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COMMENTS

DELEGATION OF POWER TO ABOLISH OFFICE OF COUNTY TREASURER—The North Carolina Constitution, in Art. VII, makes provision for a system of local government. Sec. 14 of that article provides that "the General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, except sections seven, nine and thirteen." Those three sections are not involved in this discussion. In C. S. sec. 1389, the General Assembly authorized the boards of commissioners of several counties, in their discretion, to abolish the office of county treasurer, and to appoint a bank or banks to perform the duties of the office. The office of county treasurer was established by Art. VII, sec. 1, of the Constitution of 1868. Upon a *mandamus* proceeding to compel a county treasurer whose office had been thus abolished, to pay over the funds in his possession to the appointee bank, it was objected that the statute was unconstitutional as an unwarranted delegation of legislative power. Held, the statute is valid. *Tyrrell County v. Holway*, 182 N. C. 64, 108 S. E. 377 (1921).

The original Constitution of 1868 did not contain the section under consideration. That was added by an amendment of 1875, for the purpose of giving flexibility to a local government system which had been found unsatisfactory. As an original question, the section might be thought to have a double significance. It apparently operates as a grant to the legislature of a measure of control over local government organization that it did not have under the Constitution of 1868. It is also conceivable that the section constituted a third method of amending the state constitution. If this should be so, both of these attributes would attach whenever the legislature acted. The question, therefore, whether the General Assembly can give to a local government agency the power, in its discretion, to abolish a part of the constitutional plan for the fiscal management of a county, could be said to involve not only the usual problem of the delegation of legislative power to a municipal corporation, but also the unique problem of the delegation of power to change the state constitution.

That a wide discretionary power of local self government may be vested in municipal subdivisions of the state, without infringe-

ment upon the familiar rule that the substance of legislative power cannot be delegated, is well settled. See *Thompson v. Floyd*, 47 N. C. 313 (1855); *Manly v. Raleigh*, 57 N. C. 370, 377 (1859); *Stoutenburgh v. Hennick*, 129 U. S. 141 (1888). The explanation is historical. This was the principal ground for the decision in the instant case.

The other question raised by the case, and which the Court did not discuss, is more difficult. Two views are possible. One is that at least until the legislature acted under sec. 14, all of the other thirteen sections were parts of the state constitution. Originally, and at least until 1875, they constituted a major portion of the text of one article of that instrument. Nor were they removed from the text in that year. Rather the sovereign people, who alone could take that action, made the legislature their agent to alter the content and significance of the sections. But the mere creation of an agency does not *ipso facto* accomplish the desired purpose, however clearly that may be authorized. The people had provided in the Constitution of 1868 for the amendment and revision of the state constitution by means, first, of a constitutional convention, and, second, by the legislative submission of particular amendments. See *N. C. Const.*, Art. XIII, sec. 1, 2. Did they in adopting this section, authorize the legislature to exercise a third and less cumbersome method of amending one article of the Constitution? There is, or rather, originally would have been, some basis for that view. Moreover, such a power, if actually granted, would not be in the same category with the usual power to regulate county government. Constitutional revision is a more important and significant matter. Apparently the people desired the judgment of the legislature itself on the alterations, for the provision reads: "the General Assembly shall have full power by statute to," etc. It is, therefore, extremely doubtful whether section 14, under this view, could be said to contemplate the re-grant to a local government agency, of a power so intimately related to sovereignty. See *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064 (1891).

The other view, and this has been the consistent attitude of the Supreme Court of

North Carolina, is that, by adopting section 14, the people reduced the other sections of Art. VII, except seven, nine and thirteen, to mere statutory provisions, and destroyed their status as parts of the basic law. In other words, the legislature was given an almost complete control, to be exercised in the manner of ordinary legislation, over local government organization. Moreover, whatever may have been the status of the constitutional provisions in question between the date of the adoption of the amendment in 1875 and the date of the first legislative enactments concerning their abrogation, it is entirely probable today that as a result of nearly half a century of legislative modification, they, and the offices and institutions dealt with by them have become entirely subject to all of the characteristics of legislative action. See *Rhodes v. Hampton*, 101 N. C. 630, 8 S. E. 219 (1888); *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269 (1897). It follows, of course, from this premise, that this power may, under the doctrine enunciated above, be delegated to local government agencies.

