he is entitled to it:

(DESCRIPTION OF PROPERTY)

At the hearing the plaintiff will present evidence, and you are allowed to present evidence. You may bring an attorney to this hearing. Upon the basis of the evidence presented, the clerk will decide whether or not to issue an order directing the sheriff to take the property until a trial on the merits is held. You are hereby ORDERED:

- a. Not to willfully dispose of the property;
- b. Not to remove or permit its removal from the State of North Carolina; and
- c. Not to cause or permit its damage or destruction.

If you fail to comply with this order, and it is finally determined that the plaintiff is entitled to the possession of the property, you may be guilty of contempt of court and may be fined or imprisoned as provided by law.

If you have any questions about the hearing, you may contact an attorney or the clerk of court prior to the hearing.

(CERTIFICATE OF SERVICE)

(2) VOLUNTARY WAIVER OF HEARING.

To _____ (Defendant).

You have been served with a notice that a hearing will be held before the undersigned clerk of court at _____ o'clock ____ .M. on the _____ day of _____, _____, at the _____ County Courthouse to determine if _____ (Plaintiff) is entitled to the possession of the following described property until a trial on the merits is held

(DESCRIPTION OF PROPERTY)

If you do not wish to object to the plaintiff's right to the possession of this property until a trial on the merits is held, you may waive your right to the hearing by signing the statement below, having your signature witnessed by any person who is not a party or an agent or employee of a party to this action and returning it to the undersigned clerk of court by mail or in person prior to the date set for the hearing.

Clerk of Superior Court

I, _____, do hereby voluntarily waive and relinquish my right to the hearing described above.

Defendant

Witness:
(Name)

(Address)

(1973, c. 472, s. 2; 1999-456, s. 59.)

§ 1-475. Plaintiff's undertaking.

The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be

had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 833.)

§ 1-476. Sheriff's duties.

Upon the receipt of the order from the clerk with the plaintiff's undertaking and the fee deposit described in G.S. 1-474(c), the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 834; 2015-55, s. 3(b).)

§ 1-477. Exceptions to undertaking; liability of sheriff.

The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section [G.S. 1-478]. (C.C.P., s. 180; Code, s. 325; Rev., s. 794; C.S., s. 835.)

§ 1-478. Defendant's undertaking for replevy.

At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C.C.P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C.S., s. 836; 1961, c. 462.)

§ 1-479. Qualification and justification of defendant's sureties.

The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court or judge, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C.C.P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C.S., s. 837; 1971, c. 268, s. 30.1.)

§ 1-480. Property concealed in buildings.

If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (C.C.P., s. 184; Code, s. 329; Rev., s. 798; C.S., s. 838.)

§ 1-481. Care and delivery of seized property.

When the sheriff has taken property, as provided in this Article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the property, minus any amount received pursuant to G.S. 1-474(c). If the amount due under this section is less than the amount received pursuant to G.S. 1-474(c), then the sheriff shall return the excess amount to the depositor. In the event that a third party intervener is entitled to possession of the property, any amount received pursuant to G.S. 1-474(c) shall be returned to the depositor. (C.C.P., s. 185; Code, s. 330; Rev., s. 799; C.S., s. 839; 2015-55, s. 3(c).)

§ 1-482. Property claimed by third person; proceedings.

When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least 10 days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. However, this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; C.C.P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C.S., s. 840; 1933, c. 131; 1971, c. 268, s. 30.2.)

§ 1-483. Delivery of property to intervener.

Upon the filing by the claimant of the undertaking set forth in G.S. 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; Code, s. 332; Rev., s. 801; C.S., s. 841.)

§ 1-484. Sheriff to return papers in 10 days.

The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within 10 days after taking the property mentioned therein. (C.C.P., s. 187; Code, s. 133; Rev., s. 802; C.S., s. 842.)

§ 1-484.1. Remedy not exclusive.

The provisions of this Article shall not be construed to preclude the use of attachment or any other ancillary remedy (upon the terms and subject to the conditions provided by law for the exercise thereof) simultaneously with the remedy of claim and delivery. (1973, c. 472, s. 2.1.)