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EDITORIAL NOTES

THE SUMMER LAW SCHOOL—The Summer Session of the School of Law for 1923 will open on Thursday, June 14, and close on Friday, August 17, three days prior to the North Carolina bar examination on Monday, August 20. This Session has long been devoted to a review of the subjects required by the Supreme Court rules for admission to the bar. The instruction will consist mainly of lectures, supplemented by assigned readings and quizzes. Two lectures of one and one-half hours each will be given daily. The summer faculty this year will consist of three regular members of the law faculty, Professors L. P. McGehee, A. C. McIntosh, and P. H. Winston, and of Associate Justice W. P. Stacy, of the Supreme Court of North Carolina, and Judge Henry G. Connor, of the United States District Court for the eastern district of North Carolina.

There are no entrance requirements, except that each student must satisfy the Dean that his previous training will enable him to pursue the work satisfactorily. Examinations will be given as each course is completed. At the end of the Session certificates will be issued to those passing all examinations. Work done in the Summer Session may not be counted toward a degree. The tuition fee for the Summer Session is $30.00 and the registration fee is $5.00.

The courses to be given are as follows. Dates are inclusive, and the figures in parentheses indicate the number of lectures in each course.

Torts (10) June 14-25, Professor Winston.
Contracts (15) June 14-30, Professor McIntosh.
Wills (6) June 26-July 3, Professor Winston.
Property (18) July 1-23, Professor McGehee.
Criminal Law (5) July 2-7, Professor McIntosh.
Domestic Relations (5) July 9-14, Professor McIntosh.
Constitutional Law (9) July 17-26, Judge Stacy.
Federal Procedure (2) July 23-24, Judge Connor.
Corporations (8) July 25-August 2, Judge Connor.
Evidence (6) July 27-August 2, Judge Stacy.
Code (13) August 3-17, Judge Stacy.
Equity (12) August 3-17, Judge Connor.

JURISDICTION IN COUNTERCLAIM IN NORTH CAROLINA—Whether a court can render an affirmative judgment in favor of a defendant upon a counterclaim, the amount of which is not within the jurisdiction of the court, is a question which has been discussed in various courts and with somewhat conflicting results. The differences generally depend upon the constitutional and statutory powers of the particular court, and upon the different meanings given to the term counterclaim.

In the codes of some of the states a distinction is made between counterclaim and set-off, and in others the general term counterclaim is used.[1] In North Carolina only the term counterclaim is used,[2] and its meaning has been explained to include recoupment and set-off as well as other cross-demands. "Recoupment" is a defence arising out of the circumstances constituting the plaintiff's cause of action, and it could be used at common law to reduce the plaintiff's claim or to prevent a recovery, but no judgment could be given to the defendant for any excess over the plaintiff's claim.[3] This is included in the first section of the counterclaim statute.[4]

"Set-off" is of statutory origin,[5] and allows a defendant, when sued for a debt, to counterbalance it in whole or in part by setting up as a defence a demand of his own against the plaintiff.[6] This is included under the second section of the counterclaim statute.[7] Whether a judgment can be rendered for any excess of defendant's set-off over the plaintiff's claim under the original statute does not seem to have been generally settled according to any uniform rule of practice;[8]

[1] Pomeroy, *Code Remedies*, sec. 602.

[2] C. S. sec. 519, 521.

[3] Pomeroy, *Code Remedies*, sec. 607; *Hurst* v. *Everett* (1884) 91 N. C. 399; *Electric Co.* v. *Williams* (1898) 123 N. C. 51, 31 S. E. 288.

[4] C. S. sec. 521. "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

[5] 2 Geo. II, ch. 22; 8 Geo. II, ch. 24; Rev. Stats., ch. 31, sec. 80; Rev. Code (1756) ch. 31, sec. 77.

[6] Pomeroy, *Code Remedies*, sec. 605, and cases cited in note 3, *supra*.

[7] C. S. sec. 521. "In an action arising on contract, any other cause of action also arising on contract, and existing at the commencement of the action." See cases cited in note 3, *supra*.

[8] Pomeroy, *Code Remedies*, sec. 607; 7 Wait's *Actions and Defenses*, 474; 25 *A. & E. Encyc. of Law*, 2nd ed. 499; 24 *R. C. L.* 884.

but it is clearly stated to have been the practice in North Carolina that no such judgment can be rendered, the set-off being considered only as a defence or cross-demand to reduce or defeat the plaintiff's recovery.[9]

"Counterclaim" is the creature of the code, probably derived from the cross-bill in equity, and is said to be "broader in meaning than set-off, recoupment, or cross-demand, and includes them all, and secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts."[10] As a matter of pleading, counterclaim has been distinguished from set-off and recoupment, in that, if relief or judgment is prayed for against the plaintiff, it is counterclaim; if no judgment or relief is demanded, it is either set-off or recoupment depending upon the nature of the claim.[11] This distinction being merely formal, has been abandoned, as will be seen, and the question now depends upon the nature of the cross-demand and the jurisdiction of the court in which it is used.[12] A failure to keep these differences in meaning clearly distinguished may sometimes lead to confusion and misunderstanding.[13]

In courts of limited jurisdiction, as in a court of a justice of the peace where the jurisdiction in contract is limited to $200, and in tort to $50, questions have arisen as to whether the court can consider a demand of the defendant, either as set-off, recoupment, or counterclaim, where the amount involved is beyond the jurisdiction; and if it can be considered, what disposition can be made of the claim. The result of these discussions and an explanation of most of the cases will be found in the opinion of Hoke, J., in the case of *Stacey Cheese Co.* v. *Pipkin.*[14]

In this case the plaintiff sued in a court of a justice of the peace on a contract for $199; the defendant denied the plaintiff's claim, and expressly set up as a counterclaim, for breach of warranty, an amount beyond the jurisdiction. The justice gave judgment in favor of the defendant for $38.36, excess over plaintiff's claim, and the plaintiff appealed. Upon a trial *de novo* in the superior court, the jury found that the defendant was indebted to the plaintiff in the sum of $199, and that plaintiff was indebted to the defendant on the counterclaim in the sum of $210. The defendant asked for judgment for costs, treating his demand as a set-off or recoupment, and plantiff asked for judgment for the full amount of his claim, because the defendant's claim was beyond the jurisdiction of the court in which the action originated. Judgment was rendered for the plaintiff for $199, and the defendant's claim was dismissed. Upon appeal, the Supreme Court reversed the ruling of the lower court, and held that the defendant was

[9] *McClenahan* v. *Cotten* (1880) 83 N. C. 333; *Derr* v. *Stubbs* (1880) 83 N. C. 539; *Hurst* v. *Everett* (1884) 91 N. C. 399; *Electric Co.* v. *Williams* (1898) 123 N. C. 51, 31 S. E. 288; *Cheese Co.* v. *Pipkin* (1911) 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (n. s.) 606.

[10] *Smith* v. *French* (1906) 141 N. C. 1, 53 S. E. 435; see also Pomeroy, *Code Remedies,* sec. 613; 24 *R. C. L.* 794.

[11] *Hurst* v. *Everett* (1884) 91 N. C. 399.

[12] *Cheese Co.* v. *Pipkin* (1911) 155 N. C. 394, note 9, *supra.*

[13] 34 *Cyc.* 642.

[14] (1911) 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (n. s.) 606.

entitled to a judgment for costs, thereby defeating the plaintiff's recovery, but that no judgment could be rendered for any excess over the plaintiff's claim. The result of this decision may be summarized as follows:

1. A justice of the peace cannot render a judgment for any excess of defendant's counterclaim over the plaintiff's demand, when the amount of such counterclaim exceeds his jurisdiction.

2. The Superior Court, on appeal, has only derivative jurisdiction, and can render only such judgment as the justice might have rendered.

3. A justice may consider and allow, as recoupment or set-off, a cross-demand of the defendant when the amount is beyond his jurisdiction, so as to defeat a recovery by the plaintiff.[15]

4. It is immaterial whether the defendant's demand is called set-off, recoupment, or counterclaim in the pleading, or whether affirmative relief is demanded or not. If it is a demand which may be pleaded under the statute, judgment should be rendered thereon, treating it as a counterclaim for affirmative relief when the amount is within the jurisdiction, and as a defence by way of set-off or recoupment when beyond the jurisdiction.[16]

In addition to the above decision, it has been held that the defendant in the justice's court may remit the excess of his counterclaim over the jurisdictional amount and recover any excess over the plaintiff's demand;[17] but if this has not been done in the court below, it may not be done in the Superior Court by way of amendment on appeal.[18] The defendant may not, however, use enough of his counterclaim to balance the plaintiff's demand and then recover judgment upon the excess of the same or another demand, when the amount is not within the jurisdiction.[19]

In *Hurst* v. *Everett*,[20] where several actions were brought before a justice upon different notes amounting to $800, the defendant was allowed to set up by way of recoupment a claim for damages amounting to $400, to be used in each case until the cross-demand was exhausted. But if defendant should use a claim beyond the jurisdiction as a set-off, it does not appear to have been definitely settled as to what, if anything, could be done with the balance of the claim. Upon the doctrine of set-off, as above explained, it would seem that the claim having been used as a defence could not be used again as the basis of an independent action. If it could be so used, in what court should the action be brought? If in a justice's court, it would be allowing the court to do indirectly what it cannot do directly, and would also allow a party to split up his claim and thereby confer

[15] This overrules the cases of *Meneely* v. *Craven* (1882) 86 N. C. 364, and *Raisin* v. *Thomas* (1883) 88 N. C. 148, on this point.

