THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA DURING RECONSTRUCTION,
1865 - 1876

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in the Graduate School of The Ohio State University

By

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THE ADMINISTRATION OF JUSTICE IN NORTH CAROLINA
DURING RECONSTRUCTION, 1865 - 1876

INTRODUCTION

The fundamental endeavor of this work is to discuss the basic problems of Reconstruction in North Carolina from a viewpoint hitherto either imperfectly worked or, in some cases, untouched. The political features of the period have been presented fully in the works of Professor Hamilton of the University of North Carolina. Recent writers have contributed valuable additions to this knowledge, but no work dealing primarily with the courts and their application of the laws has been attempted. The justification for such a work lies in the assumption, verified by research, that the administration of justice is a valid field for historical inquiry, because laws and their application by the courts in concrete cases are of vital importance to the life of a people in all its various aspects: political, economic, and social.

Although a good many bits of isolated information have been presented incidentally in the political studies dealing with Reconstruction in North Carolina, it has been
impossible to weld that information into coherent unity compatible with a study based upon source materials hitherto untouched and a much closer application of materials already known. A few examples will illustrate. It has been known that the State was under military control from 1865 to 1868 and that military courts existed throughout, but the definite extent of military jurisdiction, the procedure of military courts, the laws they administered, and their actual application of such laws have been virtually an unknown field. One is led to believe that there were a great many military trials of civilians throughout the period of 1865-1868; in reality, there were relatively few trials and of these few the worst examples received publicity, upon the basis of which the character of military justice has been hitherto established; moreover, there were no trials of civilians by military commission from May 1, 1866, to March 31, 1867. These conclusions could be reached only through a close study of the General Orders issued by the War Department and the military commanders in charge of North Carolina. Likewise, the procedure of military tribunals and the actual cases themselves can be understood only through a study of the manuscript records of military trials preserved in the Judge Advocate General's Office at Washington, D. C., a source hitherto unused. Also, it has been known
that an agreement between the civil and military authorities was reached in August, 1865, by which the extent of military jurisdiction in criminal cases involving civilians was limited to a small degree, but nothing was known of later agreements, of much greater importance, and of their operation. Again, such important economic legislation as stay laws, homestead exemptions, abolition of imprisonment for debt, and contracts made under the Confederacy have been virtually untouched; the application of those laws by the courts has never been handled. A good deal has been written about the status of the Negro before the courts and his place in the jury box, but no thorough work has been attempted dealing with the manner in which his interests were treated by the courts. These and other subjects — the application of such Federal legislation as the Civil Rights Acts and the Enforcement Acts, methods of selecting juries in State and Federal courts, the character of justice rendered by the State courts in the troublous period of 1868-1870, the character of the State judiciary, the changes made by the Constitution of 1868 in the structure and procedure of the courts, the pardon policy of Governor Holden and others — some of which have been unworked, others misunderstood, had vital bearing upon the history of North Carolina during Reconstruction.
In the course of research upon this subject, the writer found the manuscript collection of the Governors' Papers of North Carolina preserved in the archives of the North Carolina Historical Commission to be of incalculable value. There are over sixty boxes of such papers, each one of which contains valuable information upon the courts. Whenever people had cause of complaint or rejoicing, one or more letters would reach the governor; in these papers are found correspondence from justices of the peace and from judges; there are requests for pardons and answers to such requests; -- in short, these papers indicate what subjects concerned people the most. Of similar help are the two hundred or more boxes of Legislative Papers preserved in the same archives. A liberal sampling of these papers has proven to be of great value. These materials, together with the State laws, the Supreme Court records (printed and mss.), and private collections of judges and lawyers found in the archives of the Southern Historical Collection at the University of North Carolina, have formed the basis for the work on the State courts. For the military courts, the writer has relied primarily upon the wealth of the manuscript records of military commission and court martial trials found in the Judge Advocate's Office, and the General Orders and the Military Books now deposited in the National Archives. For the Federal courts, the
many manuscript letters and books in the archives of the Department of Justice have been carefully studied, in addition to the Supreme Court cases and the collection known as Federal Cases. Unfortunately, the latter has not preserved all the Federal cases; only the more important ones have been recorded; but such as they are, they have been useful. The United States documents, many in number and unequal in quality, have been of immense value for Federal, State, and Military courts; no study could be complete without a careful analysis of the mass of material recorded therein. Of course, the secondary materials have been searched with care for such information as they contain.

In the presentation of the materials, the writer has endeavored to avoid legal technicalities; he has been concerned with presenting, in narrative form, the main political, social, economic, and judicial problems of the Reconstruction period as viewed from a different standpoint. He hopes that in this work he may have contributed something of value to the knowledge and literature of North Carolina history.

The writer can never acknowledge fully the aid rendered him by many kind friends: Professor Sims, under whose supervision this work has been conducted; the staff of the North Carolina Historical Commission, who enabled him to use materials under the trying circumstances
of their moving; the staff of experts of the Archives of the United States of America, particularly Mr. Jesse S. Douglas and Mr. Gerald J. Davis, who contributed invaluable suggestions and guided him to the materials; and Mrs. Lyman Cotten, who placed at his disposal the materials in the Southern Historical Collection.
I

MILITARY RULE AND THE PROVISIONAL GOVERNMENT

After capturing Savannah, Georgia, General Sherman's army turned north. Beginning its advance from Savannah on February 1, 1865, it reached Goldsboro, North Carolina, by March 19 and on April 13 captured the State capital. On April 26, General Johnston surrendered on the same terms given Lee. As the Federal army occupied North Carolina, the State and Confederate civil authorities were dispersed and the Old North State passed under Federal military rule. This work was assigned to the Military

1. The occupation of the state by the Federal army, the negotiation between Johnston and Sherman, the position taken by the State government, and the early efforts of the Federal military authorities to secure order are given in J. G. de Roulhac Hamilton, Reconstruction in North Carolina. Columbia University Studies, LVIII. (New York, 1914), 95-105. Hereafter cited as Hamilton. This is the standard work on Reconstruction in North Carolina; The terms first offered Johnston by Sherman included the recognition of the civil governments of the seceded States and the re-establishment of Federal Courts. However, these terms were disapproved by Sherman's superiors; consequently, Johnston was required to surrender purely and simply upon the terms given Lee. James Ford Rhodes, History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule at the South in 1877. V. (N. Y., 1913), 166-170.

Department of North Carolina, which was created on January 31, 1865, with General Schofield the commanding officer.
2. General Orders no. 12, General Orders, War Department, Adjutant General's Office, 1865-1866. Hereafter, in citing General Orders, the specific order will be given as G. O. no. _ and the source, for General Orders issued from the War Department will be cited per the year, without giving the full title. E. g., no. 12, General Orders, 1865-1866.

General Schofield's first orders relating to the administration of justice indicated that the state was under martial law. Thus, on April 27, 1865, he announced that violators of the laws would be punished by martial law, although punishment of the political leaders responsible for secession would be left to the judicial department of the Federal government. He then proceeded to the

3. G. O. no. 31. General Orders and Circulars, Department of North Carolina, 1865. Hereafter, in citing General Orders issued by the military commander for North Carolina, the source will be given as General Orders, North Carolina, followed by the appropriate year. This will apply for 1865 and up to August 6, 1866. From Aug. 6 to Dec. 31, 1866, North Carolina was part of the Department of the South and any order cited will be so indicated. In 1867-1868, the orders will be cited as General Orders, Second Military District, as North Carolina was placed in that district in those years. From Aug. 1 to Dec. 31, 1868, North Carolina became part of the Department of the South again and thereafter was in the Third Military District. Whenever reference is made to a General Order issued by the commander possessing immediate authority over North Carolina, the department or district of which the State happened to be a part at the time of issuance of the order will be indicated, to distinguish it from a General Order of the War Department.

organization of county police. These forces, formed in each county under the supervision of the military authorities, were furnished with captured arms and ammunition; and
their members were required to take the oath of allegiance to the United States. Criminals arrested were to be brought to the nearest military post for trial by military commission. In each case, a full statement of the crime and names of witnesses were to be sent with the prisoners.


Finally, General Schofield permitted justices of the peace of known Union sympathies to maintain their functions upon taking the oath of allegiance. Thus, by early May,


a temporary organization for the apprehension and trial of law violators had been established.

