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EDITORIAL NOTES

THE JANUARY BAR EXAMINATION—The last examination of candidates for admission to the practice of law in North Carolina, given on January 29, 1923, marked a departure from precedent. Perhaps the contrast was the more notable because of the unusually low standards established by its two immediate predecessors. The January examination was not only more rigorous; much of it was of a different type. Instead of direct interrogatories calling for flat definitions of legal rules, for the dates of important statutes, and for statements of events in legal history, this examination was mainly made up of hypothetical problems. The former examinations constituted a test of the candidates' capacity for memorizing a variety of legal data. And most of the material was conveniently available in published "quizzers" containing the questions and answers involved in previous North Carolina bar examinations. The examination this year called for a demonstration of the students' power to apply legal principles to concrete cases. It was a test of their capacity for legal diagnosis. And many of the problems given were typical of those which have come before the courts in the last few years.

North Carolina has been distinctly toward the rear in the steady advance throughout the country of the requirements for admission to the practice of law, both in the length of the period of legal study prescribed and in the character of the examination itself. And it is common knowledge that the two year requirement has not been adequately enforced. The upset condition of the legislative session this year operated to discourage any attempt to strengthen those regulations which are subject to statutory control. The Supreme Court, therefore, has taken a step of far reaching significance; one that deserves the support and encouragement of every thoughtful judge, lawyer, and law teacher in the state. The inevitable consequences of continued efforts along these lines, by way of an increased thoroughness of legal study, and the consequently enlarged calibre of the future members of the bar, are worth striving for.

PROPERTY EXEMPT FROM TAXATION IN NORTH CAROLINA—In the recent case of *Trustees of Lees-McRae Institute* v. *Avery County*,[1] the Supreme Court of North Carolina again considered the question of the exemption of property from taxation. The plaintiffs owned a lot of land in Avery county on which buildings for a school were located, and also owned a tract of 1150 acres about three miles distant, on which there were no school buildings. So far as this latter land was in use, it was used for cultivation and grazing, and the entire rents and profits were applied to the support of the school. The county imposed a tax upon the 1150 acre tract, and the plaintiffs contended that it was exempt, because it was held for educational purposes. The court decided that it was subject to taxation, thereby reaffirming a principle which has been stated in several previous cases. The question is not new, therefore, but it is interesting as an illustration of the policy of tax exemption, as it has been established in North Carolina.

"The taxing power is one of the highest and most important attributes of sovereignty. It is essential to the establishment and continued existence of the government. Without it, all political institutions would be dissolved, the social fabric would be broken up, and civilization would relapse into barbarism."[2] Being a sovereign power of such importance, it belongs to the legislature, and the security against the abuse of the power is found in the structure of the government and in the influence of the constituents over their representatives.[3]

In the Constitution of 1776, and amendments thereto, no restrictions were placed upon the exercise of the power of taxation by the legislature, and taxes were imposed according to the policy expressed in the statutes passed for that purpose. In the revenue act as contained in the Revised Statutes of 1837,[4] there was a tax upon real estate, a small poll tax, and certain privilege taxes. Personal property was not mentioned in the list of taxable property. The property ex-

The question of the taxation of shares of stock in a corporation, as discussed in *Person* v. *Watts* (N. C. 1922) 115 S. E. 336, is not referred to in this note, since it is a question of the policy of taxation and not of exemption from taxation. This will be discussed in the April issue of this REVIEW.—Ed.

[1] (N. C. 1922) 114 S. E. 696.

[2] *State* v. *Petway* (1856) 55 N. C. 396.

[3] *State* v. *Bell* (1867) 61 N. C. 76; *McCulloch* v. *Maryland* (U. S. 1819) 4 Wheat. 316, 4 L. Ed. 579.

[4] Ch. 102.

pressly exempted from taxation included "real estate belonging to the university of the state, and such houses, lots and other real estate as are set apart and appropriated to divine worship, or for the education of youth, or the support of the poor, and except also such real property as is or shall be exempted in any act creating a society or company with corporate powers and privileges."[5]

In the revenue act in the Revised Code of 1854,[6] the taxes imposed were a poll tax, a tax on all real estate, certain privilege taxes, an inheritance tax, and a special tax on interest, dividends or profits derived from money invested, and upon certain articles of personal property, such as "pleasure vehicles," gold and silver plate and ornamental jewelry in use, "except ornamental jewelry worn by females." There was no *ad valorem* tax upon general personal property. The section describing the property expressly exempted from taxation varied somewhat from the former statute. "The property and estate hereby exempted from taxation, are all such and their profits as may belong to the state, or may belong to, or be set apart for the university and colleges, institutes, academies, and schools for the education of youth, or the support of the poor or afflicted, or specially set apart for and appropriated to divine worship."[7]

The foregoing statutes show the policy of the legislature as it existed from 1776 to 1868, with certain modifications from time to time. All real property was taxable; personal property generally was not taxable; and property, otherwise taxable, was expressly exempted when it was appropriated to educational or religious purposes. In construing these exemptions the court held that the exemptions were not to be extended by implication, but were to be limited to the expressed legislative intention. In *Stewart* v. *Davis*,[8] the trustees of an academy contended that a lot, belonging to the academy, which was rented and the rent applied to the support of the school, was exempt because it was "set apart and appropriated for the education of youth." The court held that the lot was liable to taxation, and that the exemption included "only that property which was specially and exclusively set apart and appropriated to divine worship or education, and directly employed for either of these purposes, as the lot on which the church stands, including the churchyard and minister's residence, if the latter be appurtenant to the principal lot; or an academy and the lot on which it is built, and the grounds appurtenant to it, if employed in the purpose of education, as for the residence of teachers, or towards the recreation or the nourishment of the youth." This principle, thus stated by the court in 1819, has been followed in subsequent cases, and controls the case under discussion.[9]

Under the Constitution of 1868, a different policy was adopted in imposing restrictions upon the will of the legislature in the exercise of the taxing power. The provision requiring that all property, both real and personal, shall be taxed

[5] Rev. Stat., ch. 102, sec. 2.
[6] Ch. 99, sec. 1.
[7] Rev. Code, ch. 99, sec. 1.
[8] (1819) 7 N. C. 244.
[9] *United Brethren* v. *Comrs.* (1894) 115 N. C. 489, 20 S. E. 626; *Corporation Com.* v. *Construction Co.* (1912) 160 N. C. 582, 76 S. E. 640; *Davis* v. *Salisbury* (1912) 161 N. C. 56, 76 S. E. 687; *So. Assembly* v. *Palmer* (1914) 166 N. C. 75, 82 S. E. 18.

by a uniform rule and according to its true value in money,[10] is mandatory, and no property is exempt unless such exemption is provided for in the Constitution.[11] Three classes of exemptions are provided for in the Constitution.[12]

The first class includes property belonging to the state, or to municipal corporations, and this exemption is absolute. Property belonging to the state includes all property belonging to any department of the government, and it also includes bonds or certificates of indebtedness issued by the state. "The uniform and well-settled policy of the state, certainly since 1852—and its power to do so seems never to have been doubted or questioned—has been to exempt its own bonds and certificates of debt from taxation;" the reason being that the state gains in the increased price of its bonds what it would otherwise secure by subjecting them to taxation.[13] But it has been held that property of the state invested in a private business enterprise is not exempt from taxation.[14] The term municipal corporation is here used in the broad sense to include counties, townships, school districts, etc., as well as cities and towns, though the property of counties, etc., might also be exempt as agencies of the state. By legislative enactment, the bonds of a municipal corporation are not exempt from general taxation, but the municipality may exempt its own bonds from municipal taxation.[15] Drainage districts are, in a sense, agencies of government, and have been called quasi-municipal corporations,[16] but they are more properly quasi-public corporations, like railroads, and their property and bonds are not exempt from taxation.[17] Where a private corporation has been created with certain governmental powers conferred upon it, such as are usually exercised by municipal corporations, it does not thereby become a municipal corporation, so as to have its property exempt from taxation.[18]

