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State v. Taylor: Resurrecting the Absolute Immunity of the Sovereign

George Montgomery Cleland IV

State v. Taylor: Resurrecting the Absolute Immunity of the Sovereign

At ancient common law one who made permanent improvements to real property did so at his own risk.[1] An innocent person who held land under color of title, with a bona fide belief that he owned the land, could be sued in ejectment by a person with superior title and had no recourse in law for the value of his improvements. The rule's rigidity worked hardships, and the common law, following the law of equity,[2] developed a claim for improvements to land.[3] The claim arose as a defense to an assertion of superior title and was enforced by way of a set-off against the true owner for the increase in value attributable to the permanent improvements.[4]

The North Carolina General Assembly adopted the common-law claim for improvements as a statutory right in 1871.[5] In its modern form the "betterments" statute is intended to protect the interest of the good faith improver of land.[6] North Carolina courts have experienced little difficulty applying and construing the betterments statute. Cases turning on the statute typically have addressed two distinct issues: the defensive nature of the betterments claim[7] and the distinction between common-law/statutory improvements claims and the equitable doctrine of unjust enrichment.[8] Beginning in 1985[9] the North Carolina courts confronted a problem of a different nature when the statutory betterments

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1. This principle of common law was discussed by the North Carolina Supreme Court in Board of Comm'rs v. Bumpass, 237 N.C. 143, 145, 74 S.E.2d 436, 438 (1953). In contrast to the common-law position, the civil-law rule was more liberal and permitted one who made "permanent improvements on land in his possession under the *bona fide* belief that he was the owner of it to extract from the true owner compensation for the improvements." *Id.*

2. *Id.* The chancellors of the court of equity had extended the civil-law rule to provide that the true owner was not permitted to take possession until he paid the improver the value of the permanent improvements on the principle that "no man should be unjustly enriched at the expense of another who has acted in good faith." *Id.* at 146, 74 S.E.2d at 438.

3. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 471, 146 S.E.2d 434, 437 (1966); Rhyne v. Sheppard, 224 N.C. 734, 736, 32 S.E.2d 316, 317 (1944).

4. *Rhyne*, 224 N.C. at 736, 32 S.E.2d at 317.

5. Public Laws of North Carolina, 1871-72, ch. 147.

6. The 1871 statute, as amended, is currently codified in the North Carolina General Statutes. N.C. GEN. STAT. § 1-340 (1983). In relevant part, this statute states:

> A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court . . . stating that he, . . . while holding the premises under color of title believed to be good, [has] made permanent improvements thereon, and praying that he may be allowed for the improvements . . . .

Id. "Color of title is a paper writing which purports to convey land but fails to do so." Carrow v. Davis, 248 N.C. 740, 741, 105 S.E.2d 60, 61 (1958).

7. *See, e.g.*, Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966); Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953); Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944); Clontz v. Clontz, 44 N.C. App. 573, 261 S.E.2d 695, *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980).

8. *See, e.g.*, *Beacon Homes*, 266 N.C. at 471-72, 146 S.E.2d at 437-38; *Rhyne*, 224 N.C. at 736-37, 32 S.E.2d at 317-18; *Clontz*, 44 N.C. App. at 575-76, 261 S.E.2d at 697.

9. On January 14, 1985, J.T. Taylor, Jr., filed a petition for betterments under N.C. GEN. STAT. § 1-340 seeking $300,000 for improvements he allegedly had made to the state's land. State v. Taylor, 322 N.C. 433, 434, 368 S.E.2d 601, 602 (1988). See *infra* notes 15-25 and accompanying text for a complete statement of the facts.

right plowed headlong into the common-law doctrine of sovereign immunity.[10]

In *State v. Taylor*[11] the North Carolina Supreme Court addressed the question whether a claim for betterments may be maintained against the State of North Carolina. In a decision emphasizing the absolute nature of the state's inherent immunity from suit and relying on a strict constructionist view of any statutory waiver of the immunity, the *Taylor* court held that "[t]here is no waiver of the State's sovereign immunity in . . . [section] 1-340,"[12] and thus individuals are barred from asserting betterments claims against the state.[13]

This Note examines the present scope of the claim for betterments to land in North Carolina in the wake of *Taylor*. The Note traces the history of the common-law claim for improvements and the modern statutory petition for betterments under the North Carolina General Statutes. It then examines the common-law doctrine of sovereign immunity and the way in which North Carolina courts have applied that doctrine. Analyzing the court's reasoning in holding that the state is exempt from section 1-340 claims, the Note concludes that, while the *Taylor* decision has a firm basis in North Carolina case law and is consistent with established rules of statutory construction, the court *could* have interpreted the claim for betterments as a "claim of title" as that term is used in North Carolina General Statutes section 41-10.1.[14] This construction would have resulted in a more equitable disposition in *Taylor* and would have avoided establishing unnecessarily rigid precedent.