While this organization was being established, much confusion and marauding existed in the rural districts. Federal troops continued to forage, plunder, and destroy to some extent. Disbanded Confederate soldiers also

6. Ibid., 103: An editorial in the Standard, May 3, 1865, stated that roving bands were plundering and robbing in Wake, Johnston, Granville, and other counties. "These men are said to be, for the most part, in federal uniform. They are doubtless of Wheeler's cavalry, together with some equally bad men who belong, or have belonged to the federal service."

7. As late as May 15, General Schofield issued a

severe order against guerrillas. They were to be treated as outlaws and robbers, and all persons assisting or advising the organization of such guerrilla bands or the continuation of hostilities against the United States were to be tried by military commission. Clearly, a good deal of confusion and disorder existed. After four years of war, it could hardly be otherwise.

The machinery established by General Schofield for the administration of justice was only temporary, ending when the program of presidential reconstruction got under way. On May 22, 1865, President Johnson appointed William W. Holden provisional governor of North Carolina. His proclamation directed the military authorities to assist Governor Holden in carrying its provisions into effect. Several days later, General Schofield issued the

9. A Compilation of the Messages and Papers of the Presidents, 1789-1897, by James D. Richardson, VI. (Washington, 1897), 313. Hereafter cited as Richardson. The proclamation enjoined the military authorities from impeding or discouraging the loyal people from the organization of a state government as authorized by its provisions. It also directed that United States courts resume their normal functions and that the United States Secretary of State put in force all laws of the United States in North Carolina.

following order:

"The military authorities will render all proper and needful aid to all executive officers of the State who
may be duly appointed under the Provisional Government, in the discharge of the duties devolved upon them by law. All such executive officers are authorized to call upon the nearest military commanders for necessary aid in the execution of their legal duties, which commanders are required to render such aid so far as it may be in their power.

"When the County Court shall be properly organized in any County, the County Police Force, organized in pursuance of General Orders, no. 35, from these Head Quarters, will thereafter act in obedience to the orders of the local magistrates, as part of the posse of the county." 10

10. G. O. no. 74, June 6, 1865, General Orders, North Carolina, 1865.

Thus a full fledged provisional civil government was, with cooperation from the military authorities, to supplant the temporary military organization for administration of justice.

Governor Holden proceeded slowly to the appointment of provisional officers. In a proclamation of June 12, he announced that he would appoint justices of the peace, who would be authorized to hold county courts and appoint sheriffs and clerks. The same proclamation announced that other provisional officers would be appointed. All would hold office until the meeting of the convention which was to restore the State to its constitutional relations with the United States Government. Shortly thereafter Holden


began to make the appointments.
The first appointments made were justices of the peace. The lists of magistrates to be found in the Governors' Papers indicate that the first appointments were made on June 15. On that date several justices were appointed for Wilson, Franklin, Beaufort, Alamance, and Lincoln counties. The following day appointments were made for Granville, Hyde, and Orange counties. Thereafter, many appointments were made daily. On July 17, Holden informed President Johnson that he had appointed about three thousand magistrates. A great many more appointments were made after that date. Most provisional justices of the peace had been named by August 3, but many scattering appointments were made up to October 20.

In selecting the persons to be named as magistrates, Governor Holden relied upon advice from leading men in the various counties. The following letter to one of them illustrates his practice:

"In reorganizing the State government it is necessary that I should appoint Justices of the Peace in all the Counties; and I respectfully request that you will aid me
in so doing. Please examine the present list of Magistrates in your County, and select from it all the truly loyal men; if you should think the number thus selected not sufficient for the County, add the necessary number of persons not now on the list of Magistrates. And then, of the list prepared, designate six of the most intelligent, men of firmness and discretion to act as a Board or Boards for administering the amnesty oath to such as may be entitled to take it.

"It is very important that you or some other loyal man should visit Raleigh with the above list, so as to take the oath, and thus be qualified to administer it to the Magistrates of the County.

"Your immediate attention is earnestly invited to this matter, as the work of reconstruction cannot be commenced until the Magistrates in the various Counties shall have been appointed and qualified."14

14. Ibid. Holden to T. D. McDowell, June 19, 1865; Although this letter bears the date of June 19, it is obvious that a similar, if not identical one, had been sent a few days before June 9 to W. A. Smith. This is important evidence that Governor Holden had formulated his plan for making appointments several days before his proclamation of June 12. See W. A. Smith to Holden, June 9, 1865. Ibid.

Outstanding advisers were Chief Justice Richmond C. Pearson, George W. Brooks, Robert P. Dick, Darius H. Starbuck, W. A. Smith, A. H. Joyce, Thomas E. Long, Thomas A. Worment, Dr. A. C. W. Powell, James R. Ellis, Thomas Settle, and Tod R. Caldwell, all strong Union men. Most of them were

15. These names have been selected from Ibid. Holden also sent out an appeal through his newspaper organ, the Standard, to all loyal men to send him lists of loyal persons for justices. Editorial in the Standard, June 23, 1865.

The appeal also made to play important roles in state politics, some as Holden men, some as his opponents later.
The Federal military authorities also contributed considerable information to aid the provisional governor in selecting his appointees. As noted above,


General Schofield permitted justices of the peace of known Union sympathies to maintain their functions. Details of soldiers were sent out to investigate the political views of the old magistrates. These investigations were carried on in the latter part of May, 1865. Apparently, many of the lists of loyal magistrates drawn up by these details were transmitted to Holden.

17. The Governors' Papers for May and June, 1865, contain many lists of loyal justices of the peace drawn up by the military authorities. Some of these were obviously made before May 29, as, for example, a survey by Colonel Elias Wright during May 21-27, 1865, of the magistrates of Sampson and Duplin counties. His report was written up May 29. Another example is to be found in the following statement from Brevet Brigadier General Thomas T. Heath to Major Charles A. Carleton, Assistant Adjutant General 10th Army Corps:

"Major,

I have the honor herewith to transmit Report of names of Justices of the Peace and their political views for the counties of Moore, Robison [sic], Richmond, Franklin, Warren, Edgecombe, Nash, and Cumberland, in compliance with Special Orders #41 Head Quarters 10th Army Corps, dated May 17th 1865."

Such reports were drawn up to aid the military authorities in determining which were "loyal" justices. While their presence in the Governors' Papers is not prima facie evidence that they were later given Holden for his benefit,
The fact that Schofield submitted lists to Holden in June, 1865, tends to prove that they were so submitted. Some military reports cannot be dated accurately. There are several in these papers that bear no date. It is evident beyond a doubt that they were drawn up in 1865, but whether in May or June one cannot say. The writer believes they were done in May, but cannot support his belief with positive proof.

Still other reports were drawn up on May 29-31, 1865. Examples are the lists of Davidson, Surry, Yadkin, Davie, Randolph, Catawba, Wilkes, and Cabarrus counties sent to Major General Cox by Brevet Major General O. Kilpatrick on May 30 and 31, 1865. Brevet Major General A. Ames sent lists for Wake, Person, Orange, Chatham, and Granville counties to Lieutenant Colonel J. A. Campbell on May 29, 1865. It cannot be determined whether these lists were gathered originally for the benefit of the military authorities or for the assistance of Holden. The writer's guess is that they were gathered for the benefit of military authorities, and then transmitted to Holden after his appointment. These lists are also to be found in the G. P. Holden, 1865.

18. It has also been noted that the Federal military authorities were directed by President Johnson to assist Governor Holden in his work and that General Schofield issued an order to that effect on June 5, 1865. On that day a list of magistrates was sent to the governor with the compliments of General Schofield. Three days later, 19. G. P., Holden, 1865. The list itself is not in the papers but a letter from Brevet Colonel Terry to Governor Holden of June 5 states that the list was forwarded that day.

General Schofield sent lists for five more counties. And 20. Anson, Mecklenberg, Gaston, Cleveland, and Union. Ibid.
on June 14, he sent two more. Clearly, the military authorities were doing all in their power to furnish the new governor with the information which they had gained from their past investigation of the old magistrates. Whether the lists were of value to him is another matter. Some of them must have been. Occasionally they were drawn up with such care and precision as to give a clear idea of which justices were really loyal, together with information regarding each magistrate which substantiated the opinions of the investigators. In other cases, they were merely bare lists of names which meant nothing. They may have aided the governor in selecting the former magistrates he intended to keep, but they did not contain any information upon possibilities for new appointments.