The second class consists of property which the General Assembly may exempt from taxation, because of the purpose for which it is used. This includes "cemeteries, and property held for educational, scientific, literary, charitable, or religious purposes."[19] This authority is a little broader in its scope than that actually exercised under the older statutes, but the construction has been the same, not to extend it by implication. In the case of *United Brethren* v. *Comrs.*,[20] the words of the statute allowing the exemption were strictly construed, so as to include only property actually used for educational or religious purposes, and not that which was rented out and the rent applied to such purposes, although the legislature might have exempted all such property. It is the opinion of the court that the legislature can exercise this power to the full extent, or in part, or decline

[10] Const., Art. 5, sec. 3.
[11] *Redmond* v. *Tarboro* (1890) 106 N. C. 122, 10 S. E. 845.
[12] Art. 5, sec. 5.
[13] *Pullen* v. *Corp. Com.* (1910) 152 N. C. 548, 68 S. E. 155; *Comrs.* v. *Webb* (1912) 160 N. C. 594 76 S. E. 552.
[14] *Atl. and N. C. R. R.* v. *Comrs.* (1876) 75 N. C. 474.
[15] C. S., sec. 2682.
[16] *Sanderlin* v. *Luken* (1910) 152 N. C. 738, 68 S. E. 225; *Newby* v. *Drainage Dist.* (1913) 163 N. C. 24, 79 S. E. 266.
[17] *Comrs.* v. *Webb* (1912) 160 N. C. 594, 76 S. E. 552.
[18] *So. Assembly* v. *Palmer* (1914) 166 N. C. 75, 82 S. E. 18.
[19] Const., Art. 5, sec. 5.
[20] (1894) 115 N. C. 489, 20 S. E. 626.

to exempt at all. It can exempt one kind of property and tax other kinds; it may exempt property held for one of these purposes and tax all others; but whether it may discriminate in regard to property belonging to the same class is not decided. It would seem that the rule as to uniformity should prevail.[21]

The question is not so much one of constitutional power as of statutory construction, and it is necessary to look to the last expressed will of the legislature in order to determine how far an exemption has been allowed. In the Consolidated Statutes of 1919, section 7768, all exemptions are expressly repealed except "property belonging to the United States and to municipal corporations and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries." It further provides that no property held for investment or rent shall be exempt, except bonds of the state and of the United States, unless the income from such investment shall be used exclusively for religious, charitable, or benevolent purposes, or to pay interest on the bonded debts of such institutions. The full extent of these exemptions is more fully explained in a subsequent section in the "machinery act," where each particular exemption is described.[22] The act of 1921,[23] which is the present law, is substantially the same as the provisions in the Consolidated Statutes. The principle of strict construction has been applied to similar statutes. Where the statute exempted rents derived from land "used exclusively for benevolent or charitable purposes," it did not include rent derived from land nor the land itself, which was held for church purposes, although it appeared that the rents were devoted to benevolent, charitable and religious purposes.[24]

The third class of property which the legislature may exempt, is the personal property of the individual taxpayer, such as household and kitchen furniture, tools of mechanics, etc., to the amount of $300.[25] While this provision has been in the Constitution since 1868, the exemption allowed under it has generally been only $25, until 1919, when it was increased to the full amount.[26] By the same statutes "growing crops" have been exempted, without regard to value, though this particular property is not mentioned in the list of exemptions in the Constitution. By the amendment to the Constitution in 1917, evidences of debt for the purchase price of a home are exempt, if the amount does not exceed $3000, with interest not to exceed five per cent, and to run not less than five nor more than twenty years.[27]

The charter of the Lees-McRae Institute, which was granted by special act of the legislature, contained a provision exempting its property from taxation so long as it was used for church, school, or charitable purposes. While the plaintiffs claimed exemption under this provision as well as under the general law,

[21] *Ibid.; Davis* v. *Salisbury* (1912) 161 N. C. 56, 76 S. E. 687.

[22] C. S., sec. 7901.

[23] Ch. 34, sec. 5; ch. 38, sec. 72.

[24] *Davis* v. *Salisbury* (1912) 161 N. C. 56, 76 S. E. 687; *Corp. Com.* v. *Construction Co.* (1912) 160 N. C. 582, 76 S. E. 640.

[25] Const., Art. 5, sec. 5.

[26] C. S., sec. 7901; *Brown* v. *Jackson* (1920) 179 N. C. 363, 372, 102 S. E. 739. This exemption was $100 in Bat. Rev. of 1872, ch. 102, sec. 11.

[27] Const., Art. 5, sec. 3.

the court did not discuss the question, because it was not necessary to do so. The question of the power of the legislature to make a contract to exempt property from taxation, has given rise to much discussion in the past. Such power was expressly recognized in the Revised Statutes of 1837,[28] but this was omitted in the Revised code of 1854.[29] This exemption began at an early period in the history of the state, probably with the charter of the Dismal Swamp Canal, in 1790, and was extended to railroads, banks, etc., to promote such enterprises for the general improvement of the state. Later, when the property of such organizations became important as objects of taxation, the validity of the exemption was questioned. In *R. R.* v. *Reid*,[30] it was held that an attempt of the legislature to interfere with such exemption, when granted for a valuable consideration, was void as impairing the obligation of a contract. In *R. R.* v. *Alsbrook*,[31] the question was again very fully discussed, and the exemption was limited strictly to the express terms of the grant, with a strong intimation that any attempt to barter away the power of taxation was invalid. These questions under the old charters have been settled by legislation, litigation, and compromise; and they could not arise under the present Constitution. The power to alter and repeal charters of corporations is expressly reserved in the Constitution,[32] and the requirement that all property shall be taxed unless exempted by the Constitution is mandatory.[33]

It is the public policy of the state that all property shall bear its share of the general taxation imposed for the public benefit and that no exemptions should be made or upheld unless they clearly come within the constitutional provision and are plainly so expressed as the legislative will.[34] A. C. McI.

ACQUISITION OF NEGOTIABLE PAPER THROUGH HOLDER IN DUE COURSE—It is a general rule that a purchaser of negotiable paper from one who took it in good faith, without notice, for value and before maturity, is entitled to recover on the instrument,[1] even though, at the time of purchase, he does not pay value,[2] or the paper is overdue,[3] or the purchaser has actual notice of defenses,[4] such as fraud in the inception of the paper or failure or want of consideration.

[28] Ch. 102, sec. 2.

[29] Ch. 99, sec. 1.

[30] (U. S. 1870) 13 Wall. 264, 20 L. Ed. 568, overruling 64 N. C. 226.

[31] (1892) 110 N. C. 137, 14 S. E. 652; S. C., 146 U. S. 279, 36 L. Ed. 972.

[32] Art. 8, sec. 1.

[33] *Redmond* v. *Tarboro* (1890) 106 N. C. 122, 10 S. E. 845.

[34] In principal case; *So. Assembly* v. *Palmer* (1914) 166 N. C. 75, 82 S. E. 18.

[1] Negotiable Instruments Law (cited as N. I. L.), sec. 58; Consolidated Statutes, North Carolina (cited as C. S.), sec. 3039: "But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."
This was the rule before the N. I. L. *Poorman* v. *Mills* (1870) 39 Cal. 345, 2 Am. Rep. 451, and cases cited in notes 2, 3 and 4 below.