[16] This is different from the statement in *Hurst* v. *Everett, supra,* note 11, which requires a prayer for affirmative relief as the test of a counter claim; and also from the rule given in Pomeroy, *Code Rem.* sec. 624, suggesting that it should be expressly pleaded as a counterclaim and also have a prayer for affirmative relief.

[17] *Heyser* v. *Gunter* (1896) 118 N. C. 964, 24 S. E. 712. This would also seem to follow from the statute which allows plaintiff to remit amount over justice's jurisdiction. C. S. sec. 1475.

[18] *Ijames* v. *McClamroch* (1885) 92 N. C. 362.

[19] *Electric Co.* v. *Williams* (1898) 123 N. C. 51, 31 S. E. 288.

[20] (1884) 91 N. C. 399.

jurisdiction.[21] If the defendant is compelled to submit to a judgment upon the plaintiff's demand, and bring an independent action in another court to enforce his claim, he might be compelled to pay the plaintiff's judgment in the meantime, and afterwards be unable to enforce his judgment against the plaintiff. To meet this difficulty, it has been intimated that the defendant might restrain the enforcement of the plaintiff's judgment until he could obtain a judgment and then set off one against the other, as in the old equity practice.[22] Such a proceeding would not be in keeping with the spirit of the modern practice which seeks to prevent multiplicity of suits and to avoid circuity of action. With the construction of the constitutional limitation of the justice's jurisdiction, this difficulty could not be remedied without a change in the Constitution, unless the rule could be adopted, that when the court has jurisdiction over the plaintiff's claim it has incidental jurisdiction over the defendant's claim. This, however, would overrule the decisions already referred to, and would allow a court of limited jurisdiction to render an affirmative judgment upon a counterclaim for an amount beyond its jurisdiction. This might not be an unmitigated evil, if it could be done, since in determining the set-off as a defence, the court necessarily determines the validity of the whole claim, but can proceed only half way in rendering a judgment.[23]

In the Superior Court, as a court of general jurisdiction, the power to render a judgment upon a counterclaim, the amount of which is below the jurisdiction and upon which an independent action could not have been brought in such court, was directly decided in the recent case of *Sewing Machine Co.* v. *Burger*.[24] The plaintiff's action was in the nature of a foreclosure of a mortgage to secure a debt of $37, and the Superior Court had jurisdiction. The defendant denied the plaintiff's claim and set up a counterclaim, arising out of contract, for $193. The jury assessed the plaintiff's debt at $37, and the defendant's counterclaim at $108, and the court gave judgment for the defendant for the excess, $71 and costs. On appeal the Supreme Court sustained the action of the lower court. The leading opinion was by Stacy, J., with a concurring opinion by Clark, C. J., while Allen, J., filed a dissenting opinion, which was concurred in by Walker, J.

The question does not appear to have been so directly presented before. There had been, of course, many cases of counterclaim in the Superior Court, but an examination of the cases will show that in most of these either the court had jurisdiction of the amount claimed or it was allowed only as a set-off or recoupment. In *Wilson* v. *Hughes*,[25] the defendant's counterclaim was for $75, and judgment was rendered thereon for $5, but under the facts of the case the claim could have been considered in tort as well as in contract, and the court would then have had jurisdiction. In *Wiggins* v. *Guthrie*,[26] the defendant's counterclaim was

[21] *Jarrett* v. *Self* (1884) 90 N. C. 478.
[22] *Love* v. *Rhyne* (1882) 86 N. C. 576; *Raisin* v. *Thomas* (1883) 88 N. C. 148.
[23] For a discussion generally as to courts of limited jurisdiction, see Ann. Cas. 1913D 158 and note; 37 L. R. A. (n. s.) 606 and note.
[24] (1921) 181 N. C. 241, 107 S. E. 14.
[25] (1886) 94 N. C. 182.
[26] (1888) 101 N. C. 661, 7 S. E. 761.

in contract and under $200, and the court ruled that it could not be allowed as a counterclaim, because not within the jurisdiction, but did allow it as set-off or recoupment. On appeal, the Supreme Court said: "This accorded to defendant all the benefit to which he was entitled, and he should be content in being allowed to use it for that purpose." Since no affirmative judgment could have been rendered for the defendant upon the facts presented, this case is not necessarily decisive of the question. These and numerous other cases are discussed in the opinions in the principal case.

The case in question decides that the Superior Court may render an affirmative judgment upon a counterclaim, the amount of which could not be the subject of an independent action in such court. The basis of the decision is, not that the court can render a judgment upon a claim not within its jurisdiction, but that the court has jurisdiction in cases of this kind. This view would seem to be in conflict with the general meaning of counterclaim as expressed in some former decisions. "A counterclaim is a distinct and independent cause of action, and when properly stated as such with a prayer for relief, the defendant becomes in respect to the matters alleged by him an actor; and there are really two simultaneous actions pending between the same parties, wherein each is at the same time both a plaintiff and a defendant."[27] "A true counterclaim . . . to be capable of affirmative relief, must be one on which judgment might be had in the action, and must therefore come within the jurisdiction of the court wherein it is pleaded."[28]

The result reached by the majority opinion is satisfactory, however, as a rule of procedure, and to take the opposite view would leave the matter in the same confusion that now exists in connection with the courts of limited jurisdiction. Some of the arguments advanced for the decision may not be entirely satisfactory, as is shown by a dissenting opinion, or may apply equally to cases in the lower courts. That the Superior Court, as a court of general jurisdiction, having jurisdiction over the plaintiff's cause of action, has also incidental jurisdiction over the defendant's counterclaim, is in conflict with the meaning of counterclaim as above defined. That the code does not fix any limit upon the amount of the counterclaim, and therefore the amount is immaterial in the Superior Court, might apply also to a court of a justice of the peace, since substantially the same words are used in authorizing a plea of counterclaim.[29] While the Constitution expressly limits the jurisdiction of a justice of the peace, it does not now make it exclusive, and no limitation is placed upon the Superior Court; but the Constitution also provides that the legislature may distribute the jurisdiction which does not pertain to the Supreme Court among other courts,[30] and this has been done by enacting that justices of the peace shall have exclusive jurisdiction in contract not

[27] *Francis* v. *Edwards* (1877) 77 N. C. 271; Garrett v. Love (1883) 89 N. C. 205.

[28] *Electric Co.* v. *Williams* (1898) 123 N. C. 51, 31 S. E. 288; *Askew* v. *Koonce* (1896) 118 N. C. 526, 24 S. E. 218; *Turner* v. *Livestock Co.* (1920) 179 N. C. 457, 102 S. E. 849. Jurisdiction would necessarily be one element of the cause of action.

[29] C. S. sec. 1500, Rule 3. The answer may contain ". . . a statement in a plain and direct manner, of any facts constituting a defence or counterclaim."

[30] Const. Art. 4, sec. 12.

exceeding $200,[31] and that the Superior Court shall have jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court.[32] The argument from inconvenience in failing to recognize the power of the court to render judgment in such cases, applies with equal force to the lower courts. These objections are presented in the dissenting opinion.

The strongest reason upon which the decision is based, and upon which it may be readily accepted as correct, is that the Superior Court has jurisdiction in such cases upon a proper construction of the counterclaim statutes, and upon the statutory power to render judgments.[33] These sections have been cited and explained in the opinions of the court. Section 588 of the Consolidated Statutes, however, is not referred to, although it must have been considered. This section provides, among other things, that "if a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly." This carries out the plan of the code, that the Superior Court may render such judgment as is necessary to do justice between the parties in administering both law and equity, and expressly requires a judgment for the defendant for the excess of his counterclaim. This power is not extended to a justice of the peace.