Governor Holden laid much stress upon the appointment of "loyal" men as justices. In his proclamation of June 12, 1865, he announced he would appoint loyal men, and,

in his letters to leading men in the counties, upon whom he relied for advice in his appointments, he asked for a selection of "truly loyal men". An appeal, through the

21. For Sampson andDuplin counties. Ibid.

22. Ibid., June 13, 1865.

columns of his newspaper organ, the Standard, to loyal
men to send him lists of persons for justices stated:

"None but loyal men will be appointed." When objection
was raised to the loyalty of five appointees in Tyrrell
county, Governor Holden revoked the appointments. And

The appointments were made August 21, 1865. C. F.,
Holden, 1865; eighteen appointees for Cherokee county and
sixteen for Clay county, both made July 17, have "Revoked"
marked on them. No reason for the revocation is given.
Ibid.

upon complaint of 140 citizens from Alamance county that
justices had been appointed who were objectionable to
loyal citizens, he appointed seventeen more justices to
ensure "absolute control to the original union men." In
taking this action, the governor stated: "Justices
ought not to be appointed . . . who are regarded with
distrust or aversion from whatever cause by any consider-
able portion of the original loyal union men of the
county." The governor even declared the action of the

Ibid., Holden to W. A. Albright, August 31, 1865.

justices of the peace in Cleveland County in county court
null and void because a due regard had not been manifested
to the present and past loyalty of the county officers
elected. Again, he appointed more justices to ensure a
"loyal" majority and ordered another meeting to elect officers. While placing this emphasis upon loyalty,

27. Ibid., Holden to R. Swan, July 19, 1865. Relatively few changes were made in the second election held July 29, 1865. Ibid.

he indicated that it was far from his purpose to cast reflections upon those secession men who had sincerely acknowledged their error and were now submitting in good faith. Although he was happy to see them showing such a spirit, he held that they could not expect to take the lead. The leading role was to be taken by the original Union men; the other group must follow and cooperate.

28. Ibid., Holden to W. A. Albright, August 31, 1865.

Just how he, with his own secession background, was en-

29. E.g. the statement made in 1851: 'We hold the right of secession as an original, pre-existing, reserved sovereign right; that whenever the Constitution is palpably violated by Congress or whenever that body fails to carry out the plain provisions of that instrument when required to protect Southern rights, that Union is dissolved...'. William K. Boyd, "William W. Holden," in Trinity College Historical Papers, III. (1889), 55.

On May 20, 1861, Holden was said to have signed the North Carolina ordinance of secession "with a gold pen purchased for the purpose and to have proclaimed, 'This is the greatest act of my life'". Ibid., 65. For a full analysis of Holden's varied attitude upon secession see Ibid., 54-65.

titled to play the leading role at the time in the reconstruction of the State was not mentioned.
Just how many of the justices who had held office before or during the war were reappointed by the provisional governor is difficult to say. Charges were made that he ignored Union men and gave preference to persons engaged in the Rebellion. To these charges, he replied that he was being very careful to appoint "originally [sic] Union men". He admitted that among four thousand appointments some had been named who ought not to have been, but "upon the whole, only loyal Union men have been appointed here..." In the light of evidence given above, his statements were probably correct. Few complaints are to found in the Governor's Papers about the loyalty of his appointees. Beyond doubt

30. G. P. Holden, 1865. Holden to Johnson, August 26. This was in answer to a communication from the President informing Holden of reports that Union men were being ignored. See also Hamilton, op. cit., 116-117.

31. Supra, 16-18.

32. Those already cited are the outstanding ones. The writer found a complaint stating that the colonel of militia and two of the three magistrates for the town of Enfield were "secessionists". G. P., Holden, 1865, N. Dunn to Holden, n. d. but apparently July 10, 1865. Rev. Hope Bain testified before the Joint Committee on Reconstruction that, in Wayne Co., there were only eighteen Union men in the county, yet Holden had appointed thirty-eight justices. "There were eighty-four magistrates
nominated in the State by a man who professed to be a Union man, but who proved to be a traitor; and out of these eighty-four magistrates we have only four Union men all told. That is precisely our position." House Reports, no. 30, 39 Cong. 1 Sess., pt. II, 205.

A fair percentage of old magistrates was reappointed. Thus, in Sampson County, of forty-three appointments made on June 21, fourteen were old magistrates. Of these, seven had been Democrats, seven had been Whigs. Four of the Democrats had owned slaves and possessed from three hundred to seventeen hundred acres of land. Three of the former Whigs had owned slaves. Four of the Democrats (slaveholders) had been original secessionists; the others had not. Of these, three had been hearty supporters of the Confederacy, and one of them had been in the Confederate army. None of the Whigs had been original secessionists or hearty supporters of the Confederacy, though six had served in the Home Guards. There had been seventy-five

33. These figures are given from the best of the investigations made by one of the Federal army details. Col. Elias Wright made a fairly thorough investigation of Sampson and Duplin Counties during the week of May 21-27, 1865. He investigated seventy-five of the old magistrates and reported their occupation, land holding, politics, activities during the war, and their slave-holdings before the war. It is interesting to note the following figures concerning the fourteen old magistrates who were reappointed in Sampson County.

<table>
<thead>
<tr>
<th>Slaves</th>
<th>Acres of land</th>
</tr>
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<tbody>
<tr>
<td>0</td>
<td>120 - 300</td>
</tr>
<tr>
<td>8</td>
<td>500</td>
</tr>
<tr>
<td>29</td>
<td>270</td>
</tr>
<tr>
<td>40</td>
<td>900</td>
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The report was written up and sent to his superior officer by Col. Wright on May 29 and is found in _G. P._, Holden, 1865.

Magistrates in the county. Thus, although one-third of the magistrates appointed were "old" ones, only one-fifth of the old ones were re-appointed. In Duplin County, of the twenty-six men first appointed by Holden, eleven were old magistrates. Of these eleven, eight had been Democrats, with slave-holdings varying from three to one hundred; two had been Whigs; and one was of undetermined party affiliation. Again, one-fifth of the old magistrates were re-

34. Ibid., same report. It is interesting to note the slaveholdings and land-owning of the Democrats:

<table>
<thead>
<tr>
<th>Slaves</th>
<th>Acres</th>
<th>(merchant)</th>
<th>200</th>
<th>300</th>
<th>400, 800</th>
<th>1000</th>
<th>1000</th>
<th>3700</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3</td>
<td>300</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>4</td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>6</td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>12</td>
<td>400</td>
<td></td>
<td></td>
<td>800</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>20</td>
<td>1000</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>25</td>
<td>1000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>100</td>
<td>3700</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

appointed (there had been fifty-five). The writer has been unable to secure such precise data in other instances.
It would require most painstaking, minute research to check on even a fair sampling of the justices. Unfortunately, county histories give no data of this type. But, from scattered items in the Governors' Papers, it may be stated hypothetically that these figures can be advanced as a rough equivalent for the State. The writer has found a sprinkling of old magistrates reappointed in various counties. And a statement from W. O' B. Gilbert,

35. E. g., eight in Cleveland County, July 8, eight in Anson County, July 25-26, nineteen in Person County (in early July — this cannot be certified with accuracy for several of the appointees failed to qualify — W. P. Wilkins to Holden, July 20, 1865. Ibid.), four in Gaston County, July 23. All in Ibid.

Holden's adviser in Currituck County, is instructive: Gilbert stated that his nominees [who were accepted by Governor Holden and appointed July 13] were "quiet, conservative men," "desirous that civil law be put in force at an early day," of the type that "accept the new order of things with good grace."