[2] *Farber* v. *National Forge etc. Co.* (1894) 140 Ind. 54, 39 N. E. 249; *Vinton* v. *Peck* (1866) 14 Mich. 287; *Fowler* v. *Strickland* (1871) 107 Mass. 552; *Hickman* v. *Sawyer* (1914) 216 Fed. 281, 132 C. C. A. 425; *Masterton* v. *Ross* (1913) 152 S. W. 1156 (Tex. Civ. App.).

[3] *Lewis* v. *Long* (1889) 102 N. C. 296, 9 S. E. 637; *Symonds* v. *Riley* (1905) 188 Mass. 470, 74 N. E. 926; *Shade* v. *Barnes Bros.* (1915) 35 S. Dak. 142, 151 N. W. 42, L. R. A. 1915 D. 271; *Miles* v. *Dodson* (1912) 102 Ark. 422, 144 S. W. 908, 50 L. R. A. (n. s.) 83; *Sonoma County Bank* v. *Gove* (1883) 63 Cal. 355, 49 Am. Rep. 92.

[4] *Glenn* v. *Bank* (1874) 70 N. C. 191; *Comrs.* v. *Clark* (1876) 94 U. S. 278, 24 L. Ed. 59; *Dillingham* v. *Blood* (1877) 66 Me. 140; *Wood* v. *Starling* (1882) 48 Mich. 592, 12 N. W. 866; *Day* v. *Rogers* (1910) 7 Ga. App. 535, 67 S. E. 279; *Aragon Coffee Co.* v. *Rogers* (1906) 105 Va. 51, 52 S. E. 843.
For an exhaustive citation of cases on all points in footnotes 1, 2, 3, and 4, see, 8 C. J., *Bills and Notes*, sec. 685.

This doctrine rests on the following considerations: When negotiable paper comes into the hands of a holder in due course, that person takes title free from all equities existing between prior parties.[5] In order that he may be given the full commercial benefits of that complete ownership and have the whole world as a market, the law usually permits him to transfer without reservation all of his rights, powers, privileges and immunities to any transferee. Normally, therefore, his immunities from prior equities must continue in favor of his transferee. Otherwise, the marketability of his paper would be seriously restricted.[6]

This is illustrated by the following case[7] in this state. The plaintiff was the holder of certain notes of the defendant bank, payable to bearer. The evidence tended to prove that the notes were originally issued to aid the state of North Carolina and the Confederate Government in the prosecution of the Civil War. Assuming that there was illegality in the issue of the notes and that the plaintiff had had full notice thereof, the court allowed a recovery, notwithstanding such notice. Rodman, J., in delivering the opinion of the court, argued as follows:

"They [the notes] were intended to circulate as money and . . . it must be presumed that they did so circulate to the end of the war. It must also be presumed, as a natural and necessary result, in the absence of all evidence to the contrary, that in the course of transmission from hand to hand in the ordinary course of business they passed to and through at least one innocent holder. That being so, the plaintiff, although he himself had notice before purchase, succeeded to the rights of such innocent holder and stands in his place. As respects land, this doctrine is familiar.[8] . . . And the same principle of equity extends to bills and notes.

If it were otherwise, an innocent holder of lands or bills who received notice of the fraud or illegality after his purchase could never sell the property, for, having notice, he would be bound in honesty to communicate it. He would thus be tied up to an inalienable estate. The rule is that he can sell his own estate such as he holds it. . . ."

And this same reasoning has been held to apply to a purchaser of overdue paper. In *Lewis* v. *Long*,[9] the court said:

"Mrs. C., being a bona fide holder and having no notice, would have been unaffected by the defenses relied upon in this action. Does the fact that the plaintiff purchased from her after maturity put him in a worse position than that occupied by his assignor? Very clearly it does not. So a purchaser after maturity from a bona fide holder, who took the paper for value, before maturity, is entitled as a bona fide holder, before maturity, to the rights of his endorser."

A recognized exception to the general rule just discussed is applied when a payee, who was originally subject to equities and defenses, reacquires the instru-

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[5] N. I. L. sec. 57, C. S. sec. 3038.

[6] In *Kost* v. *Bender* (1872) 25 Mich. 515, quoted in note in 54 L. R. A. 673, 674, Cooley, J., said: "It is true, as a general rule, that the bona fide holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce."

[7] *Glenn* v. *Bank* (1874) 70 N. C. 191.

[8] This rule is the same as the one laid down in equity in regard to the purchase and sale of land. Suppose that A purchases an estate with notice of an incumbrance and sells it to B, who has no notice. B afterwards sells to C, who has notice. The incumbrance does not bind the estate in C's hands, for otherwise an innocent purchaser might be forced to keep the estate and could not sell it. The purchaser with notice from a bona fide purchaser stands in his shoes and takes shelter under his bona fides.
Phillips v. *Lumber Co.* (1909) 151 N. C. 519, 66 S. E. 603, citing *Glenn* v. *Bank;* 54 L. R. A. 673, note.

[9] *Lewis* v. *Long* (1889) 102 N. C. 206, 208, 9 S. E. 637.

ment from a holder in due course.[10] He is said to be restored to his former inferior position, and cannot set up the title of his assignor, the holder in due course, as he might if he had not formerly been a party to the instrument. The defenses originally available against him as payee are held to be again available when he reacquires the instrument. In other words, he cannot better his position by shooting title through a holder in due course. The law, seeking to prevent the payee from escaping his former disqualification, is obliged to restrict the market of the holder in due course to this extent.[11]

Conversely, when a party, who has been a holder in due course, reacquires the instrument with notice of defenses, or after maturity, he is restored to his former position of immunity, and is entitled to recover.[12] Under the N. I. L. and by the common law, an indorser of a negotiable instrument, who afterwards becomes a holder by retransfer, may strike out his own and all subsequent indorsements.[13] By so doing, he stands exactly where he was at the time of the first taking, and all subsequent steps are wiped out. In the cases we are now considering, the reacquirer does not want to strike out the indorsements subsequent to his first taking, but claims by virtue of his acquisition of the instrument from a holder in due course. To be sure, the reacquirer cannot recover from intermediate parties, i.e., the indorsers subsequent to his first taking, since they, in turn, can look to him on the instrument.[14] The law seeks to prevent circuity of action.

There are statements in the text-books and by way of *dicta* that the scope of the above-mentioned exception is limited to the case of reacquisition by the payee.[15] That the exception is to be extended, rather than limited, is suggsted by Mr. Justice Hoke in a recent North Carolina case,[16] as follows:

"In some of these decisions the principle is held to include one who reacquires the note as agent of the payee or for his benefit, and also to one by whose influence and agency the note was fraudulently procured. . . . It was the clear purpose and meaning of our statute, we think, to extend the exception thus far, and to apply the principle, not only to a payee who has procured the execution of a note by fraud and afterwards reacquires the same from a bona fide holder, but to the agent who acts for such a payee in reacquisition of the instrument, or to one who aids and abets the payee in the fraud by which the instrument is procured."