B. B. L.

AGREEMENTS FOR FICTITIOUS AUCTION BIDS—Plaintiff had been a *bona fide* bidder at a partition sale of land. The highest bid on the first sale was \$10,250. On the last day for making an increased bid, defendant, whose minor son owned part of the land, agreed with plaintiff that if plaintiff would raise the bid to \$11,275, he (plaintiff) should receive a stipulated share of the increased bids over that amount; that in the event plaintiff should be the highest bidder and have to take the property, he would have to pay only \$11,275 for it. Plaintiff raised the bid to \$11,275. A few days later this arrangement was rescinded and a new agreement was made whereby plaintiff was to have "one half of the raised bids from his present bid of \$11,275 up to \$12,075, and one third of the raise of bids from \$12,075 up to the highest bid at the sale to be made . . . 17 November, 1919 . . . This agreement . . . is to be kept strictly confidential . . . so as to protect (plaintiff) in his future bids at the sale." At that sale plaintiff was the last and highest bidder at \$11,830. Thereafter plaintiff sold his bid to one Ferrell for \$650, without notice to defendant, in order to prevent Ferrell from increasing the bid. Plaintiff sued for the stipulated share of the difference between his bid of \$11,275 and \$11,830. Held, the plaintiff can not recover. *Jennings v. Jennings*, 182 N. C. 26, 108 S. E. 340 (1921).

"Fair competition is the essence of an auction sale," *Smith v. Greenlee*, 13 N. C. 126, 18 Am. Dec. 564 (1830). It is definitely settled law that by-bidding or "puffing" of bids at an auction is illegal. 3 *Am. & Eng. Encyc. of Law*, 2nd ed., 505-6; *Veazie v. Williams*, 8 How. (U. S.) 134 (1850); *Berwell v. Christie*, (1776 K. B.) Cowp. 395. The weight of authority in North Carolina is in accord with the general doctrine that such a practice is violative of a public policy in favor of open and competitive bidding at auction sales. *Morehead v. Hunt*, 16 N. C. 35 (1826); *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359 (1906). The Court recognized this status of the law in the principal case. It thought the agreement "close akin to by-bidding which is violative of the implied guaranty that all bids at public sales are genuine." 6 C. J. 833; *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334 (1900); *Nash v. Hospital Co.*, 180 N. C. 59, 104 S. E. 33 (1920). The Court felt, however, that the agreement was valid because the rights of third persons did not intervene, and because the purpose and tendency of the act was actually to increase bids at the sale. The observations regarding by-bidding and the validity of the contract being by way of *obiter dicta*, the Court based its decision on the plaintiff's breach of contract—that by selling his bid to prevent a higher bid, he had defeated the purpose of the agreement.

"It seems that a better ground for the decision would have been the illegality of the contract," because "the plaintiff was not prohibited by his contract from making such a sale, nor was the aim of the contract expressly stated to be for the purpose of selling to the highest bidder." 31 Yale L. J. 434. Was the contract valid? Its effect and express purpose was to create a false appearance of competitive bidding. The *bona fide* bidders at the sale knew nothing of the plaintiff's agreement with the defendant. Plaintiff's presence among the bidders implied that he was a *bona fide* bidder; that if he were the highest bidder, he would pay exactly what he publicly and in their presence bid. But no matter how high the plaintiff should bid—even though he should be the highest bidder and consequently be compelled to take the property—he would have to pay only \$11,275 for the land. "No bid, therefore, of his over \$11,275 could be considered *bona fide*;" every bid he made over the agreed price was "to the extent of the agreed share of remuneration fictitious." 31 Yale L. J. 434.