The justices of the peace appointed by Governor Holden proceeded to organize the county courts. These courts, composed of three or more justices of each county, exercised a wide jurisdiction. They heard all causes of a
civil nature where the original jurisdiction was not limited to one or more magistrates out of court, all criminal cases involving fines above one hundred dollars, and suits involving dower, partition, legacies, estates, orphans, and other like cases, as well as petit larcenies, assault and battery, trespasses and breaches of the peace, and misdemeanors where the penalty did not extend to life, limb, or member. They also heard appeals from decisions made by justices of the peace. They "appointed and controlled administrators, executors, and guardians and acted as the governing body of the county." From 1669 until their abolition in 1868, these courts were essential elements in the administration of justice. A typical example of the organization of these courts by the


38. Ibid., ch. 62, pp. 365-366.


40. A good sketch of their history to 1868 is given in ibid., 54-57.
newly appointed justices may be seen in the case of
Johnston County. The justices met on June 22 and took
the amnesty oath administered to them by Thomas D. Sneed.

For the background see the typical letter of Holden to
the men he wrote for guidance in nominating justices,
Supra, 12-13.

The justices then appointed a list of county officers, viz.,
Clerk of Court, Register of Deeds, County Trustee, Sheriff,
Tax Collector, and County Solicitor. Upon so doing and
granting a license to one Charles Beasley to retail spiri-
tuous liquors in the town of Smithfield, they adjourned until
July 3, 1865. In the case of Lincoln County the same

general procedure was followed, except that a police company
for the county was appointed with the approval of the post
commander at Lincolnton. In general, the same procedure

was followed in all the counties; a person (generally a
Holden adviser) who had taken the amnesty oath at Raleigh
administered it to the newly-appointed justices; the jus-
tices then appointed county officers and adjourned. A few
counties had organized by July 1st, but the great bulk of
them organized during the first half of that month. By
July 17, the majority of counties had so acted; yet, a
large number organized during the latter part of July and several waited until August. In general, the organizations

were perfected with no untoward incidents. However, Governor Holden declared the first action of the county court of Cleveland null and void. He also ordered the

suspension of the reorganization of Washington County.

In Surry County the local military commander refused to summon the justices appointed although he was given the list and the order of the governor. He remarked that "if Holden wanted them notified he might do it himself."

But the county was organized despite this unusual lack of cooperation. These irregularities were exceptions to the rule.

Governor Holden's next step in establishing the provisional organization for administration of justice came
in the appointment of superior court judges and solicitors. According to the law of North Carolina, there were to be eight such judges. These judges rode on circuit, and a superior court was held twice a year in each county. The judges were selected from the state at large, but each one was assigned to a certain district and was required to reside within that district while holding office. They rode the circuits successively and were permitted to exchange circuits, but no judge might ride the same circuit twice in succession. The superior courts exercised common law and equity jurisdiction in each county, heard appeals from the county courts, and, in general, could hear and try almost any cause, criminal or civil. On August 3,


1865, the governor appointed a full slate of superior court justices and solicitors. On the whole, the judicial appointments were good. The appointees were well-known and highly regarded, even by Holden's critics, although only
two of the old superior judges were chosen. Four of

50. E. g., The Sentinel, later Holden’s chief critic. “We regard the present a most excellent and efficient bench.” August 8, 1865. Judges Reade and Gilliam were the former judges reappointed. Judges Howard, French, Saunders, Heath, Osborn, and Shipp were left out.


Reconstruction period.

No provisional State Supreme Court appointments were made by Governor Holden, a fact which caused some

52. perturbation among the judges. The Supreme Court did not

52. E. g., Buxton to Holden, Dec. 15, 1865. G. E., Holden, 1865. “May I ask whether a Provisional Supreme Court has been appointed yet, or if not, whether one will be appointed? It seems to me there ought to be an appellate [sic] court to revise the proceedings of the Courts of Oyer and Terminar. I should be very unwilling that any one should be hung upon my ruling of the law, unless the prisoner had the chance of having his case reviewed.”

sit until June, 1866. This was the most serious gap in the provisional government.

53. As noted above, President Johnson’s North Carolina

53. Supra, 10 (footnote 9).

Proclamation of May 29 directed the United States Courts to resume their normal operations within the state. Accordingly, he appointed Robert P. Dick District Judge, William S.
Mason District Attorney and W. R. Richardson Marshal. None

54. Standard, June 6, 1865.

of these, however, could take the oath prescribed.


United States Attorney General Speed regretted their inability greatly, feeling that men of their calibre should be in the service of the government. He felt it very important that the District Court be open and urged Governor Holden to recommend others. The set of offi-

56. Ibid., Speed's letter was urgent. "It is very important that the Court should be open. We want natives or residents of your state and fit men. . . . Through you and your efforts we hope that proper men can be found who can qualify. . . . I earnestly invoke your prompt attention to this matter."

 Officials recommended were George W. Brooks for Judge, Darius H. Starck for District Attorney, and Daniel R. Gooles for Marshal. Their commissions were sent August 22, and

57. Ibid., p. 160.

their nominations were confirmed by the Senate in January, 1866. Although a complete set of United States officials

58. The Correspondence of Jonathan Worth, ed. by J. G. de R. Hamilton, 2 vol., Publication of the North Carolina
Historical Commission, (Raleigh, 1909), I, 479-480. B. S. Hedrick to Worth, Jan. 23, 1866. "So the U. S. Dist. Courts in N. C. are now duly organized. I think N. C. is the first State since the collapse of the rebellion to re-establish the U. S. Courts." Hereafter known as *North Correspondence*.

had thus been appointed, the District Court did not sit during 1865. Likewise, the United States Circuit Courts

59. R. J. Powell, Holden's agent in Washington, wrote him on August 15, 1865: "There is no immediate necessity for opening U. S. Courts - in our State - In fact I think it is better that they should not be opened at present." G. F., Holden, 1865.

did not sit. The Supreme Court Judges refused to hold circuit courts in the South in 1865 or 1866, for reasons stated by Chief Justice Chase:

"I so much doubt the propriety of holding circuit courts of the United States in States which have been declared by the executive and legislative departments of the national government to be in rebellion and therefore subjected to martial law, before the complete restoration of their broken relations with the nation, and the supersede of the military by the civil administration, that I am unwilling to hold such courts in such States within my circuit . . . until Congress shall have had an opportunity to consider and act on the whole subject.

"A civil court in a district under martial law can only act by the sanction and under the supervision of the military power, and I cannot think that it becomes the justices of the Supreme Court to exercise jurisdiction under such circumstances."

60. *Senate Executive Documents*, no. 19, 39 Congress, 1 Session, I. Chief Justice Chase's letter to President Johnson, October 12, 1865.

It may be doubted seriously whether the Chief Justice meant this statement at its face value or whether he had in mind
the political effect of favoring Congressional reconstruction. However, he repeated and amplified it in his

61. The most caustic criticism of Chase and his advanced ideas of Negro suffrage is found in Claude G. Bowers, The Tragic Era: The Revolution After Lincoln, (New York, 1929), 55-60.

address on June 6, 1867, when sitting on circuit duty for the first time in North Carolina. He then stated that the Supreme Court Justices "regarded it as unfit in itself and as injurious, in many ways, to the public interests, that the highest officers of the Judicial Department of the Government should exercise their functions under the supervision and control of the Executive Department."

62. 61 N. C., 389. Chase held that the Presidential proclamations of April 2 and August 20, 1866, had removed the military control made necessary by the fact of rebellion and that, although military authority was still exercised in the South, it was used "under acts of Congress, and only to prevent illegal violence to persons and property, and to facilitate the restoration of every State to equal rights and benefits in the Union," not "in consequence of the dispersal of local civil authority." Also, the military authority did not extend to Federal courts, p. 391. This reasoning appears somewhat specious under the circumstances, but it was used by Chase.

Although, under the presidential plan of reconstruction, a provisional civil government had been set up with regular machinery for the administration of justice, North Carolina still remained under military control. In fact, the provisional government possessed more of a military than a civil character. The appointment of Governor Holden
himself was based on the war powers of the President.  

63. Hamilton, op. cit., 157-158.

jurisdiction of the provisional State courts extended only as far as permitted by the military authorities. The military supervised the personnel of the county police, could and did suspend the publication of newspapers, tried civilians for criminal offenses, and regulated all matters pertaining to Negroes through the Freedmen's Bureau and military tribunals.  