In January 1971 J.T. Taylor, Jr., obtained a deed for a tract of timberland in Craven County, North Carolina from the Brandenburg Land Company.[15] After Taylor received and duly recorded his deed, he began work to improve the land.[16] He acquired a right of way, built an access road to the tract, and then began clearing a large portion of the land and selling its timber.[17] He also constructed roads and a canal on the property, converted 157 acres of timberland to farmland, and planted 12.5 acres of pine seedlings.[18]

On May 1, 1978, the State of North Carolina filed suit against Taylor, alleg-

10. "Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." Note, *Abrogation of Contractual Sovereign Immunity: A Judicial or Legislative Decision?*, 12 WAKE FOREST L. REV. 1082, 1083 (1976). A sovereign state may waive its immunity from suit. See *infra* notes 69-93 and accompanying text for a discussion of how North Carolina courts have construed waivers of sovereign immunity.

11. 322 N.C. 433, 368 S.E.2d 601 (1988).

12. *Id.* at 437, 368 S.E.2d at 603. See *supra* note 6 for the relevant text of N.C. GEN. STAT. § 1-340.

13. *Taylor*, 322 N.C. at 437, 368 S.E.2d at 604.

14. See *infra* note 28 for the relevant text of N.C. GEN. STAT. § 41-10.1. For example, the North Carolina Court of Appeals in its *Taylor* decision reasoned that "[s]ince a claim for betterments can arise *only* by virtue of a 'claim of title' . . . a claim for betterments *is* a 'claim of title' as that term is used in [N.C. GEN. STAT. §] 41-10.1." State v. Taylor, 85 N.C. App. 549, 552, 355 S.E.2d 169, 172 (1987) (emphasis added), *rev'd*, 322 N.C. 433, 368 S.E.2d 601 (1988).

15. *Taylor*, 322 N.C. at 434, 368 S.E.2d at 602.

16. *Id.*

17. *Id.*

18. *Id.*

ing that it owned the land and that therefore Taylor was trespassing.[19] The State sought his ejectment and damages for his possession. The trial court severed the issues of title and damages and on November 20, 1981, entered judgment for the State on the issue of title, permanently enjoining Taylor from going onto the land.[20] The court of appeals affirmed the trial court, and the supreme court denied Taylor's petitions for discretionary review and reconsideration.[21]

On January 14, 1985, Taylor filed a petition for betterments under North Carolina General Statutes section 1-340, seeking $300,000 for the improvements he had made to the State's land. In response, the State set forth its sovereign immunity as a complete defense.[22] On July 1, 1985, the trial court dismissed the State's defense of sovereign immunity[23] and on April 16, 1988, it dismissed Taylor's betterments claim.[24] On Taylor's appeal and the State's cross-assignment of error, the North Carolina Court of Appeals resolved all issues in favor of Mr. Taylor, with one judge dissenting on the issue of sovereign immunity.[25]

The North Carolina Supreme Court reviewed the case on the issue of the state's sovereign immunity and reversed the judgment of the court of appeals.[26] The supreme court maintained that "[t]he State of North Carolina is immune from suit unless and until it expressly consents to be sued. Absent consent or waiver, this immunity is absolute and unqualified."[27]

Having affirmed the presumptive immunity of the state from suit, the supreme court turned to the question whether the State of North Carolina had consented to, or had waived its immunity from, claims for betterments to land. The pivotal issue in the court's determination was the construction of section 41-10.1, in which the general assembly expressly waived the state's immunity in suits involving "a claim of title to land."[28]

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19. *Id.*

20. *Id.*

21. State v. Taylor, 63 N.C. App. 364, 304 S.E.2d 767 (1983), *disc. rev. denied*, 310 N.C. 311, 312 S.E.2d 655, *reconsideration denied*, 313 S.E.2d 160 (1984). The damages issue, severed at the original trial, is still pending. *See Taylor*, 322 N.C. at 434, 368 S.E.2d at 602.

22. In addition to the sovereign immunity defense, the State contended that (1) Taylor's betterments petition was not filed in timely fashion, and (2) in any event, the betterments claim must fail because Taylor had not been holding under color of title when he made the alleged improvements. *Taylor*, 322 N.C. at 434, 368 S.E.2d at 602.

23. The trial court also dismissed the State's contention that the betterments claim was not timely filed. *Id.*

24. The trial court dismissed the betterments claim on the ground that the deed from Brandenburg Land Company to Taylor did not constitute color of title as a matter of law. *Id.* at 435, 368 S.E.2d at 602.

25. State v. Taylor, 85 N.C. App. 549, 557, 355 S.E.2d 169, 174 (1987), *rev'd*, 322 N.C. 433, 368 S.E.2d 601 (1988). In dissent, Judge Eagles argued, "[t]he majority has broadened the scope of the waiver of sovereign immunity . . . so as to permit a betterments action against the State. . . . [I]n an effort to avoid an inequity, [the majority] has interpreted the waiver statute too broadly . . . ." *Id.* (Eagles, J., dissenting).