One would say, without reference to authority, that this should be the law. Since the payee, who procures the execution of negotiable paper by fraud, let us

[10] *Kost* v. *Bender* (1872) 25 Mich. 515; *Andrews* v. *Robertson* (1901) 111 Wis. 334, 87 N. W. 190, 54 L. R. A. 673 and note—*Rights of payee of note after repurchasing it from bona fide holder; Aragon Coffee Co.* v. *Rogers* (1906) 105 Va. 51, 52 S. E. 843; *Battersbee* v. *Calkins* (1901) 128 Mich. 569, 87 N. W. 760; *Hoye* v. *Kalashian* (1900) 22 R. I. 101, 46 Atl. 271; Brannan, *The Negotiable Instruments Law*, 3rd ed., 1919, 204 *et seq.*

[11] The same exception applies to real estate. Where a trustee, in breach of trust, conveys land to a bona fide purchaser without notice, and subsequently repurchases it, the trust reattaches. *Johnson* v. *Gibson* (1886) 116 Ill. 294, 6 N. E. 205; *Yost* v. *Critcher* (1911) 112 Va. 870, 72 S. E. 594; *Bourquin* v. *Bourquin* (1904) 12 Ga. 115, 47 S. E. 639; 54 L. R. A. 673, note.

[12] *Ratcliffe* v. *Costello* (1915) 117 Va. 563, 85 S. E. 469.

[13] N. I. L. sec. 48, C. S. sec. 3029, "The holder may at any time strike out any indorsement which is not necessary to his title." *French* v. *Barney* (1840) 23 N. C. 219.

[14] N. I. L. sec. 50, C. S. sec. 3031; *Adrian* v. *McCaskill* (1889) 103 N. C. 182, 9 S. E. 284.

[15] Daniel, *Negotiable Instruments*, 6th ed., 1913, sec. 805, quoted in *Pierce* v. *Carlton* (N. C. 1922) 114 S. E. 13.

[16] *Pierce* v. *Carlton* (N. C. 1922) 114 S. E. 13. *Accord, Battersbee* v. *Calkins* (1901) 128 Mich. 569, 87 N. W. 760; *Wray* v. *Warner* (1900) 111 Iowa 64, 82 N. W. 455; *Berenson* v. *Conant* (1913) 214 Mass. 127, 101 N. E. 60; *Weil* c. *Carswell* (1904) 119 Ga. 873, 47 S. E. 217.

say, cannot better his position by reacquisition from a holder in due course, it would be folly to allow the payee's agent or one who has aided or abetted the payee in the fraud, to recover by a similar reacquisition. To do so would give rise to colorable transfers of negotiable instruments to agents for the benefit of fraudulent payees. It would allow participants in the fraud to benefit by their own wrong. The law does not give such encouragement to dishonesty.

In this connection, the recent North Carolina case of *Pierce* v. *Carlton*,[17] from which the above quotation is taken, is of special interest. In an action against the makers of three promissory notes, it was found that the signatures of the makers had been procured by fraudulent representations. The notes were indorsed in blank by the fraudulent payees and transferred to the plaintiff, who was also found to have been a participant in the fraud. The plaintiff negotiated the notes to a holder in due course, who subsequently retransferred them to the plaintiff. Applying the principles of law above discussed to the facts of this situation, the court held that the plaintiff could not recover. This result is clearly correct and comes not only within "the clear purpose and meaning of the statute," but within its very terms.

Whether the above-mentioned exception should be further extended to include reacquisition by an indorsee who is subject to equities is also discussed in the same case, as follows:

"There are also decisions which seem to hold that the exception referred to properly applies to one who, not being a party or participant in the fraud, has purchased such a note from the payee with knowledge or notice thereof, and reacquires the same from a bona fide holder.[18]

"There is doubt if our statute permits an interpretation which would apply to the facts presented in these last cases. The more natural meaning of the language used would apply the exception to the payee or other taking part in the fraud or illegality which rendered the instrument invalid."

The court points out, however, that it was not called upon to make a definite decision on this question, for the jury found that the plaintiff was a "participant in the fradulent conduct by which the notes were secured."

To illustrate the effect of the above quoted *dictum*, suppose that A, induced by B's fraud, makes a note payable to B's order; B indorses it to C who has notice of the fraud; C transfers the note to D, a holder in due course, and D retransfers it to C. In terms of the principal case, suppose that the plaintiff had not participated in the fraud, but had merely had notice of it at the time of the first transfer of the notes to him. The court intimates that, under such circumstances, the plaintiff (C) should be allowed to recover.

It is true that the N. I. L., if strictly construed, does not take care of the above case of reacquisition of negotiable paper by an indorsee who takes with

[17] 114 S. E. 13.

[18] *Dollarhide* v. *Hopkins* (1897) 72 Ill. App. 509. In *Cline* v. *Templeton* (1880) 78 Ky. 550, approved in *Coyne* v. *Anderson* (Ky. 1903) 73 S. W. 753, the holder had notice of illegality of consideration in a note. He indorsed it to a bank, and, when the maker failed to pay, he was required to pay and take up the note. It was held that it became in his hands subject to all original defenses, because he had notice of its infirmity.

notice, or is otherwise subject to equities, and is not "himself a party to any fraud or illegality affecting the instrument." It has been suggested[19] that a taker with notice of the fraud, by transferring the instrument, might thereby make himself a party to the fraud or illegality, but this is a far-fetched construction. It would deny protection to purchasers with notice, who claim through holders in due course, and who have had no previous dealing with the instrument. Perhaps Mr. Brannan's proposed amendment[20] is needed to settle the difficulty, but it seems that the same result should be reached without it.

To permit an indorsee with notice to better his position by reacquiring an instrument from a holder in due course is to open the doors to fraud. It would allow a recovery against the defrauded maker by one who had no chance to recover when he first held the instrument. It would indirectly benefit the fraudulent payee, and is open to the objections made above against allowing a recovery by the fraudulent payee or his agent. Any result which encourages swindling would be deplorable, and the N. I. L. could not have so intended. It has been pointed out recently[21] that only one case under the N. I. L. has reached this unfortunate conclusion.[22] It is to be hoped that the North Carolina court will not follow that case or adhere to its own recent *dictum*.

An analogy may be found in equity with reference to like transfers of real estate.

"If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice. If A, holding a title affected with notice, conveys to B, a bona fide purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also good faith."[23]

Therefore, in the law of negotiable instruments, if a party to a bill or note is subject to equities, whether he be payee or subsequent indorsee, he should not recover against the maker on the ground that he has reacquired the instrument from a holder in due course. Even though he gets a new legal title to the instrument, he takes that title subject to former equities, and his conscience is still affected by equitable considerations. R. H. W.

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[19] Greeley, *The Uniform Negotiable Instruments Law*, 10 Ill. L. Rev. 265, 271.

[20] Brannan, *Some Necessary Amendments of the Negotiable Instruments Law*, 26 Harv. L. Rev. 493, 502. The proposed amendment to N. I. L. sec. 58, C. S. 3039, follows: "But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument *or had not previously been a holder with notice and subject to the defense of such fraud or illegality*, has all the rights of such holder in due course in respect of all parties *liable to the latter except intervening indorsers.*" (Amended portions in italics.)

[21] Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party* (1921) 21 Col. L. Rev. 538. This is the best general discussion available, and covers very thoroughly a wider field than the scope of the present note. Mr. Chafee develops his "legal title theory" as the true explanation of the cases, rather than what he calls "the old shoes theory."

[22] *Horan* v. *Mason* (1910) 141 App. Div. 89, 125 N. Y. Supp. 668. See criticism of this case by Mr. Brannan in 26 Harv. L. Rev. 493, 503-4, and in Brannan, *The Negotiable Instruments Law*, 207. The case is also criticised in Norton, *Bills and Notes*, 4th ed. (1914) 454, note.

[23] Pomeroy, *Equity Jurisprudence*, sec. 754, quoted in Brannan, *Some Necessary Amendments to Negotiable Instruments Law*, 26 Harv. L. Rev. 493, 503.