On the other hand, if the property were knocked down to a higher bidder than the

plaintiff, that *bona fide* bidder would have to pay exactly what he bid, part of which would, by the contract, be paid to the plaintiff as his commission for inflating the bids and making the bidder pay the full price. In *Bexwell v. Christie*, (1776 K. B.) Cowp. 395, the leading English case on the subject of by-bidding, is found the following statement: "Suppose there was an agreement privately with a particular person that if he was the highest bidder, so much would be abated; frequently abatements from the price fixed by the vendor are made on a private sale and of course legitimately But a private agreement of this sort between the owner and bidder at a sale by auction would be a gross fraud." See *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398 (1883). The conclusion is, therefore, that the contract, entered into in secret between the plaintiff and defendant, is invalid, because it contemplated a fraud upon third persons. *Blythe v. Lovinggood*, 24 N. C. 20, 37 Am. Dec. 402 (1841); *Veazie v. Williams*, 8 How. (U. S.) 134 (1850). "In the enforcement of such an agreement the law would be the instrument of executing a deceptive design." 31 Yale L. J. 434. While the *dictum* of the Court may be considered unfortunate, it does not operate to repeal the definitely established policy against fictitious bids at an auction.

F. B. McC.

LIABILITY OF JUSTICE OF PEACE FOR NEGLIGENCE FAILURE TO DOCKET APPEAL.—A sued B in a justice court and obtained a judgment. B gave notice of an appeal to the Superior Court, paid to the justice the appeal fee and the fee for docketing the appeal in the Superior Court, and asked him to send up the papers and docket fee to that Court. The justice agreed to do so. Because of the negligent failure of the justice to send up the papers and to docket the appeal and pay the fee within the time allowed, A had the appeal dismissed. As a result, B was required to satisfy the judgment. B then sued the justice of the peace in the County Court for damages in the sum of the amount paid A on the judgment, alleging that he had had a meritorious defense on a set-off to A's action. On a verdict in B's favor, he obtained a judgment. The justice appealed to the Superior Court, where B was non-suited. On appeal to the Supreme Court, held, non-suit sustained. *Simonds and Wife v. Carson*, 182 N. C. 82, 108 S. E. 353 (1921).

By statute, a justice of the peace is made guilty of a misdemeanor for wilful failure to

discharge any of the duties of his office. C. S. sec. 4384. While performing a judicial function within his jurisdiction, however, a justice is not usually civilly liable for such misconduct, even though he is actuated by corrupt and malicious motives. *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436 (1895); *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80 (1878). This seems to be because of the exclusiveness in such a case of the statutory remedy of prosecution for a misdemeanor. In other words, there is a public policy prohibitive of attacking the conduct of a public officer in private litigation. Moreover, and for the same reasons, a justice of the peace, when performing a judicial function within his jurisdiction, is not liable for negligent misconduct in office. *Lange v. Benedict*, *supra*; *Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412 (1882); *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86 (1898); 44 L. R. A. (n. s.) 171, note. On the other hand, a justice of the peace is civilly liable for negligent misconduct in office while acting in a purely ministerial capacity. *Grove v. Van Duyn*, *supra*; *Legates v. Lingo*, 8 Houst. (Del.) 154, 32 Atl. 80 (1888). Similarly, when he is acting even in a judicial capacity in a matter beyond his jurisdiction. *Broom v. Douglass*, 175 Ala. 268, 57 So. 860 (1912).

Docketing an appeal in the Superior Court, however, is not an official duty of a justice of the peace. He is merely required to send the papers up to the appellate court. It is the duty of the appellant to see that the case is docketed in that court and the docket fee paid. And for that purpose he is given the statutory remedy of attachment. C. S. sec. 660, 1532. Thus the agreement of the justice in the instant case to see that the case was docketed in the Superior Court was merely a personal accommodation. Apparently, however, the justice failed both to send up the papers and to docket the case. Irrespective, therefore, of his liability for the second omission, the question is involved whether, under the principles suggested above, he could be liable for the failure to comply with his statutory duty to send up the papers. The Court thought that the act of sending up the papers in an appealed case is a judicial act, apparently because it is required of the justice by statute. The Court recognized that the same act on the part of the clerk of the Superior Court in sending a record to the Supreme Court, is a ministerial function, and distinguished the principal case on the ground that a justice has no clerk and must perform