26. On July 27, 1987, the supreme court also granted a State petition for discretionary review on the issues of untimely filing and color of title. *Taylor*, 322 N.C. at 435, 368 S.E.2d at 602. These issues were not addressed by the supreme court in *Taylor* "[i]n view of . . . [the] disposition of this case on the issue of the State's sovereign immunity." *Id.* at 437, 368 S.E.2d at 604.

27. *Id.* at 435, 368 S.E.2d at 602 (citing General Elec. Co. v. Turner, 275 N.C. 493, 498, 168 S.E.2d 385, 389 (1969)).

28. N.C. GEN. STAT. § 41-10.1 reads, in relevant part:

Challenging the State's immunity defense, Taylor relied on the well-established North Carolina rule that "[a]n action for betterments is a defensive right and not an independent cause of action."[29] Because the claim can arise *only* by virtue of a claim of title, he argued, the betterments claim falls within the ambit of section 41-10.1, and the state may not assert its sovereign immunity as a defense.

Although the court of appeals accepted Taylor's argument,[30] the supreme court squarely rejected his contentions. Citing section 1-340, the supreme court held that a claim for betterments is "a claim demanding payment for *permanent improvements* to the land."[31] The majority reasoned that North Carolina courts must construe strictly statutes waiving sovereign immunity.[32] Because Taylor's betterments claim simply was not a "claim of *title* to land," the majority held that the waiver of immunity set forth in section 41-10.1 was inapplicable to Taylor's claim.[33]

The supreme court further removed Taylor's claim for betterments from the parameters of section 41-10.1 by observing that title to the land was settled in the State at trial in 1981. Because the court of appeals had affirmed the decision of the trial court and the supreme court had denied Taylor's petitions for discretionary review and reconsideration in 1984, Taylor had "exhausted his right of appeal on the issue of title."[34] Title had properly vested in the State and, accordingly, the instant proceeding was not a section 41-10.1 case in which " 'the State . . . assert[ed] a claim of title to land.' "[35] On these grounds the supreme court concluded that the claim at issue was "solely one for betterments"[36] and "[t]here is no waiver of the State's sovereign immunity in [the

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> Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual . . . likewise asserts a claim of title to the said land, such individual . . . may bring an action . . . against the State . . . for the purpose of determining such adverse claims.

N.C. GEN. STAT. § 41-10.1 (1984).

29. State v. Taylor, 85 N.C. App. 549, 552, 355 S.E.2d 169, 172 (1987), *rev'd*, 322 N.C. 433, 368 S.E.2d 601 (1988). The action for betterments accrues only when someone with superior title seeks the aid of the court to enforce his right of possession. *See* Beacon Homes, Inc. v. Holt, 266 N.C. 467, 471, 146 S.E.2d 434, 437 (1966); Board of Comm'rs v. Bumpass, 237 N.C. 143, 146-47, 74 S.E.2d 436, 439 (1953).

30. *Taylor*, 85 N.C. App. at 552, 355 S.E.2d at 172. The court of appeals observed that, in the original action brought by the State, Taylor's assertion that he owned the land was clearly a claim of title. *Id.* Finding that Taylor's defensive betterments claim was necessarily part of his original claim of title, the court of appeals held that the betterments claim was not barred by sovereign immunity by virtue of the express waiver granted in N.C. GEN. STAT. § 41-10.1 for suits involving claims of title to land. *Id.*

31. *Taylor*, 322 N.C. at 435, 368 S.E.2d at 602.

32. *Id.* at 437, 368 S.E.2d at 604 (citing Guthrie v. State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983) (court strictly construed power of North Carolina State Ports Authority "to sue and be sued," granted in N.C. GEN. STAT. § 143B-454(1) (1987))). See *infra* notes 73-74 for a discussion of *Guthrie*. *See also* Mattox v. State, 21 N.C. App. 677, 679, 205 S.E.2d 364, 365 (1974) (construing N.C. GEN. STAT. § 41-10.1, court of appeals held "[t]he right to sue the State is a conditional right, and the statutory provisions must be strictly followed").

33. *Taylor*, 322 N.C. at 435, 368 S.E.2d at 602.

34. *Id.* at 435, 368 S.E.2d at 603.

35. *Id.* at 436, 368 S.E.2d at 603 (quoting N.C. GEN. STAT. § 41-10.1). See *supra* note 28 for the relevant text of N.C. GEN. STAT. § 41-10.1.