These decisions fix the rule of practice in North Carolina in accordance with the practice declared to exist in other jurisdictions. In a court of limited jurisdiction, the defendant may use his demand as set-off or recoupment to defeat or reduce the plaintiff's demand, but he cannot obtain an affirmative judgment upon his counterclaim, when the amount exceeds the jurisdiction. In a court of general jurisdiction, judgment may be rendered for the excess of defendant's claim, although no original action could have been brought thereon in such court.[34]

A. C. McI.

IMPRISONMENT FOR DEBT IN NORTH CAROLINA—The privilege of a creditor to subject the person of his debtor to imprisonment as a means of coercing payment was recognized by the North Carolina colonial statutes. These statutes dealt mainly with the methods by which an imprisoned debtor might be freed, through the taking of an insolvent debtor's oath and a surrender of what property he had for the benefit of his creditors. The Constitution of 1776 declared "That the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors, in such a manner as shall hereafter be regu-

[31] C. S. sec. 1473.
[32] C. S. sec. 1436.
[33] C. S. sec. 521, 602.
[34] This is the rule stated in 15 *Corpus Juris* 774, but the cases there cited which seem most clearly to sustain the rule depend upon the construction of local statutes, as in the principal case. These are *Howard Iron Works* v. *Buffalo Elec. Co.* (1903) 176 N. Y. 1, 68 N. E. 66, and *Garrett* v. *Robinson* (1900) 93 Tex. 406, 55 S. W. 564. The case of *Griswold* v. *Pieratt* (1895) 110 Cal. 259, 42 Pac. 820, which is also cited and discussed in the principal case, seems to hold contrary to the rule as stated.

lated by law."[1] The questions that arose under this provision were principally concerned with the construction of the various insolvent debtor's acts enacted by the General Assembly.[2]

In 1867, however, due to the conditions existing as a result of the war between the states, the legislature abolished imprisonment for debt altogether.[3] And in the next year, the new Constitution of 1868 provided that "There shall be no imprisonment for debt in this state, except in cases of fraud."[4]

Under this provision, the Supreme Court of North Carolina has had to construe the terms "debt" and "cases of fraud." Before going into these problems, however, three more general consequences of the abolition of imprisonment for debt should be noticed. In the first place, it operated to enlarge and liberalize the equity jurisdiction of our courts in connection with supplemental proceedings by judgment creditors to subject their debtors' legal choses in action toward payment of the judgment, after execution returned *nulla bona.*[5] In the second place, it deprived the courts of power in equitable proceedings to send a judgment debtor to jail for disobedience of an order to pay the debt by a day certain.[6] Otherwise, the debtor's predicament would be worse than before the abolition of imprisonment for debt, when he could take advantage of the insolvent debtor's acts to to escape confinement. Finally, the arrest and imprisonment of a debtor, particularly when the creditor thus seeks to reach property exempt from execution, may be made the basis of an action for damages for malicious abuse of process.[7]

What the Constitution sought to prohibit was the imprisonment of one who had done nothing more reprehensible than to fail to pay a sum of money owing under a contract. It did not seek to extend immunity from arrest to one who had committed an offense such as a tort, a contempt, or a crime, or to one who had breached a duty imposed by law for the protection of the public. In other words, the term "debt" as used in the Constitution has reference only to an obligation arising *ex contractu.* It does not embrace a duty to pay money arising *ex delicto.* Thus it has been held that the Constitution does not prohibit the arrest and imprisonment of the defendant in actions for libel,[8] seduction,[9] or conversion.[10] In bastardy cases,[11] the father may be imprisoned for refusing to give bond for the support of the child, or for failure to meet his payments under the bond. This obligation is something more than a debt; the duty is imposed to

[1] N. C. Const. 1776, sec. 39.

[2] *Burton* v. *Dickens* (1819) 7 N. C. 103; *Jordan* v. *Marshall* (1824) 10 N. C. 110; *Crain* v. *Long* (1832) 14 N. C. 371; *State* v. *Manuel* (1838) 20 N. C. 144, 153; *Williams* v. *Floyd* (1845) 27 N. C. 649; *Griffin* v. *Simmons* (1857) 50 N. C 146.

[3] P. L. 1866-67, ch. 3.

[4] N. C. Const. 1868, art. 1, sec. 16.

[5] *Powell* v. *Howell and Bridgers* (1869) 63 N. C. 283.

[6] *Daniel* v. *Owen* (1875) 72 N. C. 340. See Cook, *Powers of Courts of Equity,* 15 Col. L. R. 37, 116.

[7] *Lockhart* v. *Bear* (1895) 117 N. C. 298, 23 S. E. 484.

[8] *Moore* v. *Green* (1875) 73 N. C. 394, 21 Am. Rep. 470.

[9] *Hoover* v. *Palmer* (1879) 80 N. C. 313; *Kinney* v. *Laughenour* (1887) 97 N. C. 325, 327, 2 S. E. 43.

[10] *Long* v. *McLean* (1883) 88 N. C. 3.

[11] *State* v. *Palin* (1869) 63 N. C. 471; *Wooding* v. *Green* (1874) 71 N. C. 172; *State* v. *Beasley* (1876) 75 N. C. 211; *State* v. *Giles* (1889) 103 N. C. 391, 9 S. E. 433; *State* v. *Burton* (1893) 113 N. C. 655, 18 S. E. 657; *State* v. *Wynne* (1895) 116 N. C. 981, 21 S. E. 35; *State* v. *Morgan* (1906) 141 N. C. 726, 53 S. E. 142.

prevent the child from becoming a public charge. Similarly, an award of alimony in a divorce decree is based upon the husband's common law duty to support the wife, and is not a debt within the constitutional sense of the term.[12] Nor are the fine and costs,[13] levied for a violation of the criminal law.[14] For these constitute a punishment. On the other hand, it has been said that a penalty inflicted by a municipal ordinance for a violation of its provisions is a debt within the meaning of the Constitution, so as to prevent the imprisonment of the defaulting offender.[15] This is hard to square with the notion that the debt must be one arising *ex contractu.*

To bring a case within the phrase "except in cases of fraud," the element of fraud, either in the creation of the debt or in evasion of its collection, must be alleged in the pleadings, submitted to the jury as an issue, established by the verdict, and recited in the judgment.[16] The court has wisely refrained, however, from attempting a precise definition of just what will constitute fraud. Where, however, an agent converted to his own use a sum of money collected for his principal,[17] or a person obtained credit or an advance by means of knowingly false representations,[18] or a debtor conveyed property in violation of the rights of creditors,[19] the conduct has been held fraudulent so as to permit of the offender's arrest and imprisonment. But the court has been unable to find fraud where nothing else appeared except the fact of a mere breach of promise to marry,[20] an unexplained failure of an administrator to pay over allotments to distributees,[21] or a simple breach of promise to begin work given as consideration for an advance.[22] In this connection, the recent North Carolina case of *Minton* v. *Early*[23] is of interest. A statute authorized the arrest and imprisonment of a tenant for abandoning the crop without reimbursing the landlord for advancements. Because it did not require any allegation or proof of fraud, either in the inception or breach of the contract, the statute was held unconstitutional. The offense contemplated amounted to nothing more than a mere failure to perform a promise, and the exception to the constitutional immunity from imprisonment was not applicable.[24]

M. R. K.

[12] *Pain* v. *Pain* (1879) 80 N. C. 322. See 7 Minn. L. Rev. 407.

[13] *State* v. *Manuel* (1838) 20 N. C. 144; *Neighbors* v. *Hamlin* (1878) 78 N. C. 42.

[14] Compare *State* v. *Wallin* (1883) 89 N. C. 578.

[15] *State* v. *Earnhart* (1890) 107 N. C. 789, 12 S. E. 426. The statement was a dictum. See *Vance* v. *Henderson* (1900) 126 N. C. 689, 35 S. E. 228.

[16] *Claflin & Co.* v. *Underwood* (1876) 75 N. C. 485; *Steward* v. *Bryan* (1897) 121 N. C. 46, 28 S. E. 18; *Ledford* v. *Emerson* (1906) 143 N. C. 527, 55 S. E. 969.

[17] *Powers* v. *Davenport* (1888) 101 N. C. 286, 7 S. E. 747.

[18] *Walton* v. *Haynes* (1877) 76 N. C. 122; *State* v. *Torrence* (1900) 127 N. C. 550, 37 S. E. 268. The finding of fraud in the latter case is questionable.

[19] *Preiss* v. *Cohen* (1895) 117 N. C. 54, 23 S. E. 162.

[20] *Moore* v. *Mullen* (1877) 77 N. C. 327. Had the element of seduction been present the court would probably have held otherwise.

[21] *Melvin* v. *Melvin* (1875) 72 N. C. 384.

[22] *State* v. *Norman* (1892) 110 N. C. 484, 14 S. E. 968.

[23] (1922) 183 N. C. 199, 111 S. E. 347. See also *State* v. *Williams* (1909) 150 N. C. 802, 63 S. E. 949; *State* v. *Griffin* (1911) 134 N. C. 611, 70 S. E. 292, 21 L. R. A. (n. s.) 242, and note.

[24] For the present insolvent debtor's act see C. S. ch. 28.

PRIORITY BETWEEN HUSBAND'S CREDITORS AND WIFE'S RIGHT TO REFORMATION OF DEED—In the recent case of *Spence* v. *Foster Pottery Co.*[1] the Supreme Court of North Carolina sustained a suit by a wife to reform a deed made by a third person to her husband, which had been acknowledged and recorded more than fifteen years before. The deed was reformed by inserting the wife's name as a grantee with the husband upon parol evidence that she furnished half the purchase money amounting to over thirteen thousand dollars. Land which for this long period had appeared of record as his several property was thereby converted into an estate by the entireties, and the intervening claims of the husband's creditors, founded on judgments duly docketed before the wife's discovery of the original mistake in drafting the deed, were defeated. A similar case, decided several years before the making of the deed in the instant case, appeared conclusive of the points involved,[2] unless the court was prepared to reconsider a precedent of so many years standing.

The result of the decision is that a virtual homestead or life exemption was secured to the husband in nearly $7,000 of his own property and in a like amount of his wife's property, as against creditors of the husband with docketed judgments for more than $6,000, who acted with diligence in examining the records and credited him on the strength of facts there appearing. The hardship of the case makes worth while an attempt at an impartial review of the authorities.