this duty himself. It is submitted that the sending up of a record to a higher court is an act devoid of any discretionary element and is a ministerial function whether performed by a court clerk or by a justice without a clerk, and that the liability for negligence in performing a ministerial act, indicated above, should have attached in the instant case. *State v. Sneed*, 84 N. C. 817, 824-825 (1881); *State v. Cressinger*, 88 Ind. 499, 98 Am. St. Rep. 893, note; 16 R. C. L. 347-348.

As to the second omission, namely, the negligent failure to carry out the assumed personal obligation to docket the case in the Superior Court, the Court thought that the justice could not be liable. The Court admitted that an attorney engaged in the case who failed in this regard, would be liable and that the justice would be liable for an intentional or fraudulent default, but distinguished the instant case on the ground that no consideration was given for the justice's undertaking. See *Truelove v. Norris*, 151 N. C. 757, 67 S. E. 487 (1910). In other words, the feeling was that an individual should not be made liable for mere negligent non-feasance in the performance of an assumed duty.

Was the plaintiff, however, in a position to enforce any liability on the part of the justice for negligent failure to perform even a ministerial duty of sending up an appeal to the Superior Court? The clear policy of the North Carolina Court has been to regard it as the duty of the appellant to see that his appeal is carried through to completion, and to regard him as responsible even for the failure of the justice to perform his statutory duty to send up the appeal. *Blair v. Coakley*, 136 N. C. 40, 48 S. E. 804 (1904); *Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922 (1920). Whatever, therefore, might be the liability of the justice in such a case, the appellant is contributorily negligent if he actually neglects to see that the appeal is carried through, especially if he attempts to abandon that responsibility by relying on the gratuitous undertaking of the justice to take charge of the matter. In the instant case, the appeal was taken on May 2 to a term of the Superior Court beginning May 20, and no attempt was made to docket the case in that Court until July 3. W. A. G.

ESTOPPEL BY DEED—EFFECT OF REGISTRATION

S. and wife conveyed land to defendant. Later, and before defendant placed his deed on record, S. and wife mortgaged the same

land to another, who promptly registered the mortgage. At the foreclosure sale, Mrs. S., one of the original mortgagors, repurchased the land and conveyed it to plaintiff, who immediately registered the deed. Defendant had not yet placed his deed upon record. Held, the title acquired by the repurchase did not inure by way of estoppel to the defendant's benefit. *Builders' Sash and Door Co. v. Joyner*, 109 S. E. 259 (N. C. 1921).

It is a well settled rule that when a conveyance is made with covenants of warranty by one who later gets in the title, the after acquired title inures by estoppel to the benefit of the grantee. See 17 Harv. Law Rev. 482; *Van Renslaer v. Kearney*, 52 U. S. 297 (1850); *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655 (1903). If this estoppel actually passes title to the original grantee at common law, later purchasers would be without remedy. If it merely creates an equity against the grantor, subsequent purchasers for value and without notice should be protected. See 17 Harv. Law Rev. 482. Under our registration acts, however, a satisfactory result may be obtained regardless of the view adopted. The purpose of these statutes seems to be that of facilitating transfers of title to property by making it safe to deal with the owners of the record title. Consequently, they deprive the grantee under an earlier unregistered conveyance, of the common law right which his priority of execution would naturally give him over a subsequent grantee. For the later grantee could have no notice from the record of the previous conveyance. See 17 Harv. Law Rev. 482. By virtue of the registration acts, the prior registry prevails as against a title by estoppel except as to a purchaser with notice. *Ford v. Unity Church Society*, 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, and note (1894). Where there is no record of the conveyance, there can be no constructive notice. Under the North Carolina registry act, it has been consistently held that no notice, however full and formal, will supply the place of registration. *Fertilizer Co. v. Lane*, 173 N. C. 184, 91 S. E. 953 (1917); *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138 (1921). Since the registry system is due to modern legislation, anything in the common law inconsistent with it should be considered abrogated. See 17 Harv. Law Rev. 482. W. T. S.