64. As stated above, General Schofield ordered that

64. Supra, 11.

when the county courts were properly organized in each county, the county police, established originally under military authority, would act in obedience to orders of the local justices. General Thomas H. Ruger, however, who succeeded General Schofield in early June, 1865, refused to recognize this agreement. On July 1, 1865, he announced


that complaints had been received of improper persons having been appointed on county police forces and ordered district commanders to purge the lists of objectionable persons. The revised lists were to be forwarded to headquarters with
names, residence, occupation, and other pertinent information. Also, when the convention of 1865 passed an

ordinance providing for military companies as auxiliaries to the county police, General Ruger specified rules governing the personnel of such companies:

"No person is eligible to be an officer or member of such force unless entitled to vote. No person will exercise any duty or function as a member of such force unless duly named as a member, and notified in writing to that effect by the Justices having, by the ordinance above referred to, the power to organize such force."

Members and officers were required to take an oath of allegiance to the United States and of obedience to the orders of the military authorities before the commanding officer of the nearest military post prior to exercising their functions. Their names were to be filed at district headquarters, which were to be kept informed of all changes.

Clearly, the Federal military authorities supervised closely the strong arm of the civil law.

Likewise, they regulated expression of public opinion. In July, 1865, the publication of the Salisbury Daily Union Banner was suspended for articles regarded as
disloyal in spirit — articles on the Freedmen's Bureau

68. G. O. no. 111, July 21, 1865, Ibid. One article ran as follows [quoted in the order]:

'General Ruger, General Howard, and Generals generally, are fulminating their peculiar views. If these gentlemen are to fix the status of 'our colored fellow citizens of African descent', where then the necessity of holding a convention? The same power that gives them this right, would entitle them to say what we should do in every other relation of life — they have already assumed the power to say what we shall drink and wear.'

and its policy. The editor was permitted to resume publication upon disclaiming any wrong intent, declaring his intention to avoid causing future censure, and having these statements endorsed by Governor Holden. At the same time, General Ruger announced:

"Until the restoration and full operation of civil laws, publishers of newspapers, as well as public speakers, will be subject to the restriction necessarily existing under military rule, and will not be permitted to discuss and criticize the acts of the military authorities with that freedom allowed where the civil law is in full operation.

The public is not, under existing circumstances, the tribunal to which appeal should be made respecting the acts of the Commissioner of Freedmen or other officers of the government." 69

69. G. O. no. 118, July 31, 1865. Ibid.

General Ruger was as good as his word. In December, 1865, one of the editors of the Fayetteville Observer was arrested for seditious language and released on parole. Soon

afterward Robert P. Waring, editor of the Charlotte Times was arrested for publishing an editorial declaring the South to be under a grinding despotism and under the dominance of a mercenary race. He was fined three hundred dollars. The military authorities kept strict supervision over the outward expression of opinion.

A large number of civilians were tried by military commissions during 1865. The most spectacular of these trials concerned offenses upon Negroes by whites. They came, for the most part, from July to December, 1865. Then there were a few cases, tried during the same time, involving offenses committed by Negroes. The cases involving whites only fell into two classes: offenses committed against the military authorities (largely stealing of army property — mules especially) and robbery or larceny wherein the articles in question were of doubtful ownership. Again, most of the trials were held in the latter half of 1865. Finally, provost courts attempted to

72. The information upon which the discussion of trials by military commissions is based comes from the General Orders for the Department of North Carolina and from original manuscript records of the trials on file in the office of the Chief Clerk of the Judge Advocate's office. These files bear serial numbers, LL, MM and CC, and have the case numbers following. Thus, when a reference is given as MM 3112, it refers to the manuscript record of a trial held by military commission, in file MM, case number 3112, in the office of the Chief Clerk.
handle civil cases before the establishment of the provisiona
provisional government, but this practice was promptly stopped by the authorities at Washington.

On May 19, 1865, Secretary of War Stanton referred certain papers to General Grant

"from which it appears that a Provost Court est-
established by Maj. Gen. Schofield, is exercising jurisdiction over civil matters and other sub-
jects not pertaining to military operations.
You are aware that the jurisdiction and authority of such courts have been investigated and reported upon by the J. [udge] Adv. [ocate] Gen [era] 1.
and that it has been held that all such jurisdic-
tions are void, unauthorized by law, and tend greatly to oppression and the demoralization of the army. You will please issue orders to Gen [era] 1 Schofield that will put a stop to these abuses of authority by Provost Courts or any other military tribunals."73

Mss. in National Archives.

Orders to that effect were issued promptly to General 74
Schofield.

74. Letters Received, Department of North Carolina, volume 2 (63), p. 3 (Mss. record of letters received — in National Archives). P. S. Bowers, Ass't Adjutant General to Schofield, May 20, 1865. Marked received May 31, 1865.
The writer cannot account for the marked interval; see also Richardson, VI, op. cit., 350-351.

Quite a number of civilians were tried for
stealing salt. During the War, North Carolina was without
an adequate supply of salt. To meet this need, a commissioner
to manufacture and sell salt at cost price was elected, and salt works were established. But, even so, the price of salt rose greatly, so that by March, 1865, it stood at seventy dollars per bushel in Raleigh. As salt was manufactured under government auspices, it was difficult to prove the fact of private ownership, especially if the salt were burnt. Burnt salt could easily be presumed to have been stored in a government warehouse and to have been burned either by Confederate soldiers retreating before the Federal army or else by the Federal forces. Apparently, many people felt that salt, particularly if burnt, was fair game for anyone, and, in the face of high prices, the temptation to acquire it by fair means or foul proved too great. For example, on April 18, a man, purporting to have a "Yankee" military order, came to a home in Burke County and endeavored to seize salt, corn, tobacco, and other articles. Salt was the main item. When he was haled before a military commission on a charge of robbery, his defense was that he committed no robbery, that there was no proof of private ownership, that the salt was probably the property of the Confederate government and had been appropriated by the professed owner to his own use, and that he, the defendant, merely intended to seize this
property openly to distribute it among some poor women.

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76. G. O. no. 46, Case no. 4, July 7, 1865. The trial was held June 12, 1865, before a military commission at Raleigh. General Orders, North Carolina, 1865; Wm., 3124; Wm., 3153.

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He was adjudged guilty of this and other salt stealing and given six months in the Burke County jail.

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77. Another good example can be had in the case of a white man from Burke County who saw a Negro taking a sack of salt to his former master and took it from him. He was tried for highway robbery, but was found guilty of forcible trespass and given one month in Rowan County jail. This decision seems fair enough. The ownership of the salt could not be proved, but that uncertainty did not give the white man the right to take it from the Negro! G. O. no. 52, Case no. 1, July 13, 1865. General Orders, North Carolina, 1865; Wm., 3513 (the trial was held July 6, 1865, at Salisbury).

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The night of May 7, a Federal troop train pulled into Salisbury, and a soldier dropped off and ran into David Trexler's yard to get water. Evidently Trexler had suffered from a good deal of the stealing attendant upon the confusion of the time. He and a boy who was staying at his home shot at the intruder: the soldier and another were wounded. A military commission heard the case and acquitted Trexler and the boy of intending to shoot Federal soldiers. This was the first of several cases wherein

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78. LL., 3270.

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civilians were tried for difficulties with the troops. In
October and December of 1865, three civilians were tried for stealing United States Government property: mules, bridles and saddles. The military commissions did not convict unless the evidence was very clear. Where the circumstantial evidence was strong, yet clear proof doubtful, the commissions favored the defendants. Another civilian was found guilty of endeavoring to bribe soldiers in camp near Charlotte to steal horses and harness for him. His sentence of six months and one hundred dollars fine was mitigated to three months by General Ruger, evidently because the man was drunk at the time of the offense. Still another was convicted by a military commission of disrespect to a United States officer at the county court house of Yancey County. A penciled "nonsense" on the back of the manuscript record aptly summarized the case. The defendant, a former United States soldier, had become drunk and ridden through the county court house! General Ruger, in disapproval,
commented: "His trial on such a charge was entirely without authority, ... He will be released from arrest."

81. G. O. no. 156, Nov. 8, 1865. General Orders, North Carolina, 1865. The trial, held at Salisbury, September 13, is in WW, 3150.

On the whole, civilians received the benefit of the doubt in these cases.

Two civilians were found guilty of horse-stealing.