Conceding the wife to be entitled to relief, her property rights would have been amply protected, by a decree establishing the husband and wife as cotenants. Had such a course seemed possible in other respects, however, it was not open to the court in view of the prior case cited above. The wife asserted and established an estate by entireties, and she was entitled to it so long as the courts recognize that survival from a state of society which has long ceased to exist. This estate for hundreds of years was in harmony with the legal and popular conceptions of the relation of husband and wife[3] and was not a just object of criticism. But the relation of husband and wife has been revolutionized by the spirit of the times and by statutes which have vested married women with new privileges and obligations. And in the present state of the law, the observation of Chief Justice Clark that the estate by entireties exists merely because the legislature has forgotten to change it to a cotenancy[4] is hardly too strong. Had this estate been abolished, the decree in the principal case could have been framed, even had reformation been allowed, so as "to render to each that which was his own." Perhaps sewing new cloth on old garments is a necessary evil now; the necessity might have been obviated a generation ago.

[1] Decided April, 1923. 117 S. E. 32. Stacy, J., wrote the principal opinion. Chief Justice Clark dissented.

[2] *Ray* v. *Long* (1901) 128 N. C. 90, 38 S. E. 290; S. C. (1903) 132 N. C. 891, 44 S. E. 652.

[3] It seems founded on the same common law principle which after marriage gave the husband an estate *ex jure uxoris* in his wife's land; namely, that he who has the rents and profits of land has a commensurable freehold therein. *Bilder* v. *Robinson* (1907) 73 N. J. Eq. 169, 67 Atl. 828. See *Paramour* v. Yardley, Plow. 542. But see the vigorous characterization by Clark, C. J. dissenting, in *Freeman* v. *Belfer* (1917) 173 N. C. 581, at p. 589, 92 S. E. 486: "The obscure and utterly unknown judge who in the remote past evolved the doctrine of entireties out of his own consciousness."

[4] *Bynum* v. *Wicker* (1906) 141 N. C. 95, 53 S. E. 478.

The creditors interposed two defences, the statute of limitations and the registration acts. It seems clear that the statute of limitations invoked could not aid the creditors[5] unless it appeared that the wife ought to have discovered the facts as to the state of the title at an earlier date.[6] For it might well have been contended that she was chargeable with negligence and laches for not discovering the error sooner.

The registration act,[7] as the court points out, by its term at least, had no bearing on the case. It provides that three classes of instruments, namely: conveyances, contracts to convey, and certain leases shall not be effective before registration, as against bona fide purchasers and creditors. Here the contest was as to the priority of docketed judgments and an equity to have a registered deed reformed. The statute has never been held to make a registered deed absolutely conclusive as against such equities. For instance, if the wife had discovered the mistake or inadvertence the day after the registration of the deed and had begun the suit at once, no one would have doubted her right to reformation. If the judgments were to have priority, it must have been because the case for reformation was not meritorious in the view of a court of equity. In other words the decision must turn, in the words of the court, not "on the terms of the Connor Act, but on the broad principles of equity." But the purpose of the Connor Act, in such a case, may well be an important consideration in balancing the equities of the opposing parties.[8] One of the purposes of all acts requiring record of various classes of instruments, deeds, judgments, etc., is to protect those dealing with property on the strength of the records. When a question of priority between inconsistent claims arises, and one of the parties has carefully acted on the security held out by the state to registered instruments while the other has omitted to see to it that the records indicate his claim, this fact may well be considered by the court of equity as inclining the balance in favor of the recorded title. This seems to be all that is meant by courts which base on the registration laws the preference of the recorded claims of creditors over the merely equitable claims of a wife to reformation, for such cases always invoke the wife's laches or negligence as a controlling factor. A strong expression of such an appeal to registry laws is subjoined from a Connecticut case.[9]

[5] C. S. sec. 445, the ten year statute relating to "an action for relief not herein provided for." This case, however, is "herein provided for." C. S. sec. 442(9) declares that causes of action for relief on the ground of fraud or mistake are not barred until three years after the discovery of the fraud or mistake, and the wife's case is that the mistake or inadvertence of the draftsman had been known only a few months.

[6] The statute runs from the time when the party discovered the facts "or could have discovered them by the exercise of proper effort and reasonable care." *Modlin* v. *R. R. Co.* (1907) 145 N. C. 218, 58 S. E. 1075.

[7] C. S. sec. 3309, known as the "Connor Act."

[8] See *Door Co.* v. *Joyner* (1921) 182 N. C. 518, 109 S. E. 259.

[9] In *Goldberg* v. *Parker* (1913) 87 Conn. 99, 87 Atl. 555, Ann. Cas. 1914 C 1059, the court in holding a wife equitably estopped to obtain reformation as against creditors, says: "Any other holding would do violence to the faith which, time out of mind we have given to our registry laws. With inflexible adherence we have made every title to land, so far as practicable, appear of record. We have held the record constructive notice to all the world of land titles. We have authorized reliance to be placed thereon. We have sustained contracts and conveyances made upon their faith. We cannot hold that a credit extended in reliance upon the land records, must yield to the equitable owner of the title without doing irreparable injury to the registry laws and going counter to our decisions. The maintenance of our system of registry of titles is of the greatest public importance, and he who acts in reliance upon the record has behind him not only the natural equities of his position, but also the especial equity arising from the protection afforded everyone who trusts the record."

The circumstances to be weighed in determining the priority of such conflicting claims include: the wife's conduct in not ascertaining for so long the true state of facts as to the title; the element of estoppel introduced by the creditors advancing money on the strength of the recorded deed; and the notice or absence of notice to the creditors of the wife's equity. There must be some constructive fraud, laches, or negligence on the part of the plaintiff to defeat the claim for reformation. Mere failure to detect the error in the instrument, continued for a long period, has, it seems, been considered sufficient in itself, in some cases; but combined, as it usually is with other elements in the case, it may become conclusive.[10] Nor would the mere fact that the creditors have in the exercise of due care advanced money on the strength of the record title aid them as against the wife unless some fault can be brought home to her, and if such fault exists, it must be found in the wife's permitting her husband for so long to appear as record owner in possession of the property.

"Where the true owner of property, for however short a time allows another to appear, as the owner of or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Or when others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure whether contested at law or in equity."[11]

The principle thus stated has been applied to circumstances such as existed in the instant case.[12]

On the question of notice from possession the general doctrine is that if the husband was in possession under a recorded conveyance, the creditors were without notice of the wife's equity.[13] But the cases are not uniform, and the court adopts the apparently indefensible rule, without distinction between recorded and unrecorded titles, that the husband's possession is the wife's possession when they are living together.

It thus appears that the creditors at every step acted with care and diligence in reliance upon record title, and that on principle and authority they were not chargeable with even constructive notice of the wife's equity; that the wife for

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[10] Clark, *Principles of Equity*, sec. 356.

[11] Bigelow, *Estoppel*, 6th ed., 607. *McNeil* v. *Tenth Natl. Bank* (1871) 46 N. Y. 325, 7 Am. Rep. 341. *Mayo* v. *Leggett* (1887) 96 N. C. 242, 1 S. E. 622 (citing above passage from Bigelow, but distinguishing case on ground that owner of equity had done nothing by word or act to mislead the other party).

[12] *Morgan* v. *Lewis* (1916) 172 Ky. 813, 189 S. W. 1118. "If the wife paid the consideration for the deed . . . she then permitted her husband to appear to be the owner of the land and thereby invested him with a false credit . . . while equity has leaned and no doubt will continue to lean toward the enforcement of such trusts between husband and wife, as [well] as between the latter and others possessing no intervening rights, it has not nor will it recognize such trusts or enforce them as against those who have [obtained rights upon the false credit] which the acquiescence of the wife has permitted to appear." See *Farmers' Oil etc. Co.* v. *Husten* (1917) 125 Ark. 280, 192 S. W. 890; *Mitchell* v. *Liberty Saving, etc. Corp.* (1922) 28 Ga. App. 408, 111 S. E. 215; *Krueger* v. *McDougald* (1918) 22 Ga. 429, 96 S. E. 867 (effect of wife's negligent omission to inform herself raised but not decided in view of other elements of estoppel); *Chaney* v. *Gould Co.* (1915) 28 Idaho 76, 152 Pac. 468, said to be inapplicable where wife neither knew nor should have known that title in husband; *McKecham* v. *Volmer Clear-Water Co.* (1917) 30 Idaho 505, 166 Pac. 256.

Contra: *Zeigler* v. *Zeigler* (1913) 180 Ala. 246, 60 So. 810, deed to husband reformed after 28 years, it appearing that he always recognized her right. See also authorities pro and con in note in Ann Cas. 1914 C 1066.

[13] *Kirby* v. *Tallmadge* (1896) 160 U. S. 384, 16 Sup. Ct. 349, 40 L. Ed. 466, where it is said that if land is occupied by husband and wife and there is a recorded title in one of them, such joint occupation is no notice of an unrecorded title in the other. "The rule is universal, if possession is consistent with the record title, it is not notice of an unrecorded title," citing 2 Pom. *Eq.* sec. 616, where the principle as generally held is approved and said to be "in perfect harmony with sound principle."

a prolonged period pursued such a course of conduct in not ascertaining the facts relating to the title, as to make it possible for the husband to appear with a false credit, thereby occasioning loss to innocent third parties. The better view therefore seems to us to be, at least in the present status of married women's property rights and the obligations which should accompany them, that her conduct amounts to laches and negligence and should bar her suit in equity.