PUBLIC WRONG AND PRIVATE ACTION IN NORTH CAROLINA—"When does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible?"[1] This problem arises both in connection with statutes which prohibit certain socially harmful conduct, such as automobile speeding, and in connection with statutes which seek to compel affirmative action, such as cleaning snow and ice from sidewalks. It exists, also in cases where the plaintiff's breach of a criminal statute is urged, on a theory comparable with that of contributory negligence, as a bar to his recovery in a civil action against one who has injured him, as well as in cases where the defendant's violation of a criminal law is alleged to be the basis of liability to one whom he has injured. In both situations, two judicial processes are involved, one of statutory interpretation and one of tracing causation. If the legislative body which has made certain conduct the subject of a fine or prison term has in addition expressly provided that the offender shall be liable in damages for injuries resulting proximately from his unlawful acts or omissions,[2] the matter of interpretation is relatively free from difficulty. This seldom happens,[3] however, and the court is usually called upon to ascertain from the scope and meaning of the statute, and particularly from the evil aimed at, the civil consequences flowing from its breach. Fundamentally, the problem is one of the precise basis of responsibility. That is to say, is the violation of the statute to be viewed as negligence, evidence of negligence, *prima facie* evidence of negligence, or as negligence *per se?*

The judicial conception of negligence is essentially that of the violation of a standard of conduct set up by the common law, namely, the probable behavior in a given situation of an ordinarily reasonable and prudent man. What that mythical creature would have done, unless the answer is obvious, is a matter for the jury to decide. And the jury will be warranted in finding either that he would or he would not have done what the person accused of negligence did. When, on the other hand, the legislative department of the government establishes a standard of conduct for the protection of various interests in society and coerces obedience by a threat of fine or imprisonment, the question of the nature of that standard is not referable to what a reasonable and prudent man would do. For what the standard of conduct is now depends upon the statute. And its construction is a task for the court. When the courts seek to describe the civil consequences of a breach of a criminal statute, therefore, they cannot in strictness use the word negligence. That term has reference properly only to a violation of the highly variable standard of conduct that depends upon the exigencies of each

[1] Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317. This is the classic discussion of the problem.

[2] Compare section 7 of the Sherman Anti-Trust Act: "Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act may sue therefor, etc." U. S. Comp. Stats. sec. 8829. See Katherine B. and Roswell F. Magill, *The Suability of Labor Unions*, 1 N. C. L. Rev. 81, 85.

[3] For an express prohibition of such a result, compare sec. 2 of H. B. 661, P. L. 1923, ch.—, the new stop, look, and listen law: "The provisions of this act shall not change or alter in any manner the existing law as to the duty or liability of railway companies for damages to persons or property, and failure to comply with the provisions of this act on the part of the driver of any motor vehicle shall not be considered contributory negligence in any action against the railway company for damage to persons or property, whether the same be for injury to the person or property of the driver or any other person. And it shall not be necessary to establish the fact that the driver complied with the provisions of this act in order to recover in any action for damage to persons or property against a railway company."

particular situation. The legislative standard is fixed and rigid, and of uniform application. Nor should they say that the fact of violation of a criminal law is evidence of negligence.[4] To do so is to invite the jury to consider when and to what extent it is reasonable to break the law. Nor does it help to say that the violation is *prima facie* evidence of negligence. For the very statement implies that the *prima facie* quality of the proof may be rebutted.[5] Rather, the breach of the statute is the legal equivalent of negligence. As Judge Hoke said in a recent North Carolina case, it constitutes "a distinct legal wrong, . . . an actionable wrong, a tort."[6] Seizing upon the legislative standard and giving it the same significance as the reasonable man standard, the common law system attaches to the violation of the legislative standard the same legal consequences that flow from a breach of the common law standard. Therefore, because of the paucity of catch-words in the law, we say the violation amounts to negligence in itself. In practice this means that if the jury find the party guilty of a violation of a criminal law, the only remaining problems are those of causation and the amount of damages.[7]

What has just been said, however, relates mainly to the case where the statute in question prohibits certain socially harmful conduct of an affirmative nature.[8] The legislature having labelled that conduct dangerous, a person violates the enactment at his peril. Automatically the common law attaches responsibility in damages. Thus the Supreme Court of North Carolina has upheld private actions based upon violations of child labor laws,[9] of traffic regulations,[10] of gasoline storage license requirements,[11] and of various regulations relating to lumber piles,[12] and railroad crossings.[13] But when the statute seeks to compel affirmative conduct, a violation takes the form of an omission. And if the statute is the only coercion to action, we must look to its terms exclusively for an indication that the person who has simply been inactive is to respond in damages to any person injured. For, unless there is a common law duty to act affirmatively, we have no common law consequence of mere failure to act that is the equivalent of the common law consequence of dangerous aggression.[14] Here the problem of statutory interpretation becomes more difficult and more important. Unless

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[4] The practice of the Supreme Court of North Carolina in affirming instructions given to juries by Superior Court judges to the effect that a violation of a criminal statute is evidence of negligence was stopped and the true view established in *Leathers* v. *Tobacco Co.* (1907) 144 N. C. 330, 57 S. E. 11. For an example of the earlier view see *Rolin* v. *Tobacco Co.* (1906) 141 N. C. 300, 53 S. E. 891. A recent review of the matter is found in *Taylor* v. *Stewart* (1916) 172 N. C. 203, 90 S. E. 134.

[5] See Thayer, note 1, *supra*, pp. 321-324.

[6] *Fry* v. *Utilities Co.* (1922) 183 N. C. 281, 111 S. E. 354, 361.

[7] *Leathers* v. *Tobacco Co.* (1907) 144 N. C. 330, 344, 57 S. E. 11.

[8] See Thayer, note 1, *supra*, pp. 319-328.

[9] *Rolin* v. *Tobacco Co.* (1906) 141 N. C. 300, 53 S. E. 891; *Leathers* v. *Tobacco Co.* (1907) 144 N. C. 330, 57 S. E. 11; *Starnes* v. *Mfg. Co.* (1908) 147 N. C. 556, 61 S. E. 525.

[10] *Ledbetter* v. *English* (1914) 166 N. C. 125, 81 S. E. 1066; *Goodrich* v. *Matthews* (1919) 177 N. C. 198, 98 S. E. 529; *Fry* v. *Utilities Co.* (1922) 183 N. C. 281, 111 S. E. 354 (both plaintiff and defendant alleged to have violated different ordinances. Case decided on another point.) See *Linville* v. *Nissen* (1913) 162 N. C. 95, 77 S. E. 1096, and *Taylor* v. *Stewart* (1916) 172 N. C. 203, 90 S. E. 134, where the question was indirectly involved.

[11] *Stone* v. *Texas Co.* (1920) 180 N. C. 546, 105 S. E. 425.

[12] *Ridge* v. *High Point* (1918) 176 N. C. 421, 97 S. E. 369

[13] *Paul* v. *Railroad* (1915) 170 N. C. 230, 87 S. E. 66.

[14] See Thayer, note 1, *supra*, pp. 329-333.

the statute adds detailed characteristics to an already existing affirmative common law duty,[15] or unless it provides an emphatic and summary sanction for the protection of private rights, as by making trespass a misdemeanor, or unless the statute clearly requires private action for its enforcement, it is a dangerous thing for the courts to speculate as to an unexpressed legislative intent and to create private remedies by implication. The omission of any statutory authorization for private action, in this class of cases, is significant.