36. *Taylor*, 322 N.C. at 436, 368 S.E.2d at 603.

betterments statute,] N.C.G.S. § 1-340."[37]

In ardent dissent, Chief Justice Exum, joined by Justice Webb, argued that because the doctrine of sovereign immunity derives from the common law, "it is this Court's province to say how it will be applied or whether it will be applied at all."[38] Urging affirmation of the decision of the court of appeals, Chief Justice Exum insisted that Taylor's betterments claim against the State was sustainable on "at least three legal theories."[39] First, he argued, a betterments claim is not properly a claim against the state barred by sovereign immunity.[40] Second, when the state initiates an action for title to realty, it impliedly waives its immunity to suit for betterments put on that realty.[41] Third, the Chief Justice reasoned, section 41-10.1 should be interpreted, as the court of appeals had interpreted it, to constitute an express waiver of the state's sovereign immunity defense to a betterments claim in an action for title brought by the state.[42] Moreover, Chief Justice Exum argued that the betterments doctrine is rooted in equity, and that the state ought not be relieved of its equitable obligation to pay for permanent improvements to land it receives by virtue of a successful claim of title.[43] "To apply sovereign immunity to relieve the state from this kind of obligation skirts dangerously close to depriving a citizen of property without due process of law. The state takes but it does not pay."[44]

From an historical perspective, the *Taylor* decision satisfies a not-so-voracious void in North Carolina case law. When North Carolina courts have considered statutory betterments claims, they have cited the defensive nature of the claim to distinguish it, and its common-law predecessor "improvements," from the equitable doctrine of unjust enrichment.[45] The supreme court had not addressed the question whether the state, having asserted superior title to land, was shielded by its sovereign immunity from a citizen's claim for betterments. It is in this respect that the issue facing the *Taylor* court was unique.

It is essential to review the way in which the North Carolina courts have treated the doctrines of betterments and sovereign immunity to appreciate the way the court responded to the conflict between the doctrines that *Taylor* presented. The Note proceeds by discussing the betterments doctrine.

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37. *Id.* at 437, 368 S.E.2d at 603.

38. *Id.* at 439, 368 S.E.2d at 604 (Exum, C.J., dissenting) (citing Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976)). See *infra* notes 90-93 and accompanying text for a discussion of *Smith*.

39. *Id.* at 439, 368 S.E.2d at 604 (Exum, C.J., dissenting).

40. *Id.* 368 S.E.2d at 604-05 (Exum, C.J., dissenting). According to Chief Justice Exum, enforcement of a betterments claim against the state does not require the state to expend public funds unilaterally:

> it means, rather, that the State must pay only for what, at its own instance, it demands and receives. The doctrine of sovereign immunity is a shield against payments of the former kind, not a sword to cut off a citizen's right to be paid for what the State takes.

Id. at 439, 368 S.E.2d at 605 (Exum, C.J., dissenting).

41. *Id.* (Exum, C.J., dissenting) (citing Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976)). See *infra* notes 90-93 and accompanying text for a discussion of *Smith*.

42. *Id.* at 440, 368 S.E.2d at 605 (Exum, C.J., dissenting).

43. *Id.* at 438-39, 368 S.E.2d at 604 (Exum, C.J., dissenting).

44. *Id.* at 439, 368 S.E.2d at 604 (Exum, C.J., dissenting).

45. *See* cases cited *supra* notes 7-8.

At common law, one who establishes superior title to land is entitled to possession of the land, but a court will not issue a writ of ouster until a judgment on a claim for betterments has been satisfied.[46] In *Rumbough v. Young*[47] the North Carolina Supreme Court explained that "[t]his was done, not upon any principle of contract or damages for breach of the same, but to . . . enforce equity and good conscience."[48] North Carolina has adopted by statute this common-law protection for the person who makes permanent improvements on land believing that he has good title.[49] The right to betterments is based on the "obvious principle of justice" that the owner of land only has fair claim to the land itself, plus damages.[50]

North Carolina courts have recognized the statutory betterments claim as a legislative undertaking to "declare and establish the equities" between the parties to a dispute for title to land.[51] The statute has been interpreted to impose a burden on the claimant to establish certain elements: (1) that he made permanent improvements to the property; (2) that he made the improvements with a bona fide belief that he had good title to the property; and (3) that he had reasonable grounds for his belief.[52]

If a claimant establishes these elements, section 1-340 provides for the claimant to recover the value of improvements he has made on another's land. The statute does not, however, create an independent cause of action.[53] The North Carolina courts have never departed from the position that the right is purely defensive, accruing only when the true owner of land uses the court to enforce his right of possession.[54] In *Rhyne v. Sheppard*[55] the supreme court stated that although no independent action for improvements could be maintained at common law, a plaintiff could pursue a remedy in equity. "Plaintiff is not confined to a common law action for improvements, if indeed such right may be enforced by independent action. He may resort to the equitable doctrine of unjust enrichment frequently enforced under the doctrine of estoppel."[56]

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46. *See, e.g.*, Board of Comm'rs v. Bumpass, 237 N.C. 143, 145-46, 74 S.E.2d 436, 439 (1953); Bond v. Wilson, 129 N.C. 325, 332, 40 S.E. 179, 182 (1901); Albea v. Griffin, 22 N.C. (2 Dev. & Bat. Eq.) 9, 10 (1838) (per curiam).