Finally the preference of the creditor's claims would seem to follow from "the simple and just principle" that "when one of two parties must suffer by the fraud or misconduct of a third person, he who first reposed a confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss."[14]

L. P. McG.

CRIMINAL ASSAULT AND BATTERY WITH AN AUTOMOBILE—Common law definitions of criminal assault and battery always assume the presence of wilfullness, or some equivalent, as an essential element of the crime. "An assault is an intentional attempt, by violence, to do injury to the person of another. It must be intentional . . . a present purpose to do an injury."[1] There is no assault if the circumstances show that there is not a present purpose to do an injury, as in the cases where the defendant declares his intention in such a manner as to explain away an apparent assault.[2] Ordinarily an act which begins as an assault ends as a battery and merges in it, and so it is said that a battery always includes an assault,[3] although the crime of assault may be complete without a battery. A battery is an injury done to the person of another, no matter how slight the force may be, if done in an angry, rude or hostile manner. Thus riding at a person is an assault, riding against him is a battery.

By statute, in the United States and England, various grades of criminal assault and battery have been established, depending upon the particular criminal intent actuating the wrongdoer. Thus we have assault with intent to murder, assault with intent to rob, assault with deadly weapon with intent to kill,[4] assault with intent to maim,[5] etc. Where a specific criminal intent is made an element of the statutory offense, it must be alleged in the indictment and proved.

While no specific intent is required in simple assault and battery, there must be a general criminal intent, variously described as "intent to injure," "intent to commit personal violence," "intent to do harm," etc. "If there is no present purpose to do an injury, there is no assault . . . The intention as well as the act

[14] *Lickbarrow* v. *Mason* (1787) 2 T. R. 63, 70: "Wherever one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." *Wilmington, etc. R. Co.* v. *Kitchin* (1884) 91 N. C. 39; *Havens* v. *Bank* (1903) 132 N. C. 214, 43 S. E. 639.

[1] *State* v. *Davis* (1840) 23 N. C. 125, 35 Am. Dec. 735.

[2] In *State* v. *Crow* (1841) 23 N. C. 375, the defendant raised a whip and said, "If you were not an old man, I would knock you down." This is not an assault, since there is no present purpose to do harm. Compare *State* v. *Morgan* (1842) 25 N. C. 186, 38 Am. Dec. 714, where the defendant raised an axe in position to strike and said, "Give up the gun or I'll split you down." This was held to be an assault.

[3] *State* v. *Suddereth* (1922) 184 N. C. 753, 114 S. E. 828. This statement is found in Coke on *Littleton*, p. 253.

[4] Consolidated Statutes, North Carolina (cited as C. S.) sec. 4214.

[5] C. S. sec. 4210-11-12.

makes the assault."[6] This general criminal intent, which is an element of every assault and battery, may be inferred from circumstances constituting criminal negligence,[7] but may not be inferred from mere violation of an ordinance or statute, unless the violation of the statute is the legal equivalent of negligence.[8] This is not to be confused with the doctrine of constructive intent, where the defendant intends to do one criminal act and in fact does another. In such cases, it is held that if the intention is to violate an ordinance or statute of the class known as *malum prohibitum, i.e.,* crimes which require no specific intent, and if an unexpected result happens entirely without negligence, the wrongdoer cannot be held criminally, because there is no criminal intent to carry over to the injury actually resulting.[9]

It is true that most of the cases of criminal assault and battery with an automobile have been cases where there was some statutory violation in conjunction with negligence.[10] The courts have spoken as if this violation constitutes the wilful act which imputes a criminal intent.[11] But there seems to be no reason for distinguishing negligent acts of commission, such as violations of statutory provisions, from negligent acts of omission. "There is little distinction except in degree between a will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal and within limits supplies the place of an affirmative criminal intent."[12]

Suppose the defendant, without direct intent to injure anyone, drives an automobile negligently and runs into another person. If the victim dies, he is guilty of manslaughter. If the victim lives, and if the law is to be developed to meet the changing conditions of our complex civilization, as well as with logic and symmetry, criminal responsibility, though of a lesser degree, must still attach to his act. It can be no other crime at common law except assault and battery, since the law has not split personal injuries into two degrees of offense, as in homicide.[13] Or we may say that the advent of the automobile has compelled the law to recognize a new crime of negligent assault and battery.

The negligence, which will sustain criminal responsibility in these cases, is something more than is required in a civil action. It has been termed "gross" neg-

[6] *State* v. *Hemphill* (1913) 162 N. C. 632, 78 S. E. 167.

[7] *State* v. *Suddereth* (1922) 184 N. C. 753, 114 S. E. 828 and the cases of assault and battery with an automobile cited herein. See also *State* v. *Monroe* (1897) 121 N. C. 677, 28 S. E. 547.

[8] See note on *Public Wrong and Private Action in North Carolina,* 1 N. C. L. Rev. 192, where the author points out that the violation of a statute which sets up a standard of conduct is not properly negligence, or evidence of negligence, but amounts to the legal equivalent of negligence.

[9] *Com.* v. *Adams* (1873) 114 Mass. 323, 19 Am. Rep. 362. This was an indictment of assault and battery for running into a boy with a sleigh, which was being driven in violation of a city ordinance. No question of negligence was considered, and it was held that the intent to violate the ordinance could not supply the intent necessary to sustain the charge of assault and battery, but that to supply the intent necessary for an unexpected assault, the defendant must be engaged in an act *malum in se.* See *State* v. *Horton* (1905) 139 N. C. 588, 51 S. E. 945.

[10] *State* v. *Suddereth* (1922) 184 N. C. 753, 114 S. E. 828; *State* v. *Schutte* (1915) 87 N. J. L. 15, 93 Atl. 112; s. c. affirmed 88 N. J. L. 396, 96 Atl. 659; *Luther* v. *State* (1912) 177 Ind. 619, 98 N. E. 640; *Schneider* v. *State* (1914) 181 Ind. 218, 104 N. E. 69; *Bleiweiss* v. *State* (1918) 188 Ind. 184, 119 N. E. 375; s. c. 122 N. E. 577; *State* v. *Miller* (Mo. 1921) 234 S. W. 813; *Tift* v. *State* (1916) 17 Ga. App. 663, 88 S. E. 41; *People* v. *Hopper* (Colo. 1917) 169 Pac. 152; *Fishwick* v. *State* (1911) 33 Ohio Cir. Ct. 63; *Com.* v. *Bergdoll* (1913) 55 Pa. Super. Ct. 186; *Com.* v. *Coccodralli* (1921) 74 Pa. Super. Ct. 324.

[11] *State* v. *Schutte* (1915) 87 N. J. L. 15, 93 Atl. 112; *Luther* v. *State* (1912) 177 Ind. 619, 98 N. E. 640.

[12] 1 Bishop's *New Criminal Law,* sec. 313.

[13] See note in 13 Mich. L. R. 594 on *Negligent Assault and Battery.*

ligence, but the term is misleading and is based on the idea of degrees of negligence. Criminal negligence means recklessness. It is such recklessness or carelessness as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. As the North Carolina Supreme Court said in regard to the negligence necessary to sustain a conviction of manslaughter in case of an unintentional killing, "It is such recklessness or carelessness as is incompatible with a proper regard for human life."[14] That the same standard should apply in cases of negligent assault and battery is evident. The North Carolina court has laid down the following rule which should meet with universal approval: "Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make an assault if no killing ensues."[15]

In the New Jersey case of *State* v. *Schutte*,[16] there was a conviction of assault and battery by "wilfully and unlawfully" striking and wounding another with an automobile, which was being driven at an excessive rate of speed, in violation of statute. It was argued that "both the wilful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of criminal assault; and that, as a necessary corollary, mere negligence will not sustain a conviction for such crime." The court agreed with these abstract propositions, "provided it be borne in mind that the necessary malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended and also that an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional." The decision does not appear to be based on negligence, but holds that the driving of an automobile at an excessive rate of speed is a wilful act, likely to result in injury, and malice and intention to inflict injury, which are essentials of criminal assault, may be implied, if the circumstances so warrant. For instance, the court says, "The running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a willful act as distinguished from merely negligent conduct, when considered with respect to the state of mind of the offender, which is what the criminal law considers . . . It requires neither argument or illustration to show that the excessive rate of speed at which an automobile is driven is a product of the will of its driver and not the result of his mere inattention or negligence. The two cannot be confused any more than the hurling of a baseball bat into a crowd of spectators could be confused with its accidentally slipping from the hand of the batter."[17] This case was affirmed by the Court of Errors and Appeals[18] for the reasons stated in the opinion of the Supreme Court, but the appellate court was afraid that the decision might

[14] *State* v. *Rountree* (1921) 181 N. C. 535, 106 S. E. 669; *State* v. *McIver* (1918) 175 N. C. 761, 94 S. E. 682.