NEW LIMITATIONS ON THE POLL TAX—A school district was authorized by an act of 1920 to issue bonds, after a favorable vote

of the people, and to levy a special tax upon the property and the polls within the district to meet the interest and to create a sinking fund for the payment of the principal. On January 1, 1921, the constitutional amendments of 1920 concerning the poll tax went into effect. At an election in July, 1921, the authorities of the district submitted to a favorable vote propositions for the bond issue and for a special property tax. No proposition for a special poll tax was submitted. Upon a taxpayer's action to restrain the issuance of the bonds thus authorized, it was objected that the district had not proceeded pursuant to the statute, in that the required poll tax had not been provided for. Held, the bonds were properly authorized. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102 (1921).

Art. V, sec. 1 of the North Carolina Constitution of 1868 required the legislature to levy a poll tax equal to the tax on property valued at three hundred dollars, and provided that the state and county poll tax combined should not exceed two dollars on the head. Thus, the maximum of the combined state and county tax on property could not exceed 66 2-3 cents on the \$100.00. *So. Ry. v. Cherokee County*, 177 N. C. 86, 97 S. E. 758 (1918). Inasmuch, however, as Art. IX, sec. 3 of the constitution made county commissioners subject to indictment for failure to maintain the public schools for the prescribed period, and as the maximum yield of the general poll tax often failed to bring in enough to make this possible, it was decided that this equation need not be maintained in the case of schools. That is to say, the *Collie* case, overruling, in 1907, the *Barksdale* case of 1885, held that when the proportion of the general poll tax allowed by Art. V, sec. 2 to be expended for school purposes, was actually insufficient, a special tax either on the property or polls, or both, in excess of the equation was permissible. *Barksdale v. Comrs.*, 93 N. C. 472, *Collie v. Comrs.*, 145 N. C. 172, 59 S. E. 44. Moreover, for a special purpose, and with special legislative consent, it was recognized on the basis of Art. V, sec. 6 of the Constitution of 1868, that there was practically no limit to legislative discretion as to the amount of a special poll tax. That section provided that the taxes for county purposes should never exceed the double of the state tax, except for a special purpose and with the special approval of the General Assembly. Nor did the proportion between the expenditures out of the poll tax for the schools and

for the support of the poor, as fixed in Art. V, sec. 2, apply to a special poll tax. *Moose v. Comrs.*, 172 N. C. 419, 90 S. E. 441 (1916). As a result, the total of general and special poll taxes sometimes ran as high as \$9 and \$10 on the head, and "60 per cent. of the taxes were paid by persons owning less than \$500 of property. In other words, the result was that the small taxpayer, if he paid the poll tax also, paid nearly double the rate of the larger taxpayers." See Hollander, *State Taxation*, 104, quoted in *Smith v. Comrs.*, 182 N. C. 149, 108 S. E. 443 (1921).

To remedy this situation, Art. V, sec. 1 was amended, effective January 1, 1921, so as to shift the burden of taxation from the person to his property. This was done by (1) making the poll tax permissive instead of compulsory, (2) destroying the equation between the property tax and the poll, (3) authorizing the legislature to levy a maximum poll tax of \$2.00 for general state and county purposes, (4) authorizing cities and towns to levy a maximum poll tax of \$1.00 for general purposes, and by (5) prohibiting all other poll taxes. This amendment, as was said in the principal case, was self executing, and automatically repealed, on January 1, 1921, all legislation authorizing poll taxes on terms inconsistent with its provisions, except in those cases where poll taxes had been pledged for the payment of existing debts. The court recognized that these obligations could not be impaired by constitutional amendment any more than by statute. *Broadfoot v. City of Fayetteville*, 124 N. C. 478, 32 S. E. 804 (1899); *Edwards v. Kearzey*, 96 U. S. 595 (1878). And since the amendment does not authorize them, but on the contrary expressly prohibits all other poll taxes except those levied by the legislature and cities and towns, the court was compelled to decide that special tax districts are without authority to levy any poll tax at all. As a corollary of this reorganization of the poll tax situation, it should be noted that the requirement of Art. VI, sec. 4, of the original constitution, that a person must have paid his poll tax to be eligible to vote, has been eliminated.