It has sometimes been suggested that a breach of a criminal statute should have a stricter effect in barring a plaintiff's right of action on the theory of contributory negligence, than in making him liable for injuries caused to others. "It may be, where a civil statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with the attendant circumstances appears to be negligent or wrongful. And at the same time the courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor."[16] Such a statement assumes, of course, a causal relation between the plaintiff's violation and his own injury. If there is none,[17] or if the injury caused by the plaintiff's own criminal conduct is of a kind not aimed at by the statute,[18] here as well as in the cases where the defendant's criminality is in question,[19] the mere fact of violation becomes irrelevant. The real question, therefore, is not one of disciplining the plaintiff in a day when the very defense of contributory negligence itself is gradually being broken down by statute, but is one as to which of two persons should bear an admitted loss now shouldered by the plaintiff. And most courts, including the Supreme Court of North Carolina, have handled the effect of the violation of a criminal statute by the plaintiff precisely as they have handled the issue of contributory negligence and the effect of a similar violation of the criminal law on the part of the defendant.[20]

P. H. W.

THE POLITICAL STATUS OF WOMEN—The Nineteenth Amendment[1] to the Constitution of the United States became effective on August 26, 1920. It provides that "The right of citizens of the United States to vote shall not be denied

[15] The statute requiring locomotives to carry headlights at night is probably of this type. This statute was involved in *Powers* v. *Railroad Co.* (1914) 166 N. C. 599, 82 S. E. 972, and in *McNeill* v. *Railroad* (1914) 167 N. C. 390, 83 S. E. 704. See also the case of *Stultz* v. *Thomas* (1921) 182 N. C. 470, 109 S. E. 361, where the ordinance required construction operations to be safeguarded by rails and lights. The distincton suggested in the text has not been discussed in the North Carolina cases, but the results are consistent with it.

[16] *Newcomb* v. *Boston* (1888) 146 Mass. 596, 603, 16 N. E. 555, 4 Am. St. Rep. 354. See Thayer, note 1, *supra*, pp. 338-342.

[17] This element was lacking in *Zageir* v. *Express Co.* (1916) 171 N. C. 692, 89 S. E. 43. In that case plaintiff was driving without a license. See also *Shepard* v. *Railroad* (1915) 169 N. C. 239, 84 S. E. 277.

[18] See the cases cited in the previous note. The famous case in this field is *Sutton* v. *Wauwatosa* (1871) 29 Wis. 21, 9 Am. Rep. 534.

[19] See *Ledbetter* v. *English* (1914) 166 N. C. 125, 81 S. E. 1066, and cases cited in notes 9 to 13 inclusive, *supra*.

[20] *Fry* v. *Utilities Co.*, note 6, *supra*, boy rode on ice wagon; *Jones* v. *Bland* (1921) 182 N. C. 70, 108 S. E. 354, 1 N. C. L. Rev. 57, man entered hotel to gamble; and see cases cited in note 17, *supra*. Compare *Linville* v. *Nissen* (1913) 162 N. C. 95, 97, 77 S. E. 1096.

[1] U. S. Comp. Stats., compact ed., pamphlet no. 9a, 1003; Fed. Stat. Ann., 1920 supp., 821; 2 Consol. Stats., N. C. 1160.

or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation."[2] This amendment is self executing.[3] It operated to strike from the state constitutions and statutes the word "male" wherever that word appeared as a limitation upon the privilege of suffrage.[4] It did not, however, give women the unqualified right to participate in elections. Rather, it placed them upon the same footing with men so as to prevent discriminations because of sex. Thus, before women are eligible to go to the polls they must meet the other qualifications relating to age, literacy, residence, registration, and citizenship, prescribed by the state Constitution and statutes.[5]

"The right to hold a public office under our constitutional system is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it."[6] Under our state Constitution, "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office."[7] The disqualifications referred to in this exception are on account of atheism or misconduct.[8] Before the adoption of the Nineteenth Amendment, therefore, women, not being legally qualified voters, were ineligible to public office.[9] This defect having been removed by the federal Amendment, women are now competent to serve as public officials in this state, without enabling statutes.[10]

The courts are divided, however, on the question as to how far the Nineteenth Amendment, without more, made women competent to serve as grand and petit jurors.[11] It is everywhere agreed that the privilege of jury service is not a necessary incident of suffrage. Rather, like the right to hold public office, it depends upon constitutional and statutory authorization. The judicial conflict referred to has arisen mainly in connection with the variations in the qualifications for jury service prescribed by the different state constitutions and statutes. The question has not been passed upon by the Supreme Court of North Carolina.

It should be noted just here that the jury guaranties in Art. 3, sec. 2 of the United States Constitution, and in the Fifth, Sixth, and Seventh Amendments thereto, do not mention the element of the sex of the jurors. And the Judicial

[2] Apparently Congress has not enacted any legislation enforcing this Amendment directly. For new regulations dealing with the naturalization and citizenship of American women who have married subjects of foreign states, see the Act of Congress of Sept. 22, 1922. U. S. Comp. Stats., compact ed., pamphlet no. 13a, sec. 3948, 3960, 3961, 3961a, 3961b. For a discussion of this statute see 23 Col. L. Rev. 180.

[3] *State* v. *Walker* (1921) 192 Ia. 823, 185 N. W. 619. The election laws of North Carolina have been amended to comply with the effect of the Amendment, and to fix the residence of women for the purpose of voting. P. L., Extra Session, 1920, ch. 18.

[4] *Opinion of Justices* (1921) 257 Mass. 591, 130 N. E. 685. See notes 11 and following, *post.*

[5] The North Carolina constitutional requirements are found in Art. 6. The statutory qualifications are set out in C. S. sec. 5936-5948.

[6] Mechem, *Public Officers,* sec. 64, quoted in *State* v. *Knight* (1915) 169 N. C. 333, 336, 85 S. E. 418, L. R. A. 1915 F 898, Ann. Cas. 1917 D 517. See 33 Harv. L. Rev. 295, and cases cited, note 10, *post.*

[7] Art. 6, sec. 7.

[8] Art. 6, sec. 8.

[9] *State* v. *Knight,* note 6, *supra; Bank* v. *Redwine* (1916) 171 N. C. 559, 88 S. E. 878.

[10] *Preston* v. *Roberts* (1922) 183 N. C. 62, 110 S. E. 586. Accord, *Opinion of Justices* (Me. 1921) 113 Atl. 614; *Opinion of the Justices* (Mass. 1922) 135 N. E. 173.

[11] In addition to the cases cited in the following notes, see 8 Am. Bar. Assn. Jour. 105; 20 Col. L. Rev. 483; 21 Col. L. Rev. 712; 19 Mich. L. Rev. 662; 20 Mich. L. Rev. 669; 2 Oregon L. Rev. 30.

Code makes the qualifications of grand and petit jurors in the federal courts the same as those prescribed for law courts in the state where the particular federal court is sitting.