One was a particularly clear case, so clear that the defendant had no statement or witnesses whatever to offer.

He was given two years in the penitentiary at Albany, New York. The other was not so clear cut, but enough to warrant a conviction. The man received one year at Fort Macon and a fine of one hundred dollars. Another was convicted of embezzling over three thousand dollars. He was sentenced to three years at Fort Macon but was pardoned on February 19, 1866, probably because the injured party possessed none too good a character. In all cases, there

82. G. O. no. 100, July 14, 1865. General Orders, North Carolina, 1865. The trial was held at Salisbury, June 15, 1865. The offense was committed in Rowan County in June. WW, 2509.

83. G. O. no. 154, Nov. 8, 1865. General Orders, North Carolina, 1865. The trial was held at Lexington. At the same trial, another civilian was found not guilty of aiding and abetting the man found guilty. CO, 1418.
was little doubt of guilt. This completes the trials of white persons only.

Of the trials involving offenses committed by Negroes, the most serious were those for rape or attempted rape. Three such cases were tried, all at Salisbury. In one, held in June, 1865, a Negro was convicted of rape of a white woman and sentenced to be hanged. The commission apparently intended to set an example. In another, a case of attempted rape, the Negro was acquitted, with justice.

A Negro boy who was found unquestionably guilty of rape upon a colored girl under ten years of age, had his sentence mitigated from hanging to one year of hard labor at Fort Macon. The convicting commission, while bound to sentence according to the evidence and the law, recommended mitigation upon grounds of youth and the "low state of morals in this State, at the present time, and the wicked
and licentious example, set before him by both whites and
blacks." Perhaps the commission felt that such a case
ought to be judged by standards different from those ap-
plied to whites or to attacks upon white women by Negroes.

Three Negroes were convicted of theft or larceny
in August and September. Their sentences ranged from two
months at hard labor to three years on some public works.

In an arson case, one was found guilty and received seven
years of hard labor on public works. Another was acquitted.
In only one case involving theft were Negroes
acquitted. In that case, held at Salisbury on November 2,
two Negroes were tried for stealing a yearling bull. The
evidence indicated a clear case of guilt. It is impossible
to see how or by what rules of evidence they could have
been acquitted. But they were. Though General Ruger
disapproved of the findings, the convening authority had been disbanded and consequently could not be gathered again so he released the pair.

91. G. O. no. 175, General Orders, North Carolina, 1865. Why he released them, is hard to understand, unless he were applying the rule that, as in the case of a jury trial, a man cannot be placed in jeopardy again for the same offense. The evidence was too clear to be controverted.

Military commissions tried a good many cases of offenses by white people against Negroes. The first of these was that of John Boyd of Catawba County, tried for shooting a Negro in April, 1865. The witnesses for the defense proved a case of self-defense, and Boyd was acquitted. A month later, July 10, Reginald Nelson was tried for a similar offense in Rowan County on June 17. Young Nelson shot a former slave in a quarrel over the latter's failure to perform work properly. The commission, in accepting the defendant's plea of self-defense, clearly accepted the testimony of white witnesses in preference to that offered by Negroes, and acquitted him. The first case that caused excitement, however, was the trial of Temperance Weely for the murder of a former slave. When
haled before the military commission at Salisbury, July 29, she pled that her offense was not a military one, as there was no rebellion or invasion, that peace existed, and that she was amenable to civil courts. The objection was overruled. When colored witnesses were introduced, she objected to them as being incompetent as witnesses under North Carolina laws. Again, the objection was overruled. The evidence showed that there had been a quarrel over labor matters. The slain Negress had objected and knocked down Mrs. Providence Neely, Temperance Neely's mother, when the latter whipped the Negress' ten year old daughter for being insubordinate. Either during the scuffle or immediately after, Temperance Neely seized a loaded pistol from the mantle and fired twice, the second shot taking effect. The star witness for the prosecution claimed that Temperance fired directly at the Negress as she was leaving the piazza. The defense held that Temperance seized what was thought to be a poor pistol and fired during the scuffle to frighten the Negress, that it was an unfortunate accident, and that Temperance was grief stricken. Two white witnesses impeached the character of the star prosecution witness. It appears from all the testimony that only one witness (the star one) for the prosecution was in position to see the
affair, and this (a Negro) and another Negro testified to Temperance's kindness to the slain Negro and her children. The court fined the defendant one thousand dollars and imprisoned her until it was paid. General

84. Ibid. 2968. The affair occurred in Davie County. Miss Neely's counsel was Nathaniel Boyd and W. M. Clement; the community was sympathetic toward Miss Neely. Sentinel, Aug. 11, 1865, quoting from Salisbury Daily Union Banner.

Ruger approved the verdict. This case is of importance as


being one of the first to introduce the question of conflict of civil and military jurisdiction. It also marked a change in attitude on the part of the military commission at Salisbury. The rest of such cases in 1865 went against the Whites.

The next case before the Salisbury commission was that of Stephen Lee of Anson County. Lee, a young man, engaged in an altercation with two Negro boys of about his own age and their mother, the quarrel arising out of Lee's ordering the boys to do some work on the plantation. After summoning a cousin, apparently an older man to whom the family turned for aid in such matters, to settle the trouble, young Lee went to get one of the Negro boys and took his gun
with him. He shot and killed one of the boys. The testimony concerning the shooting was flatly contradictory. Three colored witnesses, kin to the slain boy, said it was a plain case of premeditated attack. Four or five white witnesses, close friends and relatives of Lee, held it was self-defense. So directly contradictory was the testimony that the commission, in making a decision, had to accept either the colored version or the white. Moreover, the argument by the defendant’s counsel, Nathaniel Boyden, and the counter-argument of the prosecuting judge advocate emphasized this aspect still more clearly. It will be well to cite Boyden’s argument, for it probably voiced the sentiment of most whites:

"There is in this case a direct and irreconcilable conflict of testimony; between the colored [sic] and the white witnesses; and it now devolves upon you the intelligent Commission, to determine, whether two ignorant and unlettered coloured [sic] witnesses... shall be believed, and their relation of the facts be taken as true by this Commission, or that given by twice the number of white witnesses of good character and highly intelligent. No one [sic] Mr. President & gentlemen of the Commission, is more pained than myself at any act, of individuals, or of communities tending to disturb [sic] in the least, that hegemony so desirable at this time between the people, of the different section, of our common country; or between the white & coloured [sic] race, in our midst. I desire especially that all lawlessness or violence towards the coloured [sic] race because they are coloured [sic], and have been slaves, should cease at once; but let me say, to you the President and gentlemen of the Commission, that this object however desirable, is not to be obtained by our courts, military, or civil, declaring that two ignorant coloured [sic] witnesses in the nearest possible relation to the unfortunate coloured [sic] man that was slain, are to be
credited, in preference [sic] to four or five intelligent white witnesses who had a much better opportunity, to observe the transaction, than the two colored [sic] witnesses. Such a decision, would shock the community in which we live & in its results, would be most unfortunate to the colored [sic] race."

This statement summarized pretty well what Boyd thought of the value of colored witnesses generally. The pros-

96. [Mk., 3195. He made some further general observations to the same effect upon this point. Boyd played a prominent part in the State convention of 1865. A Democrat at first, he turned Republican in 1868. Professor Hamilton observes that in the debate in the General Assembly in January and February, 1866, over permitting Negro testimony, the "general unreliability of negro testimony was fully recognized. . ." Hamilton, op. cit., 155.

ecting judge advocate replied heatedly that Boyd's assertions in regard to one of the colored witnesses were "low and dull and brutish," and "altogether uncalled for and unjust." The Commission accepted the version of the 97 Negro witnesses and found Lee guilty of murder. General

97. [Mk., 3195.

Ruger disapproved the verdict, holding that the evidence showed that both the prisoner and his victim had made threats against each other and that the verdict should have been manslaughter. He released Lee.