47. 119 N.C. 567, 26 S.E. 143 (1896).

48. *Id.* at 569, 26 S.E. at 144. The court in *Rumbough* was explaining the decision in Baker v. Carson, 21 N.C. 381 (1836), in which the supreme court refused to issue a writ of ouster until the wrongful possessor was paid for his improvements.

49. N.C. GEN. STAT. § 1-340 (1983). See *supra* note 6 for the relevant text of § 1-340.

50. Pritchard v. Williams, 176 N.C. 108, 109, 96 S.E. 733, 733 (1918).

51. *Id.* at 110, 96 S.E. at 733.

52. *See, e.g.*, Pamlico County. v. Davis, 249 N.C. 648, 651, 107 S.E.2d 306, 309 (1959); Rogers v. Timberlake, 223 N.C. 59, 61, 25 S.E.2d 167, 168 (1943); *Pritchard*, 176 N.C. at 109, 96 S.E. at 733.

53. Board of Comm'rs v. Bumpass, 237 N.C. 143, 146-47, 74 S.E.2d 436, 439 (1953).

54. *Id.*; *see, e.g.*, Beacon Homes, Inc. v. Holt, 266 N.C. 467, 471, 146 S.E.2d 434, 437 (1966); Rhyne v. Sheppard, 224 N.C. 734, 736, 32 S.E.2d 316, 317 (1944); Clontz v. Clontz, 44 N.C. App. 573, 575, 261 S.E.2d 695, 697, *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980).

55. 224 N.C. 734, 32 S.E.2d 316 (1944). Plaintiff in *Rhyne*, believing that he was on his own property, built a house on land owned by defendant. Defendant made no objection to plaintiff's construction and four-year occupation of the house. Plaintiff's claim for improvements was defeated because the claim failed to allege color of title. *Id.* at 735-36, 32 S.E.2d at 316-17.

56. *Id.* (citation omitted).

The equitable root of the improvements right is of particular significance in the context of the *Taylor* decision, which did not refer even in passing to the equities of the case.[57] In prior cases, the supreme court has observed that the claim against land for improvements or betterments derives from equitable principles.[58] If a claimant, acting under an honest but mistaken belief that he owned land, made valuable improvements to it, the true owner should not take the improvements without paying for them.[59] This right to compensation "may now be considered as an established principle of equity."[60] Prior to *Taylor* the supreme court's construction of section 1-340, making relief available only to one who acted in good faith[61] and under color of title[62] he reasonably believed to be good,[63] clearly evidenced an intention to adhere to the equitable principles from which the betterments claim derived.

The decision in *Taylor* did not turn on the supreme court's determination whether Taylor's complaint satisfied the statutory elements of a betterments claim. Rather, the court questioned whether Taylor's claim was nullified by the State's immunity from suit. Invariably, the supreme court has evaluated the legitimacy of claims against the state on the basis of some formulation of the tenet expressed in *Great American Insurance Co. v. Gold*[64] that " '[i]t is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission.' "[65] This principle of sovereign immunity derives from feudal England, when the sovereign monarchy could not be held liable to its subjects.[66] Originally, the doctrine was a quasi-religious justification for the monarchy's self-exemption from the legal process, based on the tenet that "the king could do no wrong."[67]

The doctrine carried with it certain practical ramifications that have been accepted outside the monarchical context as essential to effective governance.[68]

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57. Chief Justice Exum's dissenting opinion relied heavily on considerations of equity. Taylor, 322 N.C. at 438, 368 S.E.2d at 604 (Exum, C.J., dissenting).

58. Batts v. Gaylord, 253 N.C. 181, 184, 116 S.E.2d 424, 426-27 (1960); Board of Comm'rs v. Bumpass, 237 N.C. 143, 145-46, 74 S.E.2d 436, 438-39 (1953).

59. Pritchard v. Williams, 176 N.C. 108, 109-10, 96 S.E. 733, 733 (1918).

60. Wharton v. Moore, 84 N.C. 479, 482 (1881).

61. *E.g.*, Rogers v. Timberlake, 223 N.C. 59, 61, 25 S.E.2d 167, 168 (1943); *Pritchard*, 176 N.C. at 109, 96 S.E. at 733.

62. The supreme court's concern with equitable dispositions is reflected in its liberal construction of what constitutes color of title. In *Pamlico County v. Davis*, the court accepted an unenforceable contract to convey real property as sufficient support for a claim for betterments. 249 N.C. 648, 652, 107 S.E.2d 306, 309-10 (1959). In *Albea v. Griffin*, the court allowed recovery of the value of improvements made under a parole contract to purchase land despite enforceability problems posed by the statute of frauds. 22 N.C. (2 Dev. & Bat. Eq.) 9, 10 (1838).