[15] *State* v. *Suddereth* (1922) 184 N. C. 753, 755, 114 S. E. 828; *State* v. *Leary* (1883) 88 N. C. 615, 617; *State* v. *Dula* (1888) 100 N. C. 423, 428, 6 S. E. 89.

[16] *State* v. *Schutte* (1915) 87 N. J. L. 15, 93 Atl. 112.

[17] What if the slipping of the bat from the batter's hands could be attributed to his recklessness in handling it?

[18] *State* v. *Schutte* (1916) 88 N. J. L. 396, 96 Atl. 659.

leave the impression that proof of excessive speed alone would sustain a conviction of assault and battery. So it said that exceeding the speed limit is not the controlling factor but is to be considered in deciding whether or not the defendant was running his automobile at a rate of speed, which, under the existing conditions, was obviously dangerous to pedestrians and others using the highway; i.e. whether, in other words, the defendant is guilty of criminal negligence.

In a recent North Carolina case,[19] there was a collision between the defendant's car and the car of the prosecutor. The jury found that the defendant was running his car at an excessive speed in violation of statutory provisions[20] designed to secure the safety of persons on the highways and enacted to prevent death or serious bodily harm. The court held that where one upon the highway is killed or injured by reason of the operation of an automobile in violation of the statutory provisions, the party in default may be prosecuted for murder or manslaughter if death ensues and for assault in case of personal injury. The statute in question sets up a standard of conduct, and the common law attaches to the violation of this legislative standard the same legal consequences that flow from a breach of the common law standard of criminal negligence.[21] Thus the North Carolina court makes responsibility depend on criminal negligence, which is, in every way, better than trying to imply malice or wilfulness from the performance of an unlawful act. Further, the North Carolina rule, as stated above, that "where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will make an assault if no killing ensues,"[22] seems to be the correct rule for the solution of negligent assault and battery cases.

In the above case, the prosecutor was not thrown out of his car or touched in any way by the defendant's car, but was injured by reason of the severe jar. This is none the less a battery, for the force applied unlawfully need not be direct, but a battery is any unlawful touching of the person of another, irrespective of the number of mechanical agencies through which it is transmitted. Thus to strike a horse driven by the prosecutor or to strike the prosecutor's clothes may be as much a battery as to strike his face.[23] The indictment in this case was for assault with deadly weapon. It is clear that an automobile may be a deadly weapon, for whether a weapon is deadly or not depends upon such things as its size and character, the manner of its use, the position of the parties, and other circumstances.[24]

When the verdict was rendered, in the principal case, the defendant was sentenced to twelve months in jail and assigned to the roads. The next day, when

[19] *State* v. *Sudderth* (1922) 184 N. C. 753, 114 S. E. 828.

[20] C. S. sec. 2618, as amended by ch. 98, Public Laws, Extra Session 1921, as follows: "No person shall operate a motor vehicle upon the public highways of this state recklessly, or at a rate of speed greater than is reasonably and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person; provided, that a rate of speed in excess of twenty miles per hour in the residence portion of any city, town or village, and a rate of speed in excess of ten miles per hour in any business portion of a city, town or village, and a rate in excess of thirty miles on any public highway outside the corporate limits of any incorporated city or town, shall be deemed a violation of this section."

[21] 1 N. C. L. Rev. 192, cited in note 8, *supra.*

[22] See cases in note 15, *supra.*

[23] *State* v. *Suddereth* (1922) 184 N. C. 753, 114 S. E. 828.

[24] *State* v. *Beal* (1915) 170 N. C. 764, 87 S. E. 416.

the motion for a new trial was made and overruled and appeal taken, the court struck out the first judgment and imposed a sentence of two years. The Supreme Court thought that the consideration for the imposition of the lighter sentence was the fact that, as the lower court inferred, no further resistance was intended. Judge Hoke said: "It is the accepted rule with us that within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court and may be reviewed by this court only in case of manifest and gross abuse. While the reasons for this change of sentence, and such a pronounced change, may not appear adequate or altogether satisfactory, we do not feel justified in holding as a conclusion of law that the judgment is erroneous within the meaning of the principle."[25]

In general, the judgments of a court are under its control during the term at which they are made, so that a court has power, during a term, to correct, modify or recall an unexecuted judgment in a criminal as well as in a civil case.[26] Thus a court may modify a sentence, eight days after it was begun, by reducing it from twelve months to six months imprisonment.[27] Whether a court has the power to modify a sentence by increasing it is another matter. It seems that it will be allowed if the trial court acted from right and proper motives, in order to make the punishment fit the offense. In *Nichols* v. *United States*,[28] the lower court understood from counsel that the case would not be further prosecuted and so gave a sentence of six months in jail. Thereupon counsel said that he intended to appeal, and the court increased the sentence to twelve months. The Circuit Court of Appeals thought that it was competent for the court to reconsider its sentence and impose a different one. The court said, "The bill of exceptions does not show that the first sentence was set aside and the second imposed, doubling the imprisonment, because the defendant had declared his intention of appealing the case. A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant. It would be the infliction of a penalty for the exercise of a clear legal right and would call for the severest censure. But no such motive can be imputed to the court below." A Georgia case has reached the same result of refusing to reverse the judgment of a trial court, but condemning the practice of increasing a sentence because the defendant appeals.[29] In both of these cases, the appellate courts presumed that the lower court acted from right and proper motives. In the principal case, the lower court increased the sentence, because the first sentence was given under the inference that no further resistance was to be made by the defendant, and when further resistance was made by exercising the constitutional right of appeal, the sentence was doubled. It seems that this is a dangerous practice, and the North Carolina Supreme Court would have done well to put a stop to it by reversing the judgment. Although the

[25] *State* v. *Suddereth* (1922) 184 N. C. 753, 114 S. E. 828.

[26] *Ex parte Lange* (U. S. 1873) 18 Wall. 163, 21 L. Ed. 872; *State* v. *Warren* (1885) 92 N. C. 825; *In re Brittain* (1885) 93 N. C. 587.

[27] *In re Brittain* (1885) 93 N. C. 587.

[28] *Nichols* v. *U. S.* (1901) 106 Fed. 672, 46 C. C. A. 405.

[29] *Meaders* v. *State* (1895) 96 Ga. 299, 22 S. E. 527.

presumptions are in favor of the trial court, which will be upheld, if its action is at all reasonable, it is an abuse of the trial court's discretion to double a sentence because the defendant decides to appeal.

R. H. W.

FORMAL LIMITATIONS UPON LEGISLATIVE POWER IN NORTH CAROLINA—The Constitution of North Carolina contains two provisions requiring certain formal statements to appear in enacted laws. One is found in section 21 of article 2, providing that "The style of the acts shall be: The General Assembly of North Carolina do enact." The other, located in section 7 of article 5, is that "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied and it shall be applied to no other purpose."

The provision first quoted made its initial appearance in North Carolina in the Constitution of 1868. The earlier constitutions in this state did not have a similar requirement. That was true, also, of the federal Constitution, and of the constitutions of Delaware (1897), Georgia (1877), Kentucky (1890), Pennsylvania (1873), and Virginia (1902).[1] Kentucky has since inserted such a provision in her Constitution.[2] In the absence of constitutional provision, statutes, custom, and legislative rules have covered the matter.[3] Irregularity of phraseology, or entire omission of the clause, in such a case, therefore, cannot usually affect the validity of the act. But where the Constitution stipulates the insertion and form of the enacting clause, exactness is not only advisable; it is often imperative. For the draftsman of a legislative bill to fail to comply with the constitutional requirement, in full, is to fly in the face of disaster.

The decisions about the country are in conflict as to the precise effect of this constitutional requirement. In some states it is held to be directory only, at least to the extent that variation in language will not invalidate the law. In others, the courts have held that the form prescribed in the basic law must be followed literally. Moreover, "the decisions vary all the way from holding that entire absence of enacting provisions does not destroy the law even where there is an expressed constitutional form, to the contention that a law without an enacting clause is void although there be no constitutional provisions requiring it."[4]

The matter seems to have been passed upon only once in North Carolina. In *State* v. *Patterson*,[5] decided in 1887, it appeared that the statute under which the defendant had been indicted for a violation of a prohibition regulation contained no enacting clause whatever. The present Chief Justice of the Supreme Court, then a judge of the Superior Court, Clark, J., held that the statute was valid, notwithstanding. The Supreme Court, however, per Merriman, J., reversed the judgment, and held that the constitutional provision is mandatory and must be com-

[1] For the various constituitonal provisions, see *Index-Digest of State Constitutions*, New York, 1915, page 832.
[2] Sec. 62.
[3] The fullest discussion of the whole situation is found in Jones, *Statute Law Making*, Boston, 1912, pp. 81-90. See also *Notes on Bill-drafting in Illinois*, Springfield, 1920.
[4] The cases are collected in Jones, *Statute Law Making*, note 3, *supra*.
[5] 98 N. C. 660, 4 S. E. 350.

plied with, saying: "The purpose [was] to require every legislative act of the legislature to purport and import upon its face to have been enacted by the General Assembly . . . to establish the act, to give it permanence, uniformity and certainty, to identify the act of legislation as of the General Assembly, to afford evidence of its legislative, statutory nature." While the point was not before the court, one gathers that a substantial variation from the language set forth in the Constitution, had some sort of an enacting clause been used, would have met with a similar judicial disapproval.