Where the state Constitution has not mentioned the sex of the jurors and the statutes have merely required the jury to be selected from a class designated as "qualified voters," or the like, it has usually been held that the Nineteenth Amendment, by putting women into this class, has automatically rendered them subject to jury service.[12] On the other hand, since the Constitution contemplated a common law jury, which was composed exclusively of men except when a writ of *de ventre inspiciendo* was issued, and since the qualified voters had always been men, one case has held that an enabling statute was needed, in addition to the federal Amendment, to qualify women to sit in the jury box.[13] Similarly, even though a particular constitutional provision has not dealt with the sex of jurors, a new statute has been held necessary where the existing statutes expressly or impliedly required the jury to be drawn from the male voters.[14] It will be noted, in connection with this phase of the matter, that the implied adoption in constitutional texts of the sex characteristic of the common law jury has not operated as a limitation upon the power of the legislature to modify that characteristic in favor of women.[15]

Where the Constitution has required the jurors to be "men," regardless of whether the statutes contained a similar limitation or not, the Nineteenth Amendment has of course been powerless *ipso facto* to confer the privilege of jury service upon women.[16] Even though that Amendment struck the word "male" from the state constitutions and statutes relating to suffrage, it did not purport to deal with jury service, a matter not related to the voting privilege. Whether the word "men" in some of the constitutional guaranties relating to grand and petit juries should operate as a limitation upon the power of the legislature to authorize women to perform jury service seems to be an open question.[17] The situation with respect to suffrage prior to the adoption of the Nineteenth Amendment, when the word "male" in the constitutional voting requirements prevented state legislatures from granting the full suffrage to women, might be an analogy for giving a similar effect to the word "men" in constitutional provisions dealing with jury service. Aside, however, from questions of social policy, which always enter into such constitutional problems as this, there seem to be good reasons for not viewing the word "men" as a limitation upon the power of the legislature to enable women to be jurors. In the first place, the analogy possible from the effect of the use of

[12] *Parus* v. *Dist. Ct.* (1918) 42 Nev. 229, 174 Pac. 706, 4 A. L. R. 140, and note; *People* v. *Barltz* (1920) 212 Mich. 580, 180 N. W. 423, 12 A. L. R. 520, and note; *Com.* v. *Maxwell* (1921) 271 Pa. 378, 114 Atl. 825, 16 A. L. R. 1134; *State* v. *Walker* (1921) 192 Ia. 823, 185 N. W. 619.

[13] *Opinion of Justices* (1921) 237 Mass. 591, 130 N. E. 685.

[14] *McKinney* v. *State* (1892) 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710; *State* v. *James* (1921) 96 N. J. L. 132, 114 Atl. 553, 16 A. L. R. 1141, and note; *Re Grilli* (1920) 192 N. Y. App. Div. 885, 181 N. Y. S. 938, 12 A. L. R. 525, and note.

[15] See cases cited notes 12, 13, and 14, *supra*, and *Ex parte Mana* (1918) 178 Cal. 213, 172 Pac. 986, L. R. A. 1918 E 771.

[16] *Harper* v. *State* (Tex. C. C. A. 1921) 234 S. W. 909; *State* v. *Mittle* (S. C. 1921) 113 S. E. 335.

[17] The intimation of *State* v. *Mittle*, note 16 *supra*, might possibly mean that the legislature is powerless in this connection. The Constitution of South Carolina, however, provides, unlike the others, that "the petit juries of the circuit court shall consist of twelve men."

the word "male" in constitutional suffrage provisions is not pertinent. There the state constitutions were setting up a new political machinery, and each detail of the plan was important. Moreover, the use of the adjective "male" clearly excludes the idea of "female." It was, in other words, evidence of a desire consciously to exclude and discriminate against women. And finally, as a contemporaneous analogy, the basis has been removed by the Nineteenth Amendment. In the second place, the word "men" frequently means "women" as well.[18] And in the constitutional jury provisions it is not an important detail. What these provisions preserved is the essential composition and functional aspects of the jury. Under such provisions, legislatures have always been free to regulate in a reasonable manner the qualifications of the jury.[19] Moreover, the male characteristics of the common law jury, as impliedly adopted by constitutional provisions not expressly dealing with the sex of juries, have not been held to restrain legislative authorizations of women juries. And if the clear implications of the Constitution in this connection have not restricted the legislature, an express provision to the same effect should have no greater force. Finally, in a day when women are active commercial and political agents, under the married women's acts and the constitutional grants of the suffrage and eligibility for public office, there is little life left in any apparent textual restriction in favor of only male jurors. It is submitted that the legislature is, under either type of constitutional text, free to direct that women shall be subject to jury service.

The North Carolina constitutional provisions relating to juries are as follows: "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment."[20] This provision has been held to require an indictment by a grand jury as that institution was known at the time of the adoption of the Constitution of 1776.[21] "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."[22] The first sentence of this section is the only jury provision in the Constitution that refers to the element of sex. "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."[23] The jury referred to, of course, is the common law jury. The only statutory qualifications for grand and petit jurors is that they must be such "persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence."[24] In the light of the preceding discussion, therefore, the following conclusions seem tolerably clear: (1) the Nineteenth Amendment itself could not operate to

[18] C. S. sec. 3849 (1): ". . . every word importing the masculine gender only shall extend and be applied to females as well as to males unless the context clearly shows to the contrary."

[19] *State* v. *Lewis* (1906) 142 N. C. 626, 55 S. E. 600.

[20] Art. 1, sec. 12.

[21] *State* v. *Barker* (1890) 107 N. C. 913, 12 S. E. 115; *State* v. *Lewis*, note 19, *supra*.

[22] Art. 1, sec. 13.

[23] Art. 1, sec. 19.

[24] C. S. sec. 2312.

authorize women to sit on grand or petit juries in North Carolina. (2) An enabling statute specifically granting the privilege is necessary. (3) Nor would the legislature be prohibited, by the express and implied references to the male common law jury, in the constitutional jury provisions, from enacting such a law. It is understood that a bill for that purpose failed of passage in the session of the legislature just ended.

J. T. A.

CLERK'S POWER TO ENTER DEFAULT JUDGMENT IN NORTH CAROLINA—In the recent case of *Thompson* v. *Dillingham*,[1] the court was asked to declare unconstitutional the act of 1919[2] authorizing the clerk of the Superior Court, in certain cases,[3] to enter judgment for the plaintiff by default final, and providing for an appeal to the Superior Court in term. The validity of the statute was upheld. The decision is of interest as indicating the nature of the North Carolina judicial system.

The Constitution of 1868 as amended in 1875 provides that "The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of Justices of the Peace, and such other courts inferior to the Supreme Court as may be established by law."[4] The jurisdiction of all of these courts except that of the Superior Courts and of those which are created by law, is expressly prescribed by the Constitution. By the term "Superior Court," however, the Constitution "meant the highest court in the state next to the Supreme Court and superior to all others, from which alone appeals lie direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity."[5] In other words, the Superior Courts, in 1868, were established statutory institutions, with a well understood jurisdiction. The Constitution raised them from a statutory to a constitutional status, and impliedly preserved the powers which they had formerly exercised.

The Constitution as amended in 1875 also provides, however, that ". . . the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such a manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."[6]

It follows, therefore, (1) that the powers of the Supreme Court, the Superior Courts, and the Justices of the Peace, as established or adopted by the Constitu-

[1] (1922) 183 N. C. 566, 112 S. E. 321.

[2] P. L. 1919, ch. 156, now C. S. sec. 593.

[3] For a complete discussion of the inter-relations of various recent statutes dealing with this matter see A. C. McIntosh, *Changes in North Carolina Procedure*, 1 N. C. L. Rev. 7, 15.

[4] Art. 4, sec. 2.

[5] *Rhyne* v. *Lipscombe* (1898) 122 N. C. 650, 654, 29 S. E. 57.

[6] Art. 4, sec. 12.

tion, cannot be taken from them by the legislature;[7] (2) that the General Assembly may delegate judicial powers other than those belonging exclusively to the courts just mentioned to new judicial tribunals created by statute;[8] and (3) that the legislature may regulate the manner in which the powers of all of the courts below the Supreme Court are to be exercised.