63. *E.g.*, *Rogers*, 223 N.C. at 61, 25 S.E.2d at 168; *Pritchard*, 176 N.C. at 109, 96 S.E. at 733.

64. 254 N.C. 168, 118 S.E.2d 792 (1961).

65. *Id.* at 172, 118 S.E.2d at 795 (quoting Prudential Ins. Co. v. Powell, 217 N.C. 495, 499, 8 S.E.2d 619, 621 (1940)).

66. Steelman v. City of New Bern, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971).

67. *Id.*; 72 AM. JUR. 2D *States, Territories, and Dependencies* § 99 (1974).

68. *See* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 99 (1974). The immunity is no longer inherent in a divine right of kings, but generally is viewed as a rule of social policy "protect[ing] the state from burdensome interference with the performance of its governmental functions and preserv[ing] its control over state funds, property, and instrumentalities." *Id.* If the state were

It is well-settled that the State of North Carolina is immune from suit unless and until it expressly consents to be sued.[69] It is also well-settled that it is the role of the North Carolina General Assembly to address questions of when and under what circumstances the state may be sued.[70] The standards of construction that the court has employed to interpret statutory waivers, however, have not been consistent.[71] As a consequence, there is no uncontradicted answer in North Carolina case law to the question of what constitutes a statutory waiver of immunity. The general rule is that statutory waivers of sovereign immunity being "in derogation of the common law are . . . construed strictly."[72] The *Taylor* court, citing only the language of *Guthrie v. State Ports Authority*,[73] concluded, without discussion of alternative rules of construction, that it "must" strictly construe the waiver statute under which Taylor sought to assert his betterments claim.[74] In concluding it had a mandate to construe statutory waivers strictly, the *Taylor* court neither acknowledged nor discounted a thirty-five-year line of cases which observes that, notwithstanding the court's historically strict adherence to the doctrine of sovereign immunity, courts need not construe waiver statutes strictly in those instances in which the legislature has waived the state's immunity.[75]

The North Carolina Supreme Court expressly adopted this idea of permitting courts to exercise a degree of discretion when interpreting the breadth of statutory waivers of immunity in the 1953 case of *Lyon & Sons v. State Board of*

"subjected to suit at the instance of every citizen . . . [it would be] controlled in the use and disposition of the means required for the proper administration of the government." *Id.*

69. *See, e.g.*, Guthrie v. State Ports Auth., 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983); Smith v. State, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976); Great Am. Ins. Co. v. Gold, 254 N.C. 168, 172, 118 S.E.2d 792, 795 (1961); Schloss v. State Highway Comm'n, 230 N.C. 489, 491, 53 S.E.2d 517, 518 (1949).

70. *Great Am. Ins. Co.*, 254 N.C. at 173, 118 S.E.2d at 795; *see Guthrie*, 307 N.C. at 535, 299 S.E.2d at 625; Lyon & Sons v. State Bd. of Educ., 238 N.C. 24, 26-28, 76 S.E.2d 553, 555-56 (1953); Mattox v. State, 21 N.C. App. 677, 678-79, 205 S.E.2d 364, 365 (1974).

71. As early as 1955 the North Carolina Supreme Court acknowledged the lack of agreement among courts in other states. Floyd v. State Highway Comm'n, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955).

72. Wilmington Shipyard, Inc. v. State Highway Comm'n, 6 N.C. App. 649, 651, 171 S.E.2d 222, 224 (1969), *cert. denied*, 276 N.C. 327 (1970); *see, e.g., Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627; *Floyd*, 241 N.C. at 464, 85 S.E.2d at 705; 72 AM. JUR. 2D *States, Territories, and Dependencies* § 121 (1974).

73. 307 N.C. 522, 299 S.E.2d 618 (1983). The *Guthrie* court, in a suit for injuries plaintiff sustained while operating a forklift in a warehouse supervised by the State Ports Authority, found no implicit waiver of sovereign immunity with regard to the State Ports Authority; however, it did find that the explicit limited waiver of immunity for negligent acts of state employees as set forth in the State Tort Claims Act applied to the plaintiff's claim. *Id.* at 538, 299 S.E.2d at 627. Analogously, Taylor sought to assert a N.C. GEN. STAT. § 1-340 claim for betterments against the state under the waiver of immunity granted in N.C. GEN. STAT. § 41-10.1, which waives immunity in claims of title to land. See *supra* note 6 for the text of § 1-340. See *supra* note 28 for the text of § 41-10.1.

74. State v. Taylor, 322 N.C. 433, 437, 368 S.E.2d 601, 604 (1988). In *Guthrie* the supreme court strictly construed N.C. GEN. STAT. § 143B-454(1), which vests the North Carolina Ports Authority with the authority to "sue or be sued," reasoning that "[w]aiver of sovereign immunity may not be lightly inferred." *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627.

75. *See, e.g.*, Smith v. State, 289 N.C. 303, 309-21, 222 S.E.2d 412, 417-24 (1976); Lyon & Sons v. State Bd. of Educ., 238 N.C. 24, 27-28, 76 S.E.2d 553, 555-56 (1953); Wilmington Shipyard v. State Highway Comm'n, 6 N.C. App. 649, 651-55, 171 S.E.2d 222, 224-27 (1969), *cert. denied*, 276 N.C. 327 (1970).

Education.[76] *Lyon & Sons* was a case of first impression in North Carolina and presented the supreme court with the question of the State's immunity under the State Tort Claims Act.[77] Acknowledging that the body of case law supporting strict construction was overwhelming, the *Lyon & Sons* court nevertheless observed that "the current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity."[78] This trend is especially appropriate when "[strict] interpretation would lead . . . to illogical result[s]."[79] Adopting the language of Justice Cardozo in a case construing a New York waiver statute,[80] the supreme court in *Lyon & Sons* based its retreat from traditional construction on the notion that " '[t]he exemption of the sovereign from suit involves hardship enough, where consent has been withheld. [The court is] . . . not to add to its rigor by refinement of construction where consent has been announced.' "[81] The North Carolina Court of Appeals also invoked this passage from Justice Cardozo in *Wilmington Shipyard v. State Highway Commission*.[82] There the court of appeals rejected outright the rule of strict construction of statutory waivers of immunity, remarking that the rule is of "questionable origins . . . [and is] quoted without examination in cases where the strictest possible construction [is] not required to reach the result."[83] The North Carolina Supreme Court passed up an opportunity to express its view on this rule when it refused to grant certiorari.[84]

Earlier supreme court decisions recognized the necessity of a more flexible approach to construction of statutory changes to common-law rules governing liability. In *Essick v. City of Lexington*[85] the supreme court spoke of the Workers' Compensation Act[86] as a "retreat from the outmoded methods of the common law to a more modern concept,"[87] and held that "break[s] with the past must necessarily be viewed with liberality in order to accomplish [their] pur-

76. 238 N.C. 24, 76 S.E.2d 553 (1953). There were earlier cases suggestive of this more liberal bent in statutory construction. *See, e.g.*, Essick v. City of Lexington, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950). For a discussion of *Essick*, see *infra* notes 85-89 and accompanying text.

77. *Lyon & Sons*, 238 N.C. at 26, 76 S.E.2d at 554. The State Tort Claims Act is codified at N.C. GEN. STAT. §§ 143-291 to -300.1 (1987).

78. *Lyon & Sons*, 238 N.C. at 27, 76 S.E.2d at 555. *See also* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 101 (1974) (it has been said that the doctrine is in disfavor, and "today courts are disposed to hear an action against the state unless good reason stands in the way").

79. *Lyon & Sons*, 238 N.C. at 33, 76 S.E.2d at 560.

80. Anderson v. John L. Hayes Constr. Co., 243 N.Y. 140, 153 N.E. 28 (1926) (Cardozo, J.) (suit involving lien on money state owed to contractors, and state had waived immunity to suits involving such liens).

81. *Lyon & Sons*, 238 N.C. at 27, 76 S.E.2d at 555 (quoting *Anderson*, 243 N.Y. at 147, 153 N.E. at 29-30, *quoted with approval in* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 383 (1949)).

82. 6 N.C. App. 649, 653-54, 171 S.E.2d 222, 225 (1969), *cert. denied*, 276 N.C. 327 (1970).

83. *Id.* at 653, 171 S.E.2d at 225.

84. Wilmington Shipyard v. State Highway Comm'n, 276 N.C. 327 (1970) (denying certiorari).

85. 232 N.C. 200, 60 S.E.2d 106 (1950). The *Essick* controversy concerned a state employee killed on the job and the apparent inability to reconcile provisions of the Workers' Compensation Act with the common law, which the Act substantially amended.

86. When *Essick* was decided, the Workers' Compensation Act, now codified at N.C. GEN. STAT. § 97 (1985), was titled the Workmen's Compensation Act.

87. *Essick*, 232 N.C. at 208, 60 S.E.2d at 112.

poses."[88] The North Carolina Supreme Court in *Essick* emphatically asserted that the Workers' Compensation Act is "superior to the common law in those respects in which [it] . . . amend[s] or abrogate[s] it."[89]

Liberal construction was again the mode of statutory interpretation employed by the supreme court in the 1976 case of *Smith v. State*.[90] In *Smith* the supreme court relied on the *Lyon & Sons* decision as its starting point, noting with approval the "current trend" away from strict sovereign immunity.[91] The *Smith* court proffered an exhaustive treatise on legislative and judicial erosion of the sovereign immunity doctrine in other states and, finding itself "moved by the foregoing considerations," held that "whenever the State of North Carolina . . . enters into a valid contract, the State implicitly consents to be sued for damages . . . in the event it breaches the contract."[92] Acknowledging that there was significant historical authority to the contrary, the supreme court in *Smith* held that in causes of action on contract, "the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant."[93]

It was this line of decisions on which the court of appeals relied in *Taylor* to apply a liberal construction of North Carolina General Statutes section 41-10.1 and hold that the State, having successfully sued in ejectment a citizen holding land under color of title, could not assert its sovereign immunity as an absolute defense to the citizen's claim for betterments.[94] The court of appeals reasoned that because the State had expressly waived its immunity in suits involving claims of title to land, and because the claim for betterments can only arise defensively to a claim of title to land, the claim for betterments was a component of Taylor's claim of fee simple title and should be interpreted as a "claim of title to land" as that term is used in the waiver statute, section 41-10.1.[95]

The supreme court in *Taylor* flatly rejected this reasoning. The court relied instead on an absolute interpretation of the state's immunity from suit—an interpretation rooted in the ancient common law. Without denying the existence or refuting the reasoning of recent case law to the contrary, the *Taylor* court maintained that the state is immune from suit absolutely and unqualifiedly, absent express waiver. In determining what constitutes an express waiver of immunity, the court looked to a much criticized and largely abandoned general rule of construction and fashioned from it an absolute mandate that courts strictly construe waiver statutes. Because the statute permitting action against the state in suits involving claims of title to land does not refer specifically to

88. *Id.*

89. *Id.*

90. 289 N.C. 303, 222 S.E.2d 412 (1976). In *Smith* the State asserted its sovereign immunity as a defense to a doctor's suit for wrongful discharge from a state-owned medical facility. The defendants were the State and state officials acting within the scope of their official duties.

91. *Id.* at 311, 222 S.E.2d at 418.

92. *Id.* at 320, 222 S.E.2d at 423-24.

93. *Id.* at 320, 222 S.E.2d at 424.

94. State v. Taylor, 85 N.C. App. 549, 552, 355 S.E.2d 169, 172 (1987), *rev'd*, 322 N.C. 433, 368 S.E.2d 601 (1988).

95. *Id.*

"betterments," the court held that the state is "entitled to the full protection of its sovereign immunity."[96]

By its language, the waiver statute does not refer specifically to *any* "claim of title to land."[97] Deferring to what it perceived to be overriding principles of common law, the supreme court elected to give itself no discretion in defining a "claim of title" under the statute.

The Workers' Compensation Act and the Tort Claims Act are purely statutory creatures. They can subject the state to suit in derogation of the common-law doctrine of sovereign immunity. Nevertheless, the supreme court has held unequivocally that "[t]here is no presumption of superiority in the common law,"[98] and expressly recognizing the trend away from the doctrine of sovereign immunity, the court has construed liberally these statutory waivers of immunity in order that the statutes accomplish their purposes. In *Smith* the supreme court found an *implied* waiver of immunity in actions on breach of contract in the absence of *any* statute.[99] The betterments right, though codified in the North Carolina General Statutes, is an equitable doctrine, derived from considerations of conscience and fairness. A more compelling argument can be made for liberal construction of the statute protecting this equitable interest than for the aforementioned statutorily created claims. The Worker's Compensation Act and the Tort Claims Act are drafted with particularity and their provisions have been subject to extensive litigation and commentary. Nonetheless, in *State v. Taylor* the supreme court blindly adhered to the old general rule of strict construction of waivers of governmental immunity—explaining only that it "must."

That the supreme court *can* strictly interpret waiver statutes is beyond doubt. That it *must* is an argument that fails to pass muster upon examination of relevant case law. The assertion that strict reading of section 41-10.1 is mandated by prior decisions conveniently masks the *Taylor* court's inexplicable failure to marshal the equities of the case. Permitting Taylor to recover the fair value of permanent improvements he mistakenly made to the state's land would not subject the state to a burdensome flood of litigation. Consider by comparison the liability the state incurs through suits brought by injured employees, on contracts, and in tort. Moreover, a claimant seeking to recover for betterments need not merely claim that he has placed improvements on land owned by another, but must also establish that he did so in good faith and under color of title he reasonably believed to be good.

Mr. Taylor deserved compensation for the improvements he made upon the state's land. The North Carolina Supreme Court had available the tools with which to render a sound and equitable decision in *State v. Taylor*. It was fully within the power of the court to construe Mr. Taylor's betterments claim as a

96. *Taylor*, 322 N.C. at 437, 368 S.E.2d at 604. *But see* Shingleton v. State, 260 N.C. 451, 458-59, 133 S.E.2d 183, 188-89 (1963) ("claim of title" under § 41-10.1 held to encompass actions for easements across state property).

97. See *supra* note 28 for the relevant text of N.C. GEN. STAT. § 41-10.1.

98. Essick v. City of Lexington, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950).

99. Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976).

"claim of title to land." Instead, the court put aside its innovative modern tools of construction and dusted off the ancient tools of blind convention.

GEORGE MONTGOMERY CLELAND, IV