The second provision quoted at the beginning of this note, that "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied and it shall be applied to no other purpose," has given rise to little trouble with the validity of laws. It has figured mainly in connection with the question as to how far the fiscal officers of the local government might go in spending the proceeds of taxation for a purpose not mentioned in the tax levy statute. It has been held, however, that the clause is not a limitation upon tax levies enacted by other legislative bodies than the General Assembly.[6] Thus, it is not necessary for an order of the county commissioners to specify the particular purposes for which general taxes are levied. But it does apply to all acts of the state legislature levying any kind of tax, whether upon the poll or upon property.[7] And it has been generally held that any attempt to divert funds derived from taxation to a purpose different from that specified in the legislative act violates the section quoted and is void.[8]

In this connection, the recent case of *Parker* v. *Commrs.*[9] is of interest. By an act of the General Assembly, the commissioners of Johnson county were authorized to levy and collect a special tax from a part of the property owners of the county for the purpose of erecting and maintaining a stock fence. The whole of Johnson county having later been placed under a general stock law by legislative enactment, the necessity for the continuance of the fence had ceased. Thereupon the legislature provided that the county commissioners should sell the fence, and that the proceeds of the sale, together with any balance on hand, should be paid into the school fund of the county. The Supreme Court held, per Clark, C. J., that this statute was valid. It relied mainly upon the earlier case of *Long* v. *Commrs.*[10] This case seems distinguishable upon the ground that the tax involved was one levied by the county commissioners for a necessary purpose, a levy that did not require special legislative approval, and whose purposes were not required to be stated. In other words, the tax proceeds in the *Long* case could be diverted because the Constitution did not require that they be spent for a particular stated purpose. The *Parker* case gave judicial approval to a diversion from the initial purpose of the tax, as originally stated, but a diversion authorized by the legislature itself. Justice Walker's dissent did not proceed upon the constitutional grounds here discussed.

[6] *Parker* v. *Commrs.* (1889) 104 N. C. 166, 10 S. E. 137.
[7] *Bd. Education* v. *Commrs.* (1904) 137 N. C. 310, 49 S. E. 353. Compare *Railroad* v. *Commrs.* (1908) 148 N. C. 220, 245, 61 S. E. 690.
[8] *McCless* v. *Meekins* (1895) 117 N. C. 35, 23 S. E., 99; and cases cited note 7, *supra.*
[9] (1919) 178 N. C. 92, 100 S. E. 244.
[10] (1877) 76 N. C. 273.

The effect of the *Parker* case is to suggest that, while article 5, section 7 prevents an application of the funds derived from taxation to a purpose distinct from that specified by the legislature in the original tax authorization, the legislature itself in a later act may validly permit such a diversion. Such a doctrine had theretofore been expressly denied.[11]

D. C. B.

EQUITABLE SERVITUDES IN NORTH CAROLINA—The power of a court of equity to enforce negative restrictions imposed by agreement upon the use of property has long been established. The principles controlling the exercise of this power were originally thought to be those underlying the specific performance of contracts. Current English authorities, however, and to a large extent, the more recent American decisions, regard these agreements as creating equitable property rights in another's property.[1] According to this view, they constitute "a sort of equitable appendix to the common law servitudes" of easements, profits, and covenants running with the land, and are properly called "equitable servitudes."[2]

This jurisdiction of the chancellor seems to have been developed largely because of the failure of the common law to create the rights in another's land made necessary by modern social and economic conditions, and also because of the almost total lack of governmental supervision of buildings, at the time, in Anglo-American countries.[3]

The shift from the contract theory to the property theory has produced important consequences. According to the first conception, relief was granted or denied after a discretionary consideration of the balance of hardships and conveniences between the parties. Under the property theory, the existence, nature, extent and duration of the rights resulting from the agreement depend primarily upon the intention of the original parties. If this intention was that the benefits of a restricted use of a piece of property should inure to the ownership of another piece of property, while a given relation between those properties exists, the rights to those benefits pass, without express assignment, with the property to which they are appurtenant. Moreover, persons subsequently taking the property, whose use is so restricted, having either actual or constructive notice of the outstanding rights, hold subject thereto. Therefore, while the original purpose can still be carried out, the refusal of a chancellor to enforce those rights, merely because of a discretionary sense that compliance with the restrictions would be inequitable as between the present parties, would amount to a taking of property, without the consent of the owner for the unentitled use of another.[4]

Perhaps the most familiar cases of equitable servitudes are those in which restrictions have been imposed upon the use of land for the benefit of the persons

[11] *McCless* v. *Meekins*, note 8, *supra*.

[1] See Pound, *Progress of the Law*, 1918-19, *Equity*, 33 Harv. L. Rev. 420, 813, 929, at pp. 813-822; Clark, *Equitable Servitudes*, 16 Mich. L. Rev. 90. For an apparent intimation of the contract theory, see *St. Peter's Church* v. *Brogaw* (1907) 144 N. C. 126, 133, 56 S. E. 688, note 17, *post*.

[2] 31 Harv. L. Rev. 876, 877; *Guilford County* v. *Porter* (1914) 167 N. C. 366, 370, 83 S. E. 564.

[3] See Clark, *Equitable Servitudes*, note 1, *supra*; 28 Harv. L. Rev. 201.

[4] *Riverbank Improvement Co.* v. *Chadwick* (1917) 228 Mass. 243, 117 N. E. 244, discussed in 31 Harv. L. Rev. 876. To the same effect, *Guilford County* v. *Porter*, note 2, *supra*.

who are to use another piece of land. Thus residents of an exclusive neighborhood have been protected against the disruption of building lines,[5] and against the invasion of commercial establishments,[6] apartment or tenement buildings,[7] and other obnoxious conditions.[8] It is also true that the notion of equitable servitudes was largely developed in connection with the protection of interests in real property.

Nevertheless, there is nothing in the conception of an equitable servitude to prevent its applicability to the use of properties other than land. Two chattels may have such a relation to each other that compliance with negative restrictions upon the use of one will enlarge and preserve the enjoyment of the other.[9]. Similarly, the ownership of a business may be benefited, not only by compliance with negative restrictions upon the use of a chattel, but by the restricted use of a piece of land[10] or of another business.[11] If this was the intention of the parties, there seems to be no reason why equity should not lend its coercive powers to an enforcement of such servitudes, as between those claiming under the original parties, with notice. This assertion assumes, of course, the absence of conflict with a countervailing public policy such as that prohibitive of unreasonable restraint of trade.[12] Certainly the economic happiness of the owner of a business, whose good will, trade relations, and labor problems constitute such vulnerable objectives for disturbing conditions and influences, is as deserving of equity's solicitude as the aesthetic contentment of the owner of a home.

The problem of equitable servitudes has been dealt with by the Supreme Court of North Carolina in connection with some three types of cases. The first type to be noticed is the situation in which an owner of property has subdivided it and laid out streets and alleys, selling lots in relation to the entire announced plan. In spite of a failure to carry through a formal dedication of the streets and alleys to the municipal corporation, it has been held that the purchasers of lots may be protected against their abandonment by conceiving of the owner's conduct as giving rise to an estoppel to deny a dedication.[13]

A second situation is found in the Guilford county courthouse property litigation. In 1873, pursuant to statutory authority, the county purchased three lots from Porter, Caldwell, and Staples, respectively, among others, for the purpose of enlarging the court house square. In two of these conveyances, the county covenanted "that the said lots herein conveyed shall be used by the parties of the

[5] *Manners* v. *Johnson* (1875) L. R. 1 Ch. Div. 673; *Brandenburg* v. *Lager* (1916) 272 Ill. 622, 112 N. E. 321; *Withers* v. *Ward* (1920) 86 W. Va. 558, 104 S. E. 96.

[6] *Parker* v. *Nightingale* (Mass. 1863) 6 Allen 341, 83 Am. Dec. 632; *Trustees of Columbia College* v. *Lynch* (1877) 70 N. Y. 440.

[7] See the cases collected in 41 L. R. A. (n. s.) 625, 1 B. R. C. 993, and L. R. A. 1918 C 873.

[8] *Robinson* v. *Edgell* (1905) 57 W. Va. 157, 49 S. E. 1027; and cases collected in 9 L. R. A. (n. s.) 1039. Compare *Queensborough Land Co.* v. *Cazeaux* (1915) 136 Lou. 724, 67 So. 641; *Gandolfo* v. *Hartman* (1892) 49 Fed. 181.

[9] *Murphy* v. *Christian Press Co.* (1889) 38 N. Y. App. Div. 426, 56 N. Y. S. 597; *New York Bank Note Co.* v. *Hamilton Bank Co.* (1895) 28 N. Y. App. Div. 411, 50 N. Y. S. 1093. See 32 Harv. L. Rev. 278.

[10] *Abergarw Brew. Co.* v. *Holmes* (1900) L. R. 1 Ch. 188; *Rubel Bros.* v. *Dumont Co.* (1920) 110 Misc. 32, 180 N. Y. S. 662.

[11] *Wilkes* v. *Spooner* (1910) 24 L. T. R. 157, (1911) 2 K. B. 473; *Cole* v. *Seamonds* (1920) 87 W. Va. 19, 104 S. E. 747. See 27 W. Va. L. Quart. 259, and 24 Harv. L. Rev. 574.