R. M. M.

EFFECT OF MOTIVE ON DUTY OWED HOTEL BOARDER'S GUEST—Troy was registered at defendant's hotel as a boarder. Upon Troy's invitation, Jones entered the hotel with Troy, for the purpose of playing cards for money in Troy's room on the fourth floor. The elevator shaft, just off the lobby on the main

floor, was located behind a stairway, in the dark. Due to this fact, and to the further facts that it was a cloudy day and that the paint on the shaft was of a neutral color, Jones was unable to see that the elevator carriage was not in place. As a matter of fact, it was then at one of the upper floors. Believing that the carriage was in place on the main floor, Jones stepped through the open door in the shaft, and fell to the cement floor in the basement below. In an action for personal injuries due to the alleged negligence of the defendant in permitting the door to be open when the elevator carriage was not in place, defendant had judgment below. Upon appeal, held, new trial granted for error in instruction excluding jury's use of *res ipsa loquitur*. *Jones v. Bland*, 182 N. C. 70, 108 S. E. 344, 16 A. L. R. 1383, and note (1921).

A registered boarder at a hotel, because his presence inures to the financial benefit of the owner, is an invitee in the law of torts, and to him the proprietor owes a duty to use due care to keep the premises in a safe condition. *Patrick v. Springs*, 154 N. C. 270, 70 S. E. 395 (1911). The status of the boarder's guest, however, is not so clear. Most courts regard him as a mere licensee, to whom no duty is owed save that of refraining from wilful or wanton injury and that of using care to warn him of unobservable defects in the condition of the premises. *Money v. Travelers Hotel Co.*, 174 N. C. 508, L. R. A. 1918 B, 493, 93 S. E. 964 (1917). This seems to be because of a feeling that the possibility of financial gain accruing to the owner as a result of his presence is not sufficiently direct or probable. A better view would be to regard the boarder's guest as an invitee, particularly where he is to be entertained in the restaurant or in other rooms in the hotel where an extra charge is made. *McCracken v. Meyers*, 75 N. J. L. 935, 16 L. R. A. (n.s.) 290, 68 Atl. 805 (1908); *Hotel Assn. v. Walters*, 23 Neb. 280, 36 N. W. 561 (1888). And even where, as in the principal case, the guest is to be entertained in the boarder's own room, without extra compensation to the proprietor of the hotel, his presence is not without potential economic benefit to the owner. Moreover, the relative ease and convenience with which members of the public can be received on business or for pleasure, tends to make living at a hotel more popular and thus to promote the hotel business. The basic assumption in the principal case is in accord with this view. In this connection, the Court said "such a one, termed an invitee, is entitled to the duty of ordinary care from the proprietor and his

employees." And even if the plaintiff were thought to be a mere licensee, the opened door in the obscured and darkened elevator shaft with the carriage four stories above, would probably be regarded by most courts as an unobservable defect in the condition of the premises of which Jones should have been warned by the defendant. *Schmidt v. Michigan Mining Co.*, 159 Mich. 308, 123 N. W. 1122 (1909); *Davis v. Trust Co.*, 127 Ky. 800, 106 S. W. 843 (1908).