At the same time that it heard the Lee case, the
same military commission found Joseph Corpening of Caldwell County guilty of shooting a Negro in his employ without just cause and with intent to maim. Once more the affair arose over labor troubles. The Negro, Lawson, complained to Corpening's wife about the food received and went off to see the provost marshal at Morganton. The Negro's whole attitude toward his wife angered Corpening, and a day or so later, in an argument over work, he shot the Negro in the thigh. The testimony, both white and colored, indicated that Corpening treated his Negro laborers well and that living conditions were quite good on his place. Without doubt there was no complaint on that score. As to the struggle and firing of shots, the question to be decided was, did Corpening shoot with intent to kill or maim? One Negro witness said yes. His testimony, however, was contradicted on some essential points by both whites and Negroes, while upheld on others. White testimony held that Corpening fired to frighten Lawson, not with intent to harm. It was a difficult case to decide. The prosecuting judge advocate took an uncompromising position:

"I consider this a representative case of where men feeling chagrined at the result of the late war, and the loss of slave property give vent to their bitterness of feeling by taking revenge upon, and persecuting the poor and unfortunate freedmen just as they are about to take the benefit of their liberty."

Apparently the commission took the same view, for the
defendant was sentenced to ninety days in jail and a
five hundred dollar fine. In the light of the evidence, 99

99. MM, 3159.

the sentence was too severe, for all witnesses testified to
the good treatment Negroes received at the hands of the
defendant. General Ruger modified it to thirty days and
two hundred and fifty dollars, in view of Corpening's 100
previous good character, advanced age, and poor health.

100. Ibid.

This sentence more nearly met the ends of justice. From
the point of view of the welfare of the Negroes it was
best that some punishment be laid, for it was bad to
permit a man to go unpunished for shooting a Negro in a
moment of passion, as Corpening later admitted he did. An
appeal was made to President Johnson, who referred it to
the Bureau of Military Justice. Judge Advocate Holt, in
refusing to recommend mitigation, held that the original
sentence was mild and, as modified by General Ruger, imposed
"a light punishment for an act of lawless ferocity, which
there is reason to believe was aimed at the life of the un-
fortunate colored man, whom he no longer valued as property,
but who belonged to a race whose previous status exposed
them to abuse, as passion prompted, and just so far as self
interest would allow."

101. *Ibid.* All of Holt's opinions in similar cases were biased against the whites.

On September 31, 1865, an affair, which attracted considerable attention, took place in the town of Concord, Cabarrus County. The evidence given at the trial before the Salisbury military commission was very confusing. However, certain facts stood out. On that date, when the election for the delegates to the convention was held, a crowd of freedmen assembled at Concord to hear a talk to be delivered by a Freedmen’s Bureau official. They were run out of town by a group of whites, who were tried by the commission in October. Six were convicted of assault and battery and received sentences from fifteen days in county jail to one month at hard labor and a fine of thirty dollars and four months at hard labor. It was clear that all six were guilty of striking Negroes, either with clubs, stones, or fists (one used his fists only). But the testimony did not agree on who started the row. Prosecuting witnesses, mainly Negroes, contended that the defendants started the affray. The defense claimed that a former Union soldier by name of "Yankee" Smith (who was not produced in court) had chased the freedmen, firing shots at them; that he was arrested; and that then the blacks returned
and seemed ready to take him forcibly from the authorities, whereupon the defendants drove the Negroes off.

Whatever the facts, the defendants were found guilty, and the verdict was approved by General Ruger. The evidence is so very confusing that it virtually defies analysis. The best that can be made of it is the summary as given above. One of the defendants was tried separately November 15 and admitted throwing a stick at one Negro, striking another, and being slightly drunk on election day! MN, 3526.

After the first row, an attack on one John W. Gorman by a Negro started another fracas. Gorman was given thirty days in jail and a fifty dollar fine, which was remitted by Ruger. Gorman expressed opinions in favor of suppression of Negroes generally and objected to his Negro assailant's being admitted to bail. Probably his expression of such sentiments, with the fact that he struck the Negro after the latter was taken into custody, had much to do with his sentence. His trial was held October 9. Ibid., 3111; G. O. no. 156, General Orders, North Carolina, 1865.

On the whole it may be said that, in cases where whites or Negroes alone were tried by military commissions, the verdicts rendered were generally quite fair and resulted in no complaint. But, when whites were tried for offenses against Negroes, certain issues soon came to the fore. First, the question of conflicting jurisdiction between civil and military authority arose in the Neely case. The same case, that of Stephen Lee, and that of Corpening presented the provocative question of whether white testimony
or Negro testimony could be accepted when each contradicted the other. This question really narrowed down to the issue of whether Negro testimony was acceptable at its face value, when contradicted by whites. The issue was most clear-cut in the Lee case, and the military commission favored the Negro side. It is very significant that most of the cases of offenses of whites against Negroes grew out of labor troubles. It would seem that the military commissions determined to set examples to prevent the use of weapons by white men in such disputes. It was also clear that the race issue was beginning to harden and that the military authorities were "cracking down" upon the whites in the matter. It is important to note that the first suppression of a newspaper publication also arose over the status of the Negro.


Feeling began with July, 1865. It is significant, in this connection, to note that the Freedmen's Bureau became effective in North Carolina on July 1, 1865.

104. *Infra*, 62.

Courts-martial dealt with soldiers accused of offenses of a civil nature. Many of these offenses occurred in April and early May, 1865, and involved such matters as straggling, foraging, robbery, plundering,
assaults, rape, and kindred offenses attendant upon the military occupation of the state. Where rape upon a white woman was proved, the death penalty was given.

105

105. WM, 1774. This was a clear case of brutal assault by a half drunk soldier upon an old lady living near Kinston, Lenoir county.

In a charge of rape upon a white woman in Warren county in early May, the defendant's attorneys, Sion H. Rogers and D. G. Fowle, set up the defense that when the soldier entered the yard and said "kill them" to a woman and her daughter, implying that only submission to his desires would save them, either from being killed or robbed, his words were pleasant? They claimed that the girl's submission to save the home from robbery did not constitute a case of rape. Perhaps the girl's bearing, which the attorneys claimed was not that of a virtuous woman, upon the witness stand, influenced the commission to adjudge the soldier not guilty. He was given, however, a two year sentence for robbery. 00, 945; C. O. no. 65, General Orders, North Carolina, 1865 (Rogers was later Attorney General of North Carolina under Holden and Solicitor General of the United States; Fowle was later judge of the Superior Court 1866-1867 and Governor of North Carolina).

Where rape was proved in the case of a colored woman, a court-martial gave a death verdict, which was mitigated by General Ruger to five years on the public works.

106

Apparently, a double standard was applied. Use of in-


sulting language to or in the presence of ladies consti-

107

tuted cause for dismissal from the service. Various

107. Ibid., no. 106; WM, 2586. A Wilmington case; but a
similar, though less flagrant case, held at Salisbury, resulted in a surgeon's restoration to the service with a reprimand. G. O. no. 97, General Orders, North Carolina, 1865.

sentences were inflicted for robbery or burglary. Generally, the offender received two to three years of hard labor.

108. E. g., the soldier accused of rape and robbery cited above. Supra, 52, footnote 106.

WM. 2497; G. O. no. 105, General Orders, North Carolina, 1865. A Negro private was found guilty of acting as a leader of a group of five or six Negro soldiers who robbed a home near Wilmington about May. The court-martial ordered the death penalty, which General Ruger mitigated to three years at hard labor.

Ibid., G. O. no. 158. A private found guilty of burglary was sentenced to dishonorable dismissal, forfeiture of pay, and three years in the penitentiary. General Ruger, in commenting upon this, stated: "The sentence, in the foregoing case, by act of Congress approved March 3, 1863. . . should have ordered a punishment not less than that prescribed for burglary, by the laws of North Carolina [death]. The aforesaid act of Congress having not been complied with, and it not being practicable to reconvene the Court, owing to the muster out of service of its members, the sentence is disapproved, and the prisoner will be released from arrest, and returned to duty." A queer bit of reasoning!

Shooting at Negroes to scare them resulted in sentence of loss of pay for six months. A case of burglary was tried

109. Ibid., G. O. no. 181. The offense occurred July 4, 1865, at Charlotte.

at Raleigh in July, 1865, and a private was dismissed


from the service with loss of pay for drunkenness, passing
a counterfeit coin in Alamance County, and striking a 111 superior officer. But, after May, 1865, most of these

111. G. O. no. 109, General Orders, North Carolina, 1865; MM, 2526. The offense occurred June 10.

trials involved military discipline at the posts of Raleigh and Wilmington, wherein soldiers became drunk and made public exhibitions of themselves or were absent without leave. Sentences inflicted varied from stiff reprimand to thirty days of hard labor and forfeiture of pay for that period or else dishonorable dismissal, depending upon the 112 severity of the offense.