By the code of civil procedure enacted by the legislature soon after the adoption of the Constitution of 1868, the clerks of the Superior Courts were given extensive powers, especially in connection with process and pleadings, with a view to permitting the continuous and expeditious transaction of business in these courts between terms. Among the powers thus given to the clerks, was the authority to enter a judgment by default final in certain designated cases.[9] The features of the original code of civil procedure which required pleadings to be filed with the clerk and the case to stand for trial at the next term, however, proved unsatisfactory, on account of the conditions incident to the reconstruction period, and these regulations were first suspended temporarily and then repealed,[10] so that process was made returnable at the term and pleadings required to be filed at term. This change necessarily took the powers just mentioned from the clerk, for the original code, in a clause that has since remained in the statutes, provided that the term "Superior Court" or "court" should mean the clerk unless a term of court was referred to, when it should mean the judge.[11] The act of 1919 passed upon in the principal case, is one of a number of recent statutes which have sought to restore to the clerks the powers originally granted in 1868, with certain additions.[12]

As the principal case indicated,[13] there would seem to be several reasons for upholding the validity of this statute. It may be that the statute constitutes the clerk a court of limited jurisdiction to which has been alloted a portion of the judicial power not pertaining to the Supreme Court, with the essential constitutional jurisdiction of the Superior Court preserved by the provision granting to either party the right of appeal to that court from the judgment entered by the clerk. Rather than to consider the clerk and the judge as two separate courts, however, it would seem better, since the clerk is by constitutional provision a component part of the Superior Court,[14] to say that the statute is merely a regulation by law of the manner in which, for the purpose of expediting business, the Superior Court as a fully developed unit of the judicial system is to proceed in the exercise of its powers.[15]

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[7] *RRyne* v. *Lipscombe*, note 5, *supra*; *State* v. *Baskerville* (1906) 141 N. C. 811, 53 S. E. 742.
[8] *Express Co.* v. *Railroad* (1892) 111 N. C. 463, 16 S. E. 393.
[9] *Code Civil Procedure*, 1868, sec. 217. See *Bynum* v. *Powe* (1887) 97 N. C. 374, 381, 2 S. E. 170.
[10] P. L. 1868-69, ch. 76; *Bynum* v. *Powe*, note 9, *supra*; *Campbell* v. *Campbell* (1920) 179 N. C. 413, 102 S. E. 737.
[11] C. S. sec. 397.
[12] See McIntosh, note 3 *supra*.
[13] See *Simpson* v. *Jones* (1880) 82 N. C. 323; *McCauley* v. *McCauley* (1898) 122 N. C. 288, 292, 30 S. E. 344.
[14] Art. 4, sec. 16 establishes the office and provides for the clerk's election.
[15] Compare *Brittain* v. *Mull* (1884) 91 N. C. 498, 500.

TRANSFERABILITY OF HUNTING PRIVILEGES—In the case of *Council* v. *Sanderlin*,[1] decided by the Supreme Court of North Carolina in 1922, the facts were as follows: Council and another, the owners in fee of a large tract of land, granted it to the Southern Chemical Company, in fee simple, with the following reservation: "But the said J. P. Council and J. A. Council reserve for themselves, their heirs and assigns, the right to hunt on any of the above described lands as may remain uncleared and uncultivated, and the power to protect the game on said land against the trespass of all persons except the Southern Chemical Company, their executors, administrators, and assigns." Through mesne conveyances, the title to the land became vested in one Pickett, and the latter subsequently leased to the defendants for five years the "right of hunting and protecting the game and all wild life on said lands and the right to exclude all persons from entering upon said lands with firearms or dogs or other devices used in the capture of wild life." Held, the lease was invalid, and Council was granted a permanent injunction against the defendants.

A hunting right over land is by all the authorities a right in the nature of a *profit à prendre*. It may exist either by virtue of ownership of the land or in gross distinct from such ownership.[2] When attached to the ownership of land it is essentially like an easement, but when the right exists as a personal right in gross, it is the subject of grant apart from the land, and may be in fee, for life, or for years.[3] A *profit à prendre*, being a right to profits from the estate, has been held not to be an incorporeal hereditament. A grant of it is within the statute of frauds, and must be under seal.[4]

As both parties in the principal case based their claims on express clauses in the original deed of Council, the problem before the court was one of construction. And the well settled rule of construction in this state, particularly in an equity proceeding, is to subordinate form to substance, and to effectuate the intent of the parties as embodied in the instrument, giving effect to every part and clause, if this can be done fairly and reasonably.[5]

Council reserved to himself, his heirs and assigns, a fee in gross in the hunting rights and also the power to proceed for trespass against everyone except the grantee Chemical Company, its executors, administrators, and assigns. From its place in the sentence and its wording, the exception would seem to be a waiver of the right to maintain trespass against the grantee and its assigns only. This is in substance the effect given to it by the court. For it held that the non-liability to be sued in trespass attached to the grantee Pickett as grantee of the land, and lasted only while he owned the land or an estate therein. Consequently, such a grantee could not convey the exemption apart from the land. Nor, *a fortiori*, could he

[1] 183 N. C. 253, 111 S. E. 365.

[2] *Sherwood* v. *Salene* (1912) 61 Ore. 572, 123 Pac. 49, Ann. Cas. 1914 B 542; Leake, *Uses and Profits of Land*, 78, 330; 2 Tiffany, Real Property, 2nd ed., 1388.

[3] 2 Tiffany, *op. cit.*, 1392-1393. See *Outlaw* v. *Gray* (1913) 163 N. C. 325, 79 S. E. 676.

[4] *Bird* v. *Higginson* (K. B. 1835) 2 Ad. & El. 696, 29 E. C. L. 177. See as to easements, *McCracken* v. *McCracken* (1883) 88 N. C. 272.

[5] *Baggett* v. *Jackson* (1912) 160 N. C. 26, 76 S. E. 86.

convey the privilege of hunting on the land or of protecting the game. The right of protection was never in him at all, and the right to hunt was merely indirectly and incidentally his while he held the fee.

In view of the numerous game preserves and hunting clubs growing up over the state, this case should become a valuable precedent. Besides, the point as to the transferability of hunting rights seems new.

C. C. H.

Law and Morals was the general subject of a series of three lectures delivered at the University of North Carolina, in March, on the John Calvin McNair foundation, by Dean Roscoe Pound, of the Law School of Harvard University. The first lecture discussed *The Historical View,* the second *The Analytical View,* and the third *The Philosophical View.* The manuscript will be published *seriatim* in *The Journal of Social Forces,* for May, September, and November, and in book form by The University of North Carolina Press, in the fall.

Probably the most thorough study available of the legal aspects of *Coöperative Marketing Associations* is an article under that title, by Gerard C. Henderson, of the New York City bar, in the *Columbia Law Review* for February, 1923. Apparently the other material upon the subject is limited to an article, *The Law of California Coöperative Marketing Associations,* by Stanley M. Arndt, in 8 Calif. L. Rev. 281, and a pamphlet by L. S. Hulbert, *Legal Phases of Coöperative Marketing Associations,* being Bulletin 1106, U. S. Department of Agriculture. See also a note in 22 Col. L. Rev. 470.

Those interested in the legal aspects of the farm tenancy situation will find a valuable discussion in a note in the *Harvard Law Review* for December, 1922, on *The Status of a Cropper.*

The delay in the appearance of the January number of THE NORTH CAROLINA LAW REVIEW has been caused by unanticipated editorial difficulties. The April number will be available early in May, and the June number the latter part of June. The June REVIEW will be devoted to a discussion of the Public Laws enacted by the North Carolina General Assembly of 1923.