There are two possibilities as to the effect of Jones' motive in entering the hotel. One is that his being engaged in an illegal act operated, as does contributory negligence, to bar recovery. This view is untenable for two reasons. In the first place, the mere act of entering a hotel, even for the purpose of playing cards for money, is not a crime. And in the second place, even if it were, the law prohibitive of gambling was not designed to furnish a standard of care to be observed in entering elevators. As the Court said in the principal case, in disposing of one of the contentions of counsel, "such unlawful purpose, even if established, could in no legal sense be considered as the proximate or contributing cause of plaintiff's injury." The other possibility is that Jones' motive had a direct bearing upon his status as an invitee, licensee or trespasser. Even though it were originally contemplated that Troy, a registered guest in the hotel, might entertain his friends and business associates in the various parts of the establishment, it could hardly be said that that implied invitation or license was to extend to persons brought onto the premises for a purpose prohibited by positive law. Especially would this be true where one who knowingly permits gambling on his premises is by statute made guilty of a misdemeanor. *See C. S. sec. 4431*. It would seem, therefore, that Jones' status was that of a person entering the hotel without the permission of the owner—a mere trespasser. No facts appearing to show any conduct upon the part of the proprietor that might be called wilful or wanton infliction of injury, the judgment for defendant seems to have been the correct result. This was the view taken in the principal case.

No reason is perceived, however, for remanding the case for a new trial. The reasons assigned by the Court were that by the instructions given, too great a burden of proof as to the defendant's negligence was imposed upon the plaintiff, and that the jury was precluded from using the doctrine of *res ipsa loquitur*. That is to say, the Court felt that the evidence as it stood warranted a finding of

negligence in allowing the elevator door to remain open while the carriage was out of place, and that under the instructions of the trial judge, the jury would have been compelled, in order to bring in a verdict for the plaintiff, to find specifically either that the elevator boy left the door open, or that the proprietor knew it was open, or that the door was open, for such a period of time that the proprietor should have noticed its condition. Assuming, however, that the instructions in question were erroneous, how could the error have been prejudicial to this plaintiff? If, as the Court had already decided, he was a trespasser, and if, as the Court had found, there was no evidence tending to show wilful or wanton disregard of his safety, there was no liability on the part of the defendant, for there had been no breach of any duty owed to the plaintiff. The question, therefore, as to whether the defendant or his servant had been negligent was immaterial. Nothing short of a finding of wilful or wanton injury could have aided the plaintiff.

G. T.

LIMITATIONS ON TRANSFERABILITY OF SHARES OF STOCK—The charter of a small corporation engaged in a local telephone business provided that "shares of stock in this corporation shall not be transferred or sold until said sale or transfer shall have been reported to the directors and approved by them." Plaintiff purchased a number of shares of stock and attempted to have them transferred on the books of the company. Each share recited the provision above quoted from the charter. The directors, in good faith, refused to approve the sales to the plaintiff, but offered to procure other purchasers, whose interests would be in harmony with the management. Upon *mandamus* to compel the company to transfer the stock, held, relief denied. *Wright v. Ir-dell Telephone Co.*, 182 N. C. 308, 108 S. E. 744 (1921).

A share of stock in a corporation represents a *chose* in action, an intangible personal property right. C. S. sec. 1164; *Cooper v. Dismal Swamp Canal Co.*, 6 N. C. 195 (1812). But "stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. . . . There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm." Holmes, C. J., in *Barrett v. King*, 181 Mass. 476, 479, 63 N. E. 934 (1902). And it is frequently desirable, particularly in a small business, that the shareholders may

be able to protect themselves against the acquisition of a controlling amount of stock by business rivals or other disturbers. In the principal case, the restrictions were imposed to prevent the imminent likelihood of attack through this channel by a national telephone company which, in a similar manner, had acquired control of defendant's predecessor.