[12] *P. Lorillard Co.* v. *Weingarden* (1922) 280 Fed. 238, discussed in 36 Harv. L. Rev. 107.

[13] *Sexton* v. *Elizabeth City* (1915) 169 N. C. 385, 86 S. E. 344; *Stevens Co.* v. *Myers Park Homes Co.* (1921) 181 N. C. 335, 107 S. E. 233.

second part [the county] as a public square, and be forever kept open for that purpose, and should any building or structure of any character inconsistent with said purpose be erected thereon, the said party of the first part [the grantor], his heirs and assigns, may enter upon the land herein conveyed and abate and remove any and all buildings or parts of buildings inconsistent with this use." The third deed, from Staples, contained no restriction, but a deed executed on the same day conveying to Staples an adjoining lot as partial consideration for his tract, did impose a substantially similar restriction upon the use of the lot acquired by the county. Subsequently, in 1911, the Staples lot, for the benefit of which the restriction in the deed to Staples had been imposed, was sold back to the county through mesne conveyances. In 1873, Porter owned land adjoining the public square which was intended to be benefited by the restriction in his deed. Apparently Caldwell did not, but on the same day that Caldwell conveyed his lot to the county, the county conveyed to him a tract of land adjoining this lot and the court house square. In this deed, no mention was made of the restrictive covenant. During the next year, Caldwell sold off the tract received from the county, to various persons, in separate lots, the conveyances not mentioning the restrictions imposed upon the property held by the county. And Porter, at about the same time, similarly conveyed the tract adjoining the court house square owned by him at the time the restrictive covenants were exacted from the county. Later, Porter and Caldwell both died intestate.

In 1914, the county having purchased a new court house site several blocks distant, proposed to sell the old court house square to a private corporation which planned to erect thereon a modern office building. In an action by the county and the proposed purchaser against the heirs and assignees of Porter and Caldwell, to quiet title to the property in question, the Supreme Court first held[14] that the covenants in the deeds from Porter and Caldwell to the county constituted equitable servitudes which both the heirs and the assignees of the original dominant owners could enforce by injunction. Later, in the course of four successive appeals,[15] the court held, per Clark, C. J., that the right to the enforcement of the restrictions did not pass to the assignees of the parcels composing the original dominant estate, and that the most the heirs could do would be to enter and tear down the portion of the building standing upon the Porter and Caldwell tracts. After the first appeal, however, the proposed purchaser of the square had bought out the heirs. The Chief Justice, in overruling the decision reached on the first appeal, did not acknowledge that the court was doing so. Regardless of the effect of the later decisions upon the commercial development of Greensboro, they constitute unfortunate steps in the delineation of the North Carolina law of equitable servitudes. The 1914 opinion of Judge Brown is a clear and vigorous statement of the true view. The basic test as to who is entitled to enforce equitable servitudes is the intention of

[14] *Guilford County* v. *Porter* (1914) 167 N. C. 366, 83 S. E. 564.
[15] *Guilford County* v. *Porter* (1915) 170 N. C. 310, 87 S. E. 252; (1916) 171 N. C. 356, 88 S. E. 855; *Guilford County* v. *Bynum* (1921) 181 N. C. 288, 107 S. E. 8. See also *Barker* v. *Insurance Co.* (1921) 181 N. C. 267, 268, 107 S. E. 11.

the original parties.[16] From the language of the covenants and the relationship of the lots involved, it is obvious that this intention was to benefit the Porter and Caldwell tracts adjoining the court house square into whosoever hands they might come. There were no facts or words indicating that it was the intention to benefit these lots only while held by the original covenantees. No formalities were required to pass to the assignees of the dominant estate the right to the continued use of the servient estate as a court house square. It was enough that the lots, opening onto that square, would have no value otherwise.

The third general situation in which the Supreme Court of North Carolina has discussed the doctrine of equitable servitudes is that in which a purchaser of land has resisted performance of the contract on the ground that the existence of various restrictive agreements concerning the use of the land constituted a defect in the vendor's title. The first case of this type was that of *St. Peter's Church* v. *Bragaw*,[17] arising in 1907. Two lots had been granted to a church, in 1886, on condition, *inter alia*, that the property should never be used as a cemetery. More than twenty years later, the church contracted to sell a part of the lots to Bragaw, probably as a site for a residence, and purposed to use the remainder as a site for a rectory. In a controversy without action to settle the title, Walker, J., after disposing of the issues raised by the parties, suggested that:

"The covenant against using the premises as a cemetery will bind the grantee of the original covenantor with notice and be enforced in equity against him; and in order to fix him with liability, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title and binding those who succeed to it, the question being, not whether the covenant runs with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. . . Each case, of course, will depend upon its own circumstances, and the covenant will be enforced by the court, or its enforcement refused, as the nature of the particular case may, under the general principles of equity, seem to require." While entirely sound in other respects, this intimation that the enforcement of such restrictions depends merely upon a particular chancellor's discretionary view of the balance of equities between the parties does not compare favorably with the property theory as later announced in the first case of *Guilford County* v. *Porter*, supra.

The two recent cases of *Myers Park Homes Co.* v. *Falls*,[18] decided in 1922, and of *Snyder* v. *Heath*,[19] decided in April, 1923, went off primarily upon questions as to the extent of the dominant estate, that is, the property benefited by the particular restrictive covenants. In each case, a purchaser had refused to go through with his contract, on the ground that the title of his grantor was defective in that equitable servitudes affecting the property had not been released by all of the parties entitled to their maintenance. In the first case, the court was enabled by an agreed statement of facts and by a prior adjudication[20] in relation to the

[16] See Clark, *Equity* (1919) sec. 98, and cases cited.
[17] 144 N. C. 126, 133, 56 S. E. 688. The principal points at issue related to adverse possession and the rights of two heirs who had not joined in the deed to the church in 1886, and to the question as to whether the sale to Bragaw would be an "abandonment" of the property so as to invoke a reversion to the grantors' heirs, in accordance with the original deed to the church.
[18] 184 N. C. 426, 115 S. E. 184.
[19] 117 S. E. 294.
[20] *Stephens Co.* v. *Myers Park Homes Co.* (1921) 181 N. C. 335, 107 S. E. 233.

general situation, to hold that an 1100 acre tract had not been developed as a single unit, but that each block had been improved and the lots comprising it sold as an isolated subdivision, as a result of which releases executed by all of the property owners within the particular block to which the *locus in quo* belonged were held sufficient. In the second case, three considerations caused the court to decide against the purchaser's contentions. In the first place, the vendor's grantor had apparently expressly reserved to itself the privilege of enforcing the restrictions in question. And it had now released the property from the servitude. In the second place, the lot in question was the only one in its block or within the immediate vicinity which had been sold subject to restrictions. Other lots in the original development which had been sold with restrictive covenants were at some little distance. And in the third place, the immediate vicinity had already changed from a residence to a commercial neighborhood, so that restrictions relating to the preservation of residence characteristics might be said to have lapsed.

L. T. H.

THE NORTH CAROLINA LAW REVIEW represents the fourth attempt to establish in this state a legal periodical of particular interest to North Carolina judges and lawyers. The first was *The Carolina Law Repository.* This ran into two volumes between 1813 and 1816. Who its editor was does not appear. It was printed in Raleigh by Joseph Gales. The second was *The North Carolina Law Journal.* This also ran into two volumes from 1900 to 1902. It was edited by Paul Jones, of Tarboro. While conducted as a private enterprise, it was sponsored by the North Carolina Bar Association.[1] That body, however, did not assume any financial responsibility. In 1904, largely through the efforts of the Bar Association, the *Law Journal* was revived under the name of the *North Carolina Journal of Law.* The Bar Association contributed toward the financial support of this *Journal* and made it the Association's official organ.[2] It was edited by Judge James C. McRae, then Dean of the School of Law of the University of North Carolina. After the completion of two volumes, however, Judge McRae was compelled to give up the work, in December, 1905, because of the pressure of his work as Dean, and the *Journal* ceased publication.

Each of these three periodicals contained a number of articles and editorials of permanent value to students of North Carolina law. The REVIEW will therefore prepare a cumulative index to the more valuable material found in these six volumes, and publish it together with the index to volume one of the REVIEW. The North Carolina Collection, in the University library, contains a complete file of all of the periodicals mentioned, except number twelve of volume two of the *North Carolina Law Journal,* dated April, 1902. Anyone having a copy of that number will facilitate the preparation of a complete index if he will send it to the editors of this REVIEW at once.

[1] For various statements indicating the relationship between the *Journal* and the Bar Association, see 1 *Reports,* North Carolina Bar Association, 46-56, 121, and 2 *ibid.* 8-9. A committee composed of C. W. Tillett, W. A. Guthrie, and H. A. London represented the Bar Association.

[2] See 5 *Reports,* North Carolina Bar Association, 43, 50, 174. The Bar Association committee was composed of C. W. Tillett, E. W. Timberlake, and J. Crawford Biggs. The subsidy amounted to $300 for one year. See 6 *Reports,* 53, 65, and 7 *ibid.* 58.