112. G. O. no. 86, 87, 164, 170, General Orders, North Carolina, 1865. These cases were tried at Raleigh on May 25, November 15, and November 23, 1865. Two Negroes at Wilmington were given the sentence of thirty days and forfeiture of pay for being A. W. O. L. from detail as city guard November 4, 1865. G. O. no. 185.

As noted above in the case of Temperance Neely,

113. Supra, 43-44.

the question was raised in July, 1865, whether a civilian was amenable to military jurisdiction. Shortly before this case was tried, the question had been raised in correspondence between Governor Holden and the military authorities. William A. Marcom, of Chatham County, after shooting a Negro whom he accused of stealing his mule, surrendered himself
into Governor Holden's custody. As there was no civil tribunal, the governor turned him over to Major General Cox, adding:

"I trust it will not be long before a civil magistracy will be established; and meanwhile I would respectfully suggest that you examine into the facts and do with the offender whatever you may deem right, in the way of bail or imprisonment, until the civil law can be applied in his case." 114


General Cox ordered Marcom to be held in military custody "until the civil court shall be organized and can take custody of the matter." He further advised the governor:

"Should the delays be such, or the accumulation of cases so great, that it should become important to dispose finally of them, I will whenever it meets your approbation order military commissions to try them." 115

115. Ibid., Cox to Holden, June 22, 1865.

This correspondence clearly indicated cooperation between the civil and military authorities and pointed to civil trials. On July 19, Governor Holden requested General Ruger to turn Marcom over to the civil authorities of Chatham County, since the county had been reorganized. 116

116. Ibid.

General Ames, replying for Ruger, refused, holding that the killing was deliberate and the enormity of the crime required
a military trial. A few days later, the governor

requested that three citizens of Person County, arrested
for military trial upon charge of assault upon a Negro, be
turned over to the civil authorities. He stated that this
was a matter in which the civil courts had "sole and con-
cclusive jurisdiction," that impartial justice would be
administered, and that this course would avoid "any un-
pleasant conflict between the civil and military authori-
ties." General Ruger replied that military tribunals

had jurisdiction "in all that relates to the preservation
of order," "prior to the complete restoration and full
operation of civil law." His answer also contained a
strong indictment against the state of injustice to
freedmen:

"Of late several cases of homicide of freedmen
by whites have been brought to my knowledge but in no case
so far as I have learned was any arrest made by the magis-
trates or civil officers, and no attempt had for investi-
gation. From my own observation, and information obtained
from the commissioner of Freedmen, I am of the opinion that
acts of unlawful violence towards the freedmen are becoming
more frequent. The first effect on the minds of the people
of the dispersion of the rebel forces and the occupation of
the country by our troops, is, in a measure wearing off,
and the apparent apathy and stupor resulting from the changed condition of things, is replaced in the minds of those who give up Slavery with reluctance, by feelings of hostility to the freedmen. Under the circumstances, I think that the restraining influence of prompt trial and punishment of offenders, particularly those guilty of homicide, by military Commissions is the only adequate remedy for the existing evil. The action of Grand Juries would not I fear, under the condition of things now existing in the State, correct the evil.\footnote{119}

\footnote{119. \textit{Ibid.}, August 1, 1865.}

When Governor Holden protested against this indictment and accused the general of denying the existence of civil law in North Carolina, the latter qualified his assertion by stating that he did not intend to say that the people of North Carolina were not law-abiding, nor their juries to be trusted. In his opinion the condition of the times, the result of war, lay at the bottom of violence to freedmen. He had "none but feelings of kindness towards the civil officers, and people of the state of North Carolina." However, in his opinion, martial law still existed except as modified by Presidential proclamation. Finally,\footnote{120. \textit{Ibid.} Ruger to Holden, August 11, 1865. This correspondence over these two cases is summarized in Hamilton, \textit{op. cit.}, 161-162.}

Governor Holden and General Ruger reached a definite agreement. Since the laws of the State did not admit the testimony of Negroes in cases wherein white persons were
concerned, the civil courts would handle criminal cases
in which white persons only were involved. All cases in-
volving Negroes, or whites and Negroes together, were
left to military courts.

121. Ibid., 163. The correspondence between Holden and
Ruger is in G. P., Holden, 1865, of date of September 14,
1865.

Several complaints were made of maltreatment of
Negroes by members of the local police forces. Reference
has already been made to the supervision of the personnel
of these forces by the military authorities. The

122. Supra, 31-32.

military authorities also investigated reports of such
charges. One investigation resulted in a trial before a
military commission. The defendant was found guilty of
maltreatment and assault and battery and was sentenced to
thirty days imprisonment at Fort Macon. But in another

The trial was held at Raleigh, September 1. The defendant
was of the Johnston County force.

case, the charges were found completely untrue. In this
case, a county commissioner from Sampson County, whom
Governor Holden represented as a "loyal and truthful man"
had written that the county police were assisting original
owners of Negroes in virtually repossessing them and that the Negroes were hung up by their thumbs if they refused. His letter contained lurid accusations that former masters, aided by the police, were robbing the Negroes of their real and personal property, that the practice of hunting them down by dogs was more common than in the days of slavery, and that, in general, the county police had usurped all judicial power: the loyal people of Sampson were having "a hard time of it." Governor Holden sent this account to General Ruger and requested a rigid investigation. The matter was investigated by one Major


S. C. Oliver, The county commissioner, when faced by the investigator in the presence of many witnesses, acknowledged that he did not know of a single instance to back up his statements, that he had "only reported rumors," that, in fact, things had "decidedly changed for the better—everything seems to be working satisfactorily." The entire list of charges disappeared into the thinnest air. The investigating officer closed the matter by saying that everything seemed quiet, that although most of the police force officers had actively supported the Confederacy they had willingly returned to allegiance to the United States, that he found no dereliction of duty, and that in his
opinion no injustice was being done to the Negroes. The

125. Ibid. Record of the investigation accompanying the letter.

investigation disclosed the fact that the commanding officer of the district had given the captain of police permission to tie Negroes up by the thumbs instead of whipping them.

126. Ibid.

Other reports were made of maltreatment of Negroes by local police.

127. E.g., the statement of Col. Whittlesey before the Joint Committee on Reconstruction. "They have taken negroes, tied them up by the thumbs, and whipped them unmercifully. I have been obliged to arrest them in several instances and bring them to trial for abusing negroes... They thought they were executing the laws of the State, and that they were doing what they were required to do as policemen. It is very difficult for the people of the South to look upon the negro as a free man -- as having rights such as white men have."

But the reports of cruelties to Negroes were not limited to the activities of the local police. Statements were sent to the New York Tribune that the military authorities tied Negroes up by the thumbs, permitted whipping, and forced them to suffer indignities. The Sentinel stated

128. Special Correspondent E. S. [Elias Smith] in issue of July 15, 1865. "It has been no uncommon thing to see negroes tied up by the thumbs in the capitol grounds at Raleigh for petty offenses, or walking under guard, with their heads protruding through a flour barrel, in the most public streets,
wearing a large sign, with the word 'thief' displayed in large letters thereon . . . . The colored people have been knocked down, robbed and regularly assaulted by scamps wearing the Union uniform in our public places, apparently without any attempt to punish the assailants.*

In the issue of September 5, 1865, he reported that near Louisburg, the military officer encouraged whipping.

In one of its issues: "Hanging by the thumbs is a very common punishment for offenders. We observe that recusant freedmen come in for their full share on our streets. We understand some of them say, it is 'worse dan de cowhide old Massa used!' " In fact this form of punishment was

129. August 16, 1865. The Sentinel was a Raleigh newspaper conservative in politics.

the usual one administered by the Raleigh provost marshal court.


Meanwhile, the Freedmen's Bureau had made its appearance in North Carolina. Created by act of March 3,

131. The standard work on the Bureau generally is Paul Skeels Peirce