A statute authorizing restrictions on the transfer of stock to be incorporated in the charter and recited in the stock certificate, has been held valid. This because it negated any public policy prohibitive of such restrictions as improper restraints on alienation. *Longyear v. Hardman*, 219 Mass. 405, 108 N. E. 1012 (1914); 28 Harv. Law Rev. 705. When restrictions are imposed in the charter either under such statutory authority or in the absence of a countervailing public policy, they form original incidents or conditions of the shares, and, especially when recited in the stock certificate, are binding upon all holders. *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 149 N. W. 754 (1914); Clark, *Corporations*, 2nd ed., 393. A mere by-law, however, may not validly contain such a restriction. This is because so great an advantage would be given to the majority of the shareholders as to amount to a power to impose a general restraint upon alienation by the minority, without their consent. *Morris v. Husong Dyeing Mach. Co.*, 81 N. J. Eq. 256, 86 Atl. 1026 (1913); *Sargent v. Franklin Insurance Co.*, 8 Pick. (Mass.) 90 (1829). But the fact that the restriction appears in a by-law is no objection if the share of stock is actually taken on that basis. *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432 (1894); *Farmers' Mercantile and Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366 (1911). Moreover, a contract between the shareholders themselves or between them and the corporation, to the effect that no share will be sold without the approval of the company, is binding upon the parties thereto. *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488 (1903); *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57 (1896); 20 Harv. Law Rev. 328. The restriction, however, must be a reasonable one, and its exercise must be free from caprice. *Rice v. Rockefeller*, 134 N. Y. 174, 31 N. E. 907 (1892); *In re Copal Varnish Co., Ltd.*, (1917) 2 Ch. 349; 31 Harv. Law Rev. 654.

In North Carolina there is no statutory authority for imposing restrictions upon the transferability of shares of stock. On the other hand, there seems to be no public policy

prohibitive of them. The principal case, therefore, is an instance of a reasonable restriction validly contained in the corporate charter that was exercised in good faith.

R. H. F.

STATE ENFORCEMENT OF EIGHTEENTH AMENDMENT—The defendant was convicted of having liquor in his possession for the purpose of sale in violation of C. S. sec. 3379. He appealed on the ground that the statute was repealed by the Eighteenth Amendment to the Constitution of the United States. The court sustained the conviction. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86 (1921).

The Eighteenth Amendment gives to Congress and to the several states "concurrent power" to enforce its provisions by "appropriate legislation." Since this is the only place in the Constitution where this identical expression is used in a similar connection, the construction of this phrase has given rise to a new problem. See 33 Harv. Law Rev. 968. Does the Amendment mean that the joint action of both Congress and the state legislatures is necessary to the enactment of enforcement provisions? Interpreting the word "concurrent" as meaning "running together, having joint and equal authority," the phrase may mean that the laws of neither sovereign are supreme over those of the other and that the united action of state and nation is necessary to the validity of any legislation on the subject. See *National Prohibition Cases*, 253 U. S. 350, 392, 407 (1919), dissenting opinions. Or, does the term "concurrent power," contemplate that each sov-

eighty may enact such legislation as is actually an enforcement of the Amendment? By this theory the words are held to imply that the power exists in both at the same time, each being independent of the other. This view is adopted by the courts. *National Prohibition Cases*, 253 U. S. 350 (1919); *Powell v. State*, 90 So. 138 (Ala. 1921); *Palmer v. State*, 133 N. E. 388 (Ind. 1921). But the same authorities hold that, where there is a conflict between the national and state laws on this subject, the state laws must yield. Each state may then make such laws as it pleases within its jurisdiction so long as such acts contemplate the enforcement of the Amendment and are not inconsistent with the existing federal statutes on the same subject. *Ex parte Volpi*, 199 Pac. 1090 (Cal. 1921). See 34 Harv. Law Rev. 317.

Thus all of the prohibition laws of North Carolina, whether passed prior to or after the adoption of the Amendment, if not in conflict with the federal enforcement provisions, are to this extent valid. *State v. Fore*, 180 N. C. 744, 105 S. E. 334 (1920); *State v. Muse*, 181 N. C. 506, 107 S. E. 320 (1921). Moreover, one act may be a violation of the laws of both sovereigns, state and nation. See 19 Mich. Law Rev. 647. Therefore, a conviction under the laws of one is not a bar to a subsequent prosecution for the same act under the laws of the other. That is to say, such a proceeding does not constitute double jeopardy. *U. S. v. Holt*, 270 Fed. 639 (W. D., N. Dak. 1921); *Bryson v. State*, 108 S. E. 63 (Ga. 1921).

C. G. A.