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# *The* North Carolina Law Review

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## EDITORIAL NOTES

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LUCIUS POLK McGEHEE

Lucius Polk McGehee, Professor of Law and Dean of the School of Law, University of North Carolina, was taken out of the very midst of his work, when death came to him in a hospital in Richmond, Virginia, on the 11th. of October, 1923. He was born in Person County, North Carolina, in 1868, his mother being a daughter of United States Senator Badger and a descendant of the Polk family of which President Polk was a member. He was graduated, as valedictorian of his class, from the University of North Carolina in 1887, then taught school in Asheville and in Mebane, North Carolina, for several years, reëntering the University for the study of law in 1890 and being admitted to the North Carolina Bar in 1891. After practicing in Raleigh, North Carolina, for a short time, he went to New York City, where he was admitted to the bar and practiced law with the firms of Evarts, Choate and Beaman, Wells, Waldo and Gridecker and Henry A. Robinson. From 1895 to 1903, he was a member of the editorial staff of the *Edward*

Thompson Company and associate editor-in-chief of the second edition of the American and English Encyclopedia of Law, after which he returned to the University of North Carolina as Associate Professor of Law for four years; then reëntered the active practice of law in the offices of Cravath and Henderson in New York City, and finally came to the University of North Carolina in 1910 as Dean of the Law School. As an author, he is best known for his treatise on "Due Process of Law," for numerous articles in the American and English Encyclopedia of Law and as Editor-in-chief of the Consolidated Statutes of North Carolina, 1919.

THE NORTH CAROLINA LAW REVIEW mourns the loss of an associate editor and a leading contributor, whose discussions of particular problems in the law of Real Property added much to an understanding of that difficult subject. Had he lived, he might have gradually covered in such discussions the entire field. His advice was being constantly sought in connection with LAW REVIEW work, and those, who came to him, were not disappointed, for he had a way of seeing through the surface to the heart of things.

His former students mourn the loss of an inspiring teacher, respected for his great learning and loved for his great spirit. Throughout the state of North Carolina, his opinions and views carried the greatest weight, especially in his favorite fields of Constitutional Law and Real Property.

His associates of the faculty mourn the loss of a leader, who was ever faithful in the service to which he gave himself so unselfishly, who was unassuming, friendly and delightful to talk with and who held high the standards of legal scholarship.

Two appreciations of Dean McGehee are printed below because they reveal the man to us from two different viewpoints. The first is by Louis Graves, Editor of the *Chapel Hill Weekly*, and shows us the man as Chapel Hill knew him. The second is by William Mack, Editor-in-Chief of *Corpus Juris*, and shows us the man in the eyes of his associates of two decades ago.

We trust that we have put into a lasting form some part of the affection we feel for our departed Dean and for our loved and loving friend.

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Lucius McGehee is dead. He was dean of the University Law School, a faithful servant of the institution, an inspiring teacher. But it is not the member of the faculty of whom the University and Chapel Hill are thinking now. It is the man of simple tastes and quiet ways, who went to and fro about the village, stopped to pass the time of day in front of the postoffice, sat before the fire and smoked and chatted with his friends—and was always the good and friendly neighbor. Of Lucius McGehee it can be truly said that those loved him most who knew him best.

He was a singularly modest and unassuming man. Zealous as he was in his duties, deeply interested as he was in building up the department of the University that was under his charge, probably there was never anybody who talked less about

himself, what he had done and what he planned to do. In a noisy age of automobiles and jazz and all the furor of progress, he somehow seemed to carry over with him the flavor of tranquil days gone by. One hesitates to use the phrase, "a gentleman of the old school,"—it has been so overworked—but it leaps to the mind as completely fitting when applied to him.

From the fact that he figured not at all in social affairs, and could not be persuaded to present himself at gatherings that partook of the nature of functions people not well acquainted with him might have fancied that he shunned companionship. Nothing is farther from the truth.

It is only that he cared nothing for the dross and the tinsel and the trappings of intercourse with his fellow men. The true substance of friendship he dearly loved. An interested observer of human affairs, alive to the humor of the passing throng, keen, whimsical, he was the constantly delightful comrade of the group of men who were fortunate enough to see him day by day.

The son of Montford McGehee, he was born at Woodburn, Person County, in 1868, and received his early education at Morson's school in Raleigh. Graduating from the University in 1887, he returned here three years later and completed the law course. Then he went north and became editor of the *English Encyclopedia of Law*. His book, "Due Process of Law" won wide recognition.

In January, 1903, he was married to Miss Julia Leslie Covert. She died the following August.

In 1904 he became Professor of Law in the University, and in 1910 was chosen dean. Under his leadership the Law School grew steadily, in the number of students, in the strength of the faculty, in prestige. Handicapped as he always was—as the heads of many departments have been, in a period of such great expansion—by antiquated and inadequate quarters, he looked forward eagerly to the completion of the new law building. During the last year of his life he was busy conferring with architects and builders, with committees of the trustees and the faculty, about the layout of the library and the lecture rooms. And just as the building was completed and the law school was moving in to take possession his physical being collapsed. He went first to the hospital in Durham, and then his friend, Dr. William de B. MacNider, took him to Richmond. His illness lasted only three or four weeks.

Gentleness and understanding and humor and charm are happily abundant upon the earth, but in few men are they so beautifully and perfectly blended as they were in him whom this community now mourns. His life was a constant giving of himself to make easier the burdens of others, and his selflessness gained a hundredfold in virtue because he was so completely unconscious of it. No man ever laid less of claim to the love of those about him, and none ever won it more securely. Near a century ago a great Englishman, in a tribute to the greatest of Americans, asked: "What is a gentleman?" and answered: "To bear good fortune meekly, to suffer evil with constancy, and through evil or good to maintain the truth always." So might the same words be spoken of the good gray man

who died and was laid at rest last week. Someone will come to carry on his work, and will doubtless do it well; his place as head of the Law School will be filled, but his place in the hearts of his friends is his very own. There will never be another Lucius McGehee.

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The death of Dean McGehee marks the passing of a cultured gentleman, an able lawyer, an accurate writer, and a successful teacher.

It was not our privilege to know McGehee in the brilliant successes of his student days at Chapel Hill, but those, who did know him then, speak of him only in words of love and admiration. Nor did we know him personally in later years in the class room of his Alma Mater, which he graced with his ripe scholarship and accumulated wisdom. We knew him best in his law-writing days, as a member of that "fascinating circle" of law writers whose literary labors and products have been vividly described by Judge Thomas A. Street in his Introduction to the American and English Encyclopedia of Law and Practice.

A lifelong friend, on hearing of his death, remarked: "I have known him nearly forty years and consider him one of the cleanest, finest men I ever knew. In the matter of pure mentality, I do not believe I ever came in close contact with his equal."

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THE LAW REVIEW begins its second volume with this number. It is indeed hard to carry on the work with the loss of Dean McGehee and of Mr. Van Hecke, who, as Editor, was most largely responsible for the success of the first volume. No change will be made in editorial policies, and we hope to be able to carry forward the plans of the founders of the LAW REVIEW. May we express the hope of our first Editor that this LAW REVIEW may be of service to the law students, the law teachers, the members of the bar, and to the judges upon the bench, and, through them all, to the people of the state. We would especially like to build up a closer connection with the judges in the state and attorneys in active practice, to learn their attitude and needs and problems and to receive their constructive suggestions for dealing with the difficulties of administering justice according to law. The LAW REVIEW will continue to publish, in the form of articles, editorial notes and comments, discussions of important legal problems and of significant recent decisions, placing special emphasis on the development of the North Carolina law. We are also anxious to present the economic and sociological aspects of legal problems. If we are successful in a degree, we are confident that the LAW REVIEW will continue to be favorably received.

We desire to call the attention of our subscribers to the change in the time of publication of our four numbers from the months of November, January, April and June to the months of December, February, April and June. This more nearly corresponds with the appearance of the LAW REVIEW last year, and we believe it to be a better arrangement. Our subscribers are therefore receiving this number instead of a November issue.

## THE LAW SCHOOL

**THE SUMMER TERM 1923**—The summer term of the Law School opened on June 14, and closed on August 17. During the first half of the term Messrs. McGehee, Winston and McIntosh, of the regular faculty, were in charge of the work, Mr. McGehee having the subject of Real Property, Mr. Winston the subjects of Torts, Carriers and Partnership, and Mr. McIntosh the subjects of Contracts, Negotiable Instruments and Agency. During the second half, instruction was given by Judge W. P. Stacy, of the State Supreme Court, in the subjects of Constitutional Law, Civil Procedure and Evidence, and Judge H. G. Connor, Federal District Judge for the Eastern District of North Carolina, in the subjects of Federal Procedure, Private Corporations and Equity.

The enrollment for the term was 47, being an increase of 16 over that of the term of 1922, and of these, 31 out of 33 applicants passed the Supreme Court examination for license in August. The plan which had been announced by Dean McGehee, to give work for credit in the summer term as in the regular term, was not carried out this year on account of the difficulty in adjusting the courses to be taken, but it is expected that this will be done later.

**REGULAR TERM, 1923-1924**—This term began on September 20, and the number of students enrolled was 126. Of this number 3 withdrew near the beginning of the term, leaving 123, the largest number enrolled in the history of the Law School. These are divided among the classes, as follows: 63 first year, 43 second year, and 17 third year. The registration shows that 8 are from other states, and 69 were not in the school last year. An examination of the records shows two rather noticeable and encouraging tendencies. The students have a better preliminary preparation before beginning the study in law, 20 having a college degree, 60 with two or more years of college work, and 29 with one year of college work. There are 43 registered for work for the degree of law, and of these 12 are in the third year, while last year only 4 took the degree. The other tendency is, for more of the students to continue the study of law in the Law School after passing the examination for license. Of 17 now in the third year, 12 have already passed the examination for license, and out of 14 who passed the examination in February, 13 continued the work to the end of the college year.

The present requirement for admission to the Law School is one year college work, except for a limited number of special students; and applicants for the degree are required to have two years college work and to take three years in law. It is proposed to increase the entrance requirement to two years college work in 1925.

**THE LAW FACULTY**—Mr. Winston, Mr. Wettach and Mr. McIntosh continue their work this year, Mr. Winston and Mr. McIntosh having taught in the summer school, and Mr. Wettach having taught during the summer in the University of Pittsburgh. Mr. Van Hecke resigned in June to go to the University of

Kansas, and Mr. Albert Coates was elected to fill this vacancy. Mr. Coates graduated from this University in 1918, and from the Harvard Law School in 1923, and was admitted to the bar in this state in 1923.

The loss of the services of Mr. McGehee, an account of whose death is given elsewhere in this REVIEW, made additional assistance necessary, and Mr. Fred B. McCall was engaged temporarily for the work. Mr. McCall is a graduate of the University in the class of 1915, received his law training in this Law School, was admitted to the bar in 1922, and is a member of the Charlotte bar. Mr. McIntosh is Acting Dean of the Law School until some one is elected to fill that position permanently.

**THE LAW BUILDING**—The new building, which was in course of construction last year, was ready for occupancy at the beginning of the term, and the Law School began its work in its new home. The building is called Manning Hall, in honor of Dr. John Manning, who was in charge of the school from 1881 until his death in 1899. A description of the plan of the building was given in the LAW REVIEW for June, 1922, and it has been completed according to the plan there described, with some slight modifications. The reading-room, stack-rooms, and offices are on the first floor; the recitation rooms are on the second floor, and in the basement is a large social room for the convenience of the students. The recitation rooms are furnished with desks and chairs of light oak, and the reading-room and offices have tables, desks and chairs of dark oak. In its new and well equipped home the Law School has a larger opportunity for growth and expansion, and an additional obligation for the most efficient service to the University and to the State.

**THE LAW LIBRARY**—The law library, which in the crowded condition in the old building could not be used to the greatest advantage, has been removed to the new quarters and conveniently arranged in the stack-room and reading-room. While the books now on the shelves furnish a good working library, it is very necessary that some adequate provision should be made for additions from year to year to meet the growing needs of the school. Miss Lucile Elliott is secretary and librarian of the school, and with two student assistants, Mr. W. B. Bass and Mr. C. R. Britt, has general supervision of the library. The general library of the University has recently received from Mrs. Richmond Pearson, of Asheville, several hundred volumes which belonged to the law library of Chief Justice Pearson and of his son, Richmond Pearson. This collection will be placed in the law library and will be of especial historic interest and value because of its having been owned and used by one of the greatest judges of the state.

**THE LAW CLUBS**—Two or three years ago, as a substitute for the Moot Court system, the students were organized into groups, known as Law Clubs, for practice in the investigation and management of legal problems. These have been reorganized this year under the direction of Mr. Coates, and they are proving a valuable opportunity for individual work and research on the part of the students.

There are seven of these clubs, each named for some prominent lawyer in the history of the state, Iredell, Ruffin, Gaston, Pearson, Manning, MacRae, and McGehee.

A. C. McI.

**PAR CLEARANCE OF CHECKS**—The year just past brought surprises in the matter of the par clearance controversy. Until June it appeared that the federal reserve banks were to be successful in the establishment of universal par clearance and collection of checks. In the South, where state bank opposition was centered, the Federal Reserve Banks of Richmond, Atlanta and Cleveland had won an unbroken series of legal victories in the local courts, both state and federal.<sup>1</sup>

With especial positiveness and finality the Supreme Court of the State of North Carolina, in a decision written by Mr. Chief Justice Clark, had upheld the action of the Federal Reserve Bank of Richmond in promoting par clearance, and pronounced as invalid certain conflicting North Carolina statutes expressly designed to aid the state banks in their fight against par clearance.<sup>2</sup>

However, with equal positiveness and finality, the United States Supreme Court, June 11, 1923, rescued these self-same statutes from the invalidation of the state's own highest tribunal, and pronounced the Federal Reserve Bank to be the real offending party in acting beyond the limits of the powers granted by the Federal Reserve Act.<sup>3</sup>

Since an account of the par clearance controversy for the period ending with the North Carolina decision has been given in a previous issue of this journal,<sup>4</sup> it remains here only to restate the case in brief, and indicate the nature of the latest decision.

On February 5, 1921, the North Carolina legislature enacted a law authorizing the state banks to make an exchange charge of not more than one-eighth of one per cent; and, in case a federal reserve bank, post office, or express company, should make presentation of checks at the counters of the drawee banks and demand payment in cash, the drawee banks might legally offer payment in the form of drafts on correspondents.<sup>5</sup>

In compliance with the provisions of this law certain state banks refused further to remit at par to the federal reserve bank for checks sent through the mail. When, in consequence, the federal reserve bank presented checks at the counter, the state banks offered par payment in drafts, but refused payment in cash. Whereupon, the federal reserve banks returned the checks to the former holders as being dishonored, but taking care to state the reasons for the dishonor.

<sup>1</sup> *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond* (1922) 183 N. C. 546, 112 S. E. 252; *Farmers and Merchants Bank of Cottleburg v. Federal Reserve Bank of Cleveland* (Dist. Ct. Ky.—1923) 286 Fed. 610; *American Bank and Trust Co. v. Federal Reserve Bank of Atlanta* (Ga. 1922) 280 Fed. 940, affirmed in 284 Fed. 424 and in 43 Sup. Ct. Rep. 649 (1923).

<sup>2</sup> *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond* (1922) 183 N. C. 546, 112 S. E. 252.

<sup>3</sup> *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond* (1923) 43 Sup. Ct. Rep. 651.

<sup>4</sup> C. T. Murchison, *Par Clearance of Checks*, 1 N. C. L. Rev. 133.

<sup>5</sup> Pub. Laws 1921, ch. 20.



This returning of checks as dishonored caused embarrassment and expense not only to collecting banks, but also to drawee banks, and their depositors. Believing that the state law afforded a remedy for this situation, the Farmers and Merchants Bank of Monroe, with twelve other state banks and trust companies, later increased to over 250 in number, instituted injunction proceedings in the Superior Court of Union County. They were awarded a temporary restraining order, February 29, 1921, made permanent after trial on March 29 following, in which the Federal Reserve Bank of Richmond was enjoined from refusing to accept exchange drafts drawn by the plaintiffs in payment of checks presented at their counters, and also enjoined from returning as dishonored those checks which had been presented for payment and for which payment had been tendered in the form of drafts.

The defendant bank appealed to the Supreme Court of North Carolina, and on May 24, 1922, the latter tribunal, reversing the lower court, declared invalid the North Carolina statute upon which the injunction was based.<sup>6</sup>

On writ of certiorari the case then went to the United States Supreme Court, where on June 11, 1923, the North Carolina decision was reversed. Justice Brandeis, delivering the opinion, stated that "The North Carolina statute . . . does not obstruct the performance of any duty imposed upon the Federal Reserve Board and the federal reserve banks. Nor does it interfere with the exercise of any power conferred upon either. It is therefore, consistent with the Federal Reserve Act and with the Federal Constitution."<sup>7</sup>

The main issue was whether the North Carolina statute, modifying the common law rule which requires payment in cash, violated the Federal Constitution. The Court held that the legal tender clause of the Constitution was not violated in that "The debt of the bank is solely to the depositor," and that therefore the depositor has the right if he so desires to consent to payment by exchange drafts. Under the North Carolina statute depositors had the right to require cash payment at par, but the exercise of the right in so far as exchange operations were concerned, called for a written statement to that effect on the face of the check.<sup>8</sup>

Relative to this point the North Carolina court had said: "No act of this state can authorize the paying bank to pay less than the face amount of the check drawn upon it by its depositor or to remit its check in payment or pay it otherwise than in legal tender money."<sup>9</sup>

Of equal interest is a comparison of the positions taken by the two courts relative to the meaning of the word "may" as it appears in Sec. 13 of the Federal Reserve Act. The United States Supreme Court, reasoning inferentially held that it was a word of authorization merely and did not imply compulsion. The North Carolina Court, through a process of reasoning which was also inferential, but far wider in scope, construed "may" as tantamount to "shall." It reached this con-

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<sup>6</sup> See note 2, *supra*.

<sup>7</sup> See note 3, *supra*.

<sup>8</sup> In actual practice, of course, depositors would not be expected to write on the face of the check that it should be paid in cash. This would be decidedly new and startling in business usage.

<sup>9</sup> See note 2, *supra*.

clusion by regarding the federal reserve bank in the light of all its powers and functions, recognizing that the proper performance of any one function is of necessity conditioned upon unrestricted performance of other but closely related functions. Federal reserve banks are compelled to act as reserve depositories for all their members, as banks of loan and rediscount, as banks of deposit for members, as banks of issue, and as depositories and fiscal agents of the government, not to mention many others of importance.

It requires no expert in banking to recognize that efficient performance of these various mandatory duties is to a large extent dependent upon unrestricted use of the customary instruments of banking. A conclusion so obvious as this deserved greater consideration than was accorded it by Mr. Justice Brandeis.

The Federal Reserve banks, for the time being thwarted in their attempts to achieve universal par clearance, have amended their Regulation J to provide that no federal reserve bank shall receive on deposit or for collection any check drawn on any non-member bank which refuses to remit at par in acceptable funds. Furthermore, the federal reserve bank itself shall make a collection charge on checks drawn by, indorsed by, or emanating from any non-member bank which refuses to remit at par.<sup>10</sup>

Enforcement of these regulations has been indefinitely postponed by the Federal Reserve Board, however, and there is as yet considerable doubt as to the next move of the federal reserve banks.

It has been suggested that the state statute may prove to be vulnerable in that it tends to impair the negotiability of checks, in view of the requirement of paragraph 1 of the Negotiable Instruments Law that a negotiable instrument must call for the payment of a sum certain in money.<sup>11</sup>

C. T. MURCHISON.

MUNICIPAL AID AND PUBLIC BENEFIT—Can a municipal corporation issue bonds and levy a tax to aid a railroad corporation in building a passenger station? This question is answered in the affirmative in the recent case of *Hudson v. City of Greensboro*.<sup>1</sup>

An act was passed by the legislature authorizing the city to issue bonds to the amount of \$1,300,000, to raise money to aid the railroad in building a passenger station and approaches thereto and an underpass for streets. The railroad was to build the station and other work designated, pay in monthly payments a sufficient sum to meet the interest on the bonds and to provide a sinking fund, and as security to convey to a trustee for the benefit of the city, the land on which the station was to be built. The action was brought by the plaintiff to enjoin the city from carrying out this agreement with the railroad, on the ground that the act authorizing it was unconstitutional. It does not appear in the statement of

<sup>10</sup> 1923 Fed. Reserve Bulletin (July), p. 773.

<sup>11</sup> See note in 37 Harv. L. Rev. 133, *The Federal Reserve System Against the Country Banks of the South: The Struggle for Par Clearance*.

<sup>1</sup> (1923) 185 N. C. 502, 117 S. E. 629.

the case in what particular the Constitution was violated, but the Court decides that it does not violate any constitutional provision and sustains the validity of the proposed agreement. There are no citations of authority in the decision of the Court, probably because the policy has been so often discussed and sustained that no authorities were considered necessary.

Subject to the limitation which the legislature may impose as to the amount to be expended and the rate of taxation, a municipal corporation may incur a debt for necessary expense without legislative consent or the popular vote.<sup>2</sup> What is a necessary expense, or as called by some courts a "prudential concern," is a question of law for the court.<sup>3</sup> It is not contended that the term "necessary expense" applied to this case, unless perhaps that part of it which required the construction of an underpass for the streets. As to this, the city might construct it, or share the expense with the railroad, or compel the railroad to construct it.<sup>4</sup> To contract a debt for other than necessary expense the city must be authorized by an act of the legislature passed in the manner required by the Constitution and also ratified by the popular vote.<sup>5</sup> All this was done in this case, and the only question is whether it is an object for which the public money may properly be expended.

It is one of the fundamental principles of a popular government that the power of taxation and the use of the public money can be justified only for a public purpose and not for private gain or to aid a strictly private enterprise.<sup>6</sup> The two ways in which the property of the citizen may be taken for such public use are through the power of eminent domain and of taxation. In the first, compensation must be made, and, in the second, compensation is supposed to be received through the public benefit. A railroad is a private corporation organized for private gain, but it is also affected with a public interest in the nature of its business, and it is therefore subject to public control; and in order to enable it more efficiently to perform its duty to the public, it is clothed with the power of eminent domain.<sup>7</sup> Whether a railroad is such a public purpose as to justify the expenditure of public money in its construction is a proposition which has been before the courts so often and has been so often sustained that it has become an established policy.<sup>8</sup> Under the name of internal improvements the state has from time to time engaged in building railroads and in aiding in their construction, and even now there is a plan for the state to build a railroad across the mountains to reclaim the "lost provinces."<sup>9</sup> What the state may do itself it may also authorize to be done by subordinate agencies; so that counties, townships, cities and towns may be and have been authorized to build railroads and to contribute to their construction by private individuals and corporations.

<sup>2</sup> Const., art. 7, s. 7; C. S. s. 2691; *Swindel v. Belhaven* (1917) 173 N. C. 1, 91 S. E. 369.

<sup>3</sup> *Fawcett v. Mt. Airy* (1903) 134 N. C. 125, 45 S. E. 17.

<sup>4</sup> *Durham v. R. R.* (1923) 185 N. C. 240, 117 S. E. 17.

<sup>5</sup> Const., art. 2, s. 14; art. 7, s. 7; C. S. s. 2691; *Mayo v. Comrs.* (1898) 122 N. C. 5, 29 S. E. 343.

<sup>6</sup> *Cooley on Taxation*, vol. I, p. 181; *Dillon, Munic. Corp.*, vol. I, s. 884; *Loan Association v. Topeka*, 20 Wall. (U. S.) 655.

<sup>7</sup> C. S. s. 1706.

<sup>8</sup> *Dillon, Munic. Corp.*, Vol. I, s. 313.

<sup>9</sup> Laws of 1923, c. 116.

While the courts in most of the states have taken the same view, it has not been without strong opposition, and sometimes with rather severe criticism even on the part of those who sustained it. Perhaps the most interesting cases presenting the opposing views are, the case of *Sharpless v. Mayor of Philadelphia*,<sup>10</sup> decided about 1853, in which Black, C. J., rendered the decision sustaining the proposition, and the case of *People ex rel. Detroit etc. R. R. v. Township of Salem*,<sup>11</sup> in 1870, in which Cooley, J., rendered the decision taking the opposite view. About the time of the Pennsylvania case the question arose in this state, in the case of *Taylor v. Comrs. of New Bern*,<sup>12</sup> in which Nash, C. J., gave the opinion, reaching the same conclusion as Judge Black, and two or three years later, in *Caldwell v. Justices of Burke*,<sup>13</sup> Ruffin, J., considers the question as settled. In *Wood v. Oxford*,<sup>14</sup> the same view is expressed by the court, although Smith, C. J., in a concurring opinion, says that if the question were new he would be disposed to hold the contrary view. Because of this general tendency and its liability to be overworked, some of the states adopted constitutional provisions against it.<sup>15</sup>

Whether a city of 40,000 population should be authorized to incur a debt of \$1,300,000, to aid a railroad, which has been in operation for many years, to build a passenger station suitable to accommodate the traveling public, is not a question of constitutional right but of public policy, the wisdom of which rests with the legislature and the citizens of the municipality. There being no limit in the Constitution as to taxation by a municipal corporation, except as to poll tax, the legislature has by general law and special act imposed limits, but such general limits are not to apply in this case, by express provision in the authorizing statute. It has also been provided<sup>16</sup> that this bond issue shall be deducted from the gross indebtedness of the city, probably because it is secured by a deed of trust and the principal and interest are to be paid by the railroad, thus being considered more in the nature of an asset than a liability. At any rate it would appear to be a safe investment for the bondholder.

Since a municipal corporation may incur a debt for other than necessary expense with legislative consent and the popular vote, is there any limit to the purposes for which such expenditure may be made? Since it must be for a public purpose, is there any test of such public purpose other than the legislative will and popular vote? The public interests are so varied and affected by such a variety of circumstances that it is sometimes difficult to draw the line between what is a public purpose and what is not. Stated briefly the test might be, if the expenditure is intended primarily to benefit the general public and incidentally to benefit a private individual or enterprise, it may be a public purpose, but if it is

<sup>10</sup> (1853) 21 Penn. St. 158, 59 Am. D. 759 and note.

<sup>11</sup> (1870) 20 Mich. 452, 4 A. R. 400. See also 5 Am. Law Rev. 126.

<sup>12</sup> (1855) 55 N. C. 141.

<sup>13</sup> (1858) 57 N. C. 323.

<sup>14</sup> (1887) 97 N. C. 227, 2 S. E. 653.

<sup>15</sup> Dillon, *Munic. Corp.*, vol. I, s. 884.

<sup>16</sup> Private Laws 1923, c. 83.

to benefit a certain individual or enterprise primarily and the general public incidentally, it is not a public purpose.<sup>17</sup> While the legislature has and must have a wide discretion in determining to what purposes the public money may be applied, its decision, even with the popular vote added, is not necessarily conclusive. "An appeal to the law for the protection of individual property must necessarily render the question, which lies at the foundation of the demand, a judicial question, upon which the courts cannot refuse to pass."<sup>18</sup>

Many instances in which public money is expended pass without question, either because the incidental public advantage is apparent, or because of lack of interest on the part of those affected by it. A street is a proper object for municipal expense, but a street established only for the benefit of a certain individual is not a public purpose, and neither the legislative will nor the popular vote would make it such.<sup>19</sup> An electric light plant may be a proper object for municipal taxation, but one established merely as an enterprise for gain or profit would not be.<sup>20</sup> So in the present case, the city might float its bonds at four per cent and receive six per cent from the railroad. This might be a good investment, but it would not be a public purpose, for the city to go into the money lending business.

Two reasons may be given why any attempt on the part of a municipal corporation to depart from the purely governmental or public functions should be watched closely. One is that certain private individuals or enterprises may be sustained or supported at public expense, and the other is that the municipal corporation may enter into competition with private enterprise. We have seen that the first cannot be done. Whether the municipality can go into business as a community, because it may thereby control competition and enable the citizen to buy on more reasonable terms, is not so clearly settled. It has arisen in the establishment of public coal yards, and the like, and the views of the courts are not uniform.<sup>21</sup>

Two or three recent private statutes<sup>22</sup> show that some municipal corporations are thinking about and are willing to try the plan of municipal aid a little farther than it yet appears to have been tried in our courts. In one case a municipal moving picture show is authorized. One statute authorizes the municipality to issue bonds and levy a tax to build a hotel, and either to build the hotel or to lend the money to some corporation to build it, if the corporation will furnish some more money and secure the city by mortgage on the hotel. This is the same plan as the passenger station, but does the same rule apply? Another statute authorizes the municipality to appropriate a certain per cent of the general taxes to certain purposes, one of which is "for the purpose of aiding and encouraging the location of manufacturing, industrial and commercial plants in and near the city."

<sup>17</sup> See Dillon, *Munic. Corp.*, vol. I, s. 319; Cooley, *Taxation*, vol. I, p. 206.

<sup>18</sup> Cooley, *Taxation*, vol. I, p. 183, 195; *Loan Association v. Topeka* (1874) 20 Wall. (U. S.) 655.

<sup>19</sup> *Stratford v. Greensboro* (1899) 124 N. C. 127, 32 S. E. 394.

<sup>20</sup> *Slocumb v. Fayetteville* (1899) 125 N. C. 362, 34 S. E. 436.

<sup>21</sup> See discussion in Ann. Cas., 1918 B, 104; *Holton v. Camilla* (1910) 134 Ga. 560, 68 S. E. 472, 31 L. R. A. N. S. 116; *Laughlin v. Portland* (1914) 111 Me. 486, 90 Atl. 318, 51 L. R. A. N. S. 1143.

<sup>22</sup> Private Laws 1923, cc. 8, 48, 72, 125, 268, 508, and perhaps others.

The fact that this money is to be paid over to an organization known as the Board of Trade, and by it expended for the purpose named, does not change the purpose. The lending money to build a passenger station is only one of the ways in which municipal corporations are seeking to improve local conditions, with the hope of rendering the burdens a little lighter in the future by making them a little heavier now.

A. C. McL.

ENFORCEMENT OF INSURANCE POLICY ACCORDING TO ITS TERMS—Writing in 1777 in the case of *Tyree v. Fletcher*,<sup>1</sup> Lord Mansfield said: "In all mercantile transactions certainty is of much more consequence than which way the point is decided, and more especially so in the case of policies of insurance; because, if the parties do not choose to contract according to the established rule, they are at liberty between themselves to vary it." This was said in a case of marine insurance. Can it be applied to fire and life insurance? It is true that in some respects a life insurance contract is quite different from one of marine or fire insurance. It is not, for instance, a contract of indemnity. We do not put a money valuation on a human life as we do upon a house or a ship. Fundamentally all are contracts based on consent of parties. Whence, then, the persistent desire to construe this kind of contract in a way more favorable to one party than to the other? The reasons are evidently historical and due to a feeling that the parties do not have an equal advantage in dealing with one another. The reasons were sound, historically, but there is a question whether this is sufficient justification today for making a different agreement from that written by the parties. Should not certainty be attained by construing the contract according to its terms even though the result some times be hard? The law of contracts does not permit a party to escape his agreement because it turns out to be a bad bargain.

It is interesting to note the practical result of a holding that the policy will not be enforced as written, for instance, because of wrong doing on the part of the agent. The companies soon realize that they are carrying a greater risk than they had supposed, and they add an additional amount to the premium, thus adding to the cost of insurance for the innocent policy holder. If the companies feel sure that the contract will be enforced as made, they can sell cheaper. If it be said that this often works a hardship, that will soon become known, and greater care will be taken about making the contract, or corrective legislation will be passed. But, it is submitted that a court should adopt definitely one view or the other, so that lawyers may know how to advise clients and business men in the regulation of their affairs.

Suppose a client consults his attorney with reference to the question presented in *Fox v. Insurance Co.*<sup>2</sup> This was a suit to recover \$3,000, the value of a life insurance policy, on account of the wrongful failure of defendant's agent to deliver the policy to plaintiff's intestate in accordance with the agreement between them.

<sup>1</sup> Cowp. 666; Richards', *Cases on Insurance*, 63.

<sup>2</sup> (1923) 185 N. C., 121, 116 S. E. 266.

Plaintiff's intestate applied for insurance in the defendant company through their agent, who agreed that the insured could pay the first premium at the time the policy was delivered. The policy was issued and sent to the agent to be delivered to the insured while in good health, according to the terms of the application. The agent kept the policy for two weeks, during which the insured was in good health, and refused to deliver it at the end of that time because the insured had contracted typhoid fever, of which he died subsequently. The trial judge nonsuited the plaintiff because of the specific provision that the policy was not to take effect until delivered to the insured in good health. The Supreme Court, in an opinion by Clark, C. J., granted a new trial on the ground that the defendant company is responsible for the loss sustained as a result of the wrongful failure of their agent to deliver the policy. Judge Adams, in a concurring opinion, took the position that there was a binding contract of insurance in existence, since the defendant company accepted the plaintiff's offer by issuing the policy and sending it to the agent to deliver, and that the agent was merely performing a ministerial act in handing the policy to the insured, since it was already delivered. Judge Walker concurred in the opinion of the Chief Justice, that the defendant company was liable in tort, and also in the opinion of Judge Adams, that the defendant was liable in contract, saying that he saw no "substantial difference between them." He placed the defendant's responsibility on the doctrine of *respondeat superior*, and that the defendant was liable for the neglect and default of its agent in failing to deliver the policy properly. Judge Stacy dissented, contending that the parties should abide by the express terms of their contract, and, as there was no delivery of the policy, the defendant was not liable. The unfortunate death of Judge Walker since this case was decided, leaves the question in greater uncertainty.

In the case of *Black v. Insurance Co.*,<sup>3</sup> a similar difficult situation was faced several years ago with reference to standard fire insurance policy. Black carried other insurance which was contrary to the terms of the policy, unless he had permission. The plaintiff claimed that the agent knew of this. But the policy provides that any such permission must be endorsed on the policy. The court decided by a three to two decision that the policy should be enforced as written and the plaintiff could not recover his insurance. One of the judges who was with the majority in this decision retired from the bench soon afterward, and there seems to be some doubt whether the judge who succeeded him was altogether in accord with his views, since he suggests in a dictum in *Gazzam v. Insurance Co.*<sup>4</sup> that if the other insurance had been in force when the policy sued on was taken out that the plaintiff would be entitled to recover. The weight of authority seems to be in accord with this view<sup>5</sup> in spite of the reasoning and decision of the United States Supreme Court to the contrary in the *Northern Assurance Co.*<sup>6</sup> case where we have just the situation referred to, i. e. the insured had other insurance at the

<sup>3</sup> (1908) 148 N. C. 169, 61 S. E. 672.

<sup>4</sup> (1911) 155 N. C. 336, 71 S. E. 434.

<sup>5</sup> Vance, *Insurance*, 362 et seq.

<sup>6</sup> *Northern Assurance Co. v. Grand View Building Association* (1901) 183 U. S. 308; 22 Sup. Ct. 133, 46 L. Ed. 213.

time the policy in question was issued. This fact was known to the agent but no written consent endorsed on the policy. The court decided to enforce the policy as written, which prevented a recovery of the insurance.<sup>7</sup> It is interesting to note that two of the judges who decided for the plaintiff in the *Fox* case wrote dissenting opinions in the *Black* case. True, the *Black* case is fire insurance under the standard policy and the *Fox* case is life insurance, but certainty is important in both cases. It is said that some parts of Lloyd's Marine policy are archaic, but they are retained because they have been definitely construed. It would seem desirable that such should be the case as soon as may be with all insurance policies.

The desire of a court to favor the plaintiff in insurance cases is natural. In the *Fox* case, *supra*, the recovery is not allowed on the policy but plaintiff is allowed to recover for the negligence of defendant's agent in failing to deliver the policy. Since the measure of damage is the value of the policy, the result is substantially holding the defendant liable on the policy.

Two other interesting recent cases involving this question of delivery in a somewhat different way are *National Insurance Co. v. Grady*<sup>8</sup> and *Life Insurance Co. v. Box Co.*<sup>9</sup> Both of these suits are brought by the insurance companies to have the policies cancelled. In the first, the court unanimously decides that it cannot be done because delivery of the policy completed the contract in spite of the poor health of the insured. The court accepted the jury's finding that in spite of the provision of the policy that there was no contract until the policy was delivered during the good health of the insured, that this had been waived by the conduct of the agent. In this case he delivered the policy. In the *Fox* case, *supra*, he did not. In the second, with one dissent, it is decided that the policy should be cancelled because of material misrepresentation on the part of the assured.<sup>10</sup>

In the first of these cases the following dictum appears: "Unless there is fraud, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy."<sup>11</sup> It is to be noted that *Black v. Insurance Co.*, *supra*, is not referred to in the list of cases cited in support of this statement. Does the court mean that the decision in that case is abrogated or that a different rule is applicable to life insurance from that adopted in cases of fire insurance?

The attitude of a concurring judge in *McAreevy v. Magirl*<sup>12</sup> with reference to a disputed question in the law of partnership is a helpful illustration of an honest desire to settle the law with some definiteness where, as here, there is a difference of opinion. After referring to a number of cases laying down the opposite doctrine, the opinion continues, "the writer of this opinion would be content to accept it as

<sup>7</sup> In this case the plaintiff brought a new suit in the state court, had the policy reformed and finally recovered. *Grand View Building Association v. Northern Assurance Co.*, 73 Neb. 149, 102 N. W. 246; 203 U. S. 106; 27 Sup. Ct. 27, 51 Am. Ed. 106.

<sup>8</sup> (1923) 185 N. C. 348, 117 S. E. 289.

<sup>9</sup> (1923) 185 N. C. 543, 117 S. E. 785.

<sup>10</sup> In *National Insurance Co. v. Grady*, *supra*, it is admitted that if there had been fraud, the policy should be canceled.

<sup>11</sup> 185 N. C. at p. 353.

<sup>12</sup> (1904) 123 Iowa 605, 99 N. W. 193.



authoritative. The majority of the court prefers to follow the other line of authorities, and therefore he agrees, as the result arrived at cannot be said to be essentially unjust."

P. H. W.

**RIGHT OF JURY TRIAL IN CIVIL CASES IN NORTH CAROLINA**—The question of constitutional guaranty of trial by jury in civil cases was considered by the Supreme Court of North Carolina in two comparatively recent cases of *Board of Commissioners of Stokes County v. George*,<sup>1</sup> and *Groves et al v. Ware et al*.<sup>2</sup> A review of the facts and holdings in these cases will lead us into a discussion of our main topic.

*Board of Commissioners of Stokes County v. George.* C. H. Lunsford made complaint that certain of his sheep had been killed by dogs, and, as authorized by Consolidated Statutes, Sec. 1681, the Board of County Commissioners appointed three free-holders to assess the amount of his damages, which they found totaled \$43.00. Upon the evidence they found that W. W. George's (the defendant) dogs were in the sheep pasture, but no evidence that they killed the sheep. The assessed amount of damages was paid L. out of the dog tax, and, as authorized by C. S. Sec. 1681, the Board of Commissioners as plaintiffs now bring this suit against George to recover the amount of damages together with the costs incurred. Judgment of \$55.00 (\$12.00 costs included) for plaintiff; defendant excepted and appealed on the ground that the statute was unconstitutional in that the statutory provision for the assessment of damages by three free-holders was an express denial of the right of trial by jury in violation of Art. 1, Sec. 19 of the Constitution of North Carolina. *Held*, that the court's construction of the statute afforded the dog owner the opportunity to present every defense he would be entitled to in case of suit brought by the owner of the injured or destroyed sheep; that his constitutional rights would be protected in his defense of the suit brought against him by the commissioners to recover from him the amount paid out by them.

*Groves et al v. Ware et al.* L. F. Groves died and by his will he devised his property to his wife and four sons. Shortly after two of the sons had qualified as administrators, a third son, F. M. Groves, was declared by the superintendent of an insane asylum to be insane and incapable of managing his financial affairs. Thereupon a guardian was duly appointed who represented the said F. M. Groves in special proceedings, instituted by the administrators, by which the widow's dower was allotted and the land partitioned among the devisees as tenants in common. After partition, one of the sons, H. H. Groves, with his wife conveyed his allotted share of the land to the defendants for valuable consideration; said defendants refused to complete payments thereon on the ground that said land had not been legally partitioned in that F. M. Groves had not been legally served with summons nor legally brought into court. Petition was then filed by the guardian to have F. M. Groves declared sane. Afterwards a jury of six men, in

<sup>1</sup> (1921) 182 N. C. 414, 109 S. E. 77.

<sup>2</sup> (1921) 182 N. C. 553, 109 S. E. 568.

accordance with the provisions of C. S. s. 2287 declared the said Groves to be sane and capable of managing his own affairs. He then ratified the proceedings both for partition and for the allotment of the widow's dower. When this suit was brought against the defendants to compel completion of payment of purchase money, they demurred on the grounds that the alleged order of restoration to sanity was based upon a proceeding which is unconstitutional; that the jury was composed of six men instead of twelve; that F. M. Groves had been deprived of his property without due process of law; and that consequently H. H. Groves and wife cannot deliver the defendants a good, legal, and indefeasible title. Upon this demurrer being overruled, the defendants excepted and appealed. *Held*, that C. S. s. 2287, authorizing an inquiry into the sanity of an insane person by a jury of six, and, providing that if the jury find him to be sane, he may make contracts and sell his property, is not in violation of Const. Art. 1, sec. 19, guaranteeing the right to a trial by a jury of twelve, for such right applies only to cases in which the prerogative existed at common law or was procured by statute when the constitution was adopted, and not to those where the right and remedy was thereafter created by statute.

In both of these cases it is claimed that the constitutional right of a trial by a jury of twelve good and lawful men has been infringed upon, and that the statutory provisions, in the one case, providing for the assessment of damages by three free-holders, and, in the other, for the adjudication of the sanity of a person by a jury of six, are unconstitutional as being repugnant to Const. Art 1, sec. 19 which provides that "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." The Supreme Court in both instances decided that the statutory proceedings did not come within the inhibitions of the constitutional article just quoted.

We are then led to a consideration of two questions: first, when and under what circumstances in a civil action, is a party constitutionally guaranteed the right of trial by jury; second, what statutory modifications, if any, may the legislature make upon this right?

In the endeavor to arrive at any satisfactory answer to the first of these questions, it is necessary to consider, generally, the language of N. C. Const. Art. 1, Sec. 19, guaranteeing trial by jury in civil actions. Judicial decisions interpreting the language of this article will probably afford us the best insight into the matter.

Doubtless the "ancient mode of trial by jury" means the trial by a jury as guaranteed by the common law.<sup>3</sup> The essentials of such a jury are that they should be impartial, and that their verdict should be unanimous.<sup>4</sup> "Trial" refers to a dispute and issue of fact and not to an issue of law or an inquisition of damages.<sup>5</sup> "Controversies at law" include *all* civil actions, suits in equity having

<sup>3</sup> *Railroad v. Davis* (1837) 19 N. C. 451.

<sup>4</sup> Note in 48 Am. D. 191; 16 R. C. L. 221.

<sup>5</sup> Note 3, *supra*.

been abolished by Const. Art. 4, Sec. 1.<sup>6</sup> "Controversies at law respecting property" have been construed by the court to mean those civil actions in which there is in litigation property which, in its most general sense, embraces everything tangible and intangible, over which a man may have exclusive domain.<sup>7</sup> The constitution confers the right to demand the intervention of a jury not absolutely or unqualifiedly in all controversies arising in the courts, but only in cases involving issues of fact, which have been construed to mean issues of fact raised by proper pleadings or in some proceeding where a substantial right comes directly and finally in question.<sup>8</sup> The cardinal principle is that the essential features of trial by jury as known at the common law must be preserved and its benefits secured to all entitled to that right.<sup>9</sup> From the remotest times it has been held that this right of trial by jury did not apply to equitable proceedings, and that in the determination of many matters of fact the intervention of a jury was neither necessary nor possible.<sup>10</sup>

What modifications, if any, may the legislature make upon this right of trial by jury in civil cases?

The general doctrine seems to be that if the case is one in which the defendant had at the time of the adoption of the state Constitution a legal right to be tried by a common law jury of twelve men, then the legislature cannot by any legislative enactment interfere with or abridge the right which was fully secured to him by the common law at the time of the approval of the state Constitution, and which right was further guaranteed to him by such Constitution. If, on the other hand, the right to a trial by a common law jury of twelve men was not secured to him and did not exist at the time the state Constitution was adopted, then it is within the power of the state legislature to control and make provisions for regulating the trial by jury in such cases, and any statutes or enactments dealing with the number and agreement of jurors in such cases will be upheld.<sup>11</sup>

The constitutionality of a verdict in civil cases by less than the common law jury of twelve men, has, however, been upheld, especially in cases in inferior and justices' courts under statutes of some of the states, notwithstanding that constitutions of the same have provided that the right shall remain inviolate.

The constitutionality of such statutes has generally been upheld upon the ground that juries did not form any part of the machinery of such tribunals at common law, and, upon the further ground, that in such cases there is an appeal to the courts of common law where the parties are entitled to a trial by jury unless same is waived.<sup>12</sup>

<sup>6</sup> *Porter v. Armstrong* (1904) 134 N. C. 447, 46 S. E. 997.

<sup>7</sup> See note 6, *supra*; *Wilson v. Charlotte* (1876) 74 N. C. 748.

<sup>8</sup> *Andrews v. Pritchett* (1872) 66 N. C. 387; *Railroad v. Davis* (1837) 19 N. C. 451; *Pasour v. Linberger* (1884) 90 N. C. 160.

<sup>9</sup> (1853) 59 Am. D. 671.

<sup>10</sup> *Caldwell v. Wilson* (1897) 121 N. C. 425, 28 S. E. 363.

<sup>11</sup> 43 L. R. A. 56, note; 16 R. C. L. 224.

<sup>12</sup> 43 L. R. A. 53, note; *State v. Brittain* (1907) 143 N. C. 668, 57 S. E. 352; *State v. Lytle* (1905) 138 N. C. 738, 51 S. E. 66. While these North Carolina citations support the rule regarding the preservation of right to jury trial through appeal in criminal cases, the same reasoning should apply to the right in civil actions.

We have considered, generally, the types of situations to which the constitutional guaranty of trial by jury does apply and also the modifications to the right that might be made by statutory enactment. We shall now consider some specific instances, first, those in which the trial by jury was held to apply, second, those in which the constitutional guaranty did not apply. These cases will serve to indicate the difficulties sometimes encountered by the courts in determining just when a litigant in a civil action is entitled to a jury trial.

First, those cases in which a jury trial was held to apply. In an action on a guardian's bond the defendants were entitled to have issues of fact submitted to a jury though a reference of the cause had been made.<sup>13</sup> Issues in an action to abate a nuisance are triable by a jury.<sup>14</sup> Jury trial in a case involving plea of payment is a matter of right if demanded in due season.<sup>15</sup> A direct attack on the validity of a liquor election was triable before a judge and a jury.<sup>16</sup> In case of "lappage," if claimant under senior grant is driven to show actual possession, an issue of fact is thereby raised which must be submitted to a jury.<sup>17</sup> In special proceedings before the clerk to make assets, an agreement to an arbitration conclusively entered into between the claimant and administrator—although binding upon the heirs at law—when admitted in evidence, does not deprive them of their right of trial by jury.<sup>18</sup> Facts put in issue by pleadings in a suit in equity must be submitted to a jury, except upon waiver.<sup>19</sup>

The following cases will tend to show the types of situations to which the constitutional guaranty will not apply. In a statutory proceeding to drain lowlands where questions raised by the answer are such as would be passed upon by commissioners.<sup>20</sup> Also in proceedings before the Corporation Commission, if appeal is allowed.<sup>21</sup> *Caldwell v. Wilson*,<sup>22</sup> holds that a trial by a jury is unnecessary where the Governor, under Acts 1891, Chap. 320, Sec. 1, removes a member of the Corporation Commission. In proceedings incident to the exercise of the right of eminent domain a citizen is not, as a matter of right, entitled to a common law jury to assess his compensation unless the Constitution so provides.<sup>23</sup> Law of 1895 giving judges of the Supreme and Superior Courts supervisory power to compel clerks of court to appoint and remove officers; and allowing the judges to make final orders in the matter without giving jury trial, held constitutional.<sup>24</sup> In attachment and other ancillary proceedings it is competent for the court to find facts from the affidavits and other evidence and a party consenting to this mode of trial cannot afterwards demand a trial by jury.<sup>25</sup> However, in an arrest and

<sup>13</sup> *Armfield v. Brown* (1874) 70 N. C. 27.

<sup>14</sup> *Hyatt v. Myers* (1875) 73 N. C. 232.

<sup>15</sup> *Isler v. Murphy* (1874) 71 N. C. 437.

<sup>16</sup> *Wallace v. Salisbury* (1908) 147 N. C. 58, 60 S. E. 713.

<sup>17</sup> *McAllister v. Devane* (1877) 76 N. C. 57.

<sup>18</sup> *Chasteen v. Martin* (1879) 81 N. C. 51.

<sup>19</sup> *Boles v. Caudle* (1903) 133 N. C. 528, 45 S. E. 835.

<sup>20</sup> See note 6, *supra*.

<sup>21</sup> *Walls v. Strickland* (1917) 174 N. C. 301, 93 S. E. 857.

<sup>22</sup> See note 10, *supra*.

<sup>23</sup> *Railroad Co. v. Parker* (1890) 105 N. C. 247, 11 S. E. 328; 6 A. and E. Encyc. (2nd. Ed.) 980.

<sup>24</sup> *Harkins v. Cathey* (1896) 119 N. C. 650, 26 S. E. 136.

bail proceeding the defendant may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues are tried by a jury.<sup>26</sup>

To return again to the principal cases, we find that neither of them comes within that class of cases in which the prerogative of jury trial existed at common law or in that class in which the right was procured by statute when the Constitution was adopted. No essential common law element of right was infringed upon; the statute in each case was enacted since the adoption of the Constitution in 1868. Each of them involved a statutory proceeding in which a right was created by statute, and by the same statute a remedy for the violation of that right was provided. The scope of Const. Art. 1, Sec. 19, does not include such cases. So the court held in *Groves v. Ware*.<sup>27</sup> The constitutionality of the statutory provision in *Board of Commissioners of Stokes County v. George*,<sup>28</sup> was upheld also on the ground that the defendant's right to a jury trial was fully protected by the provisions of the statute which empowered the commissioners to bring suit for the amount paid out, in which suit the defendant's right would be amply protected.

F. B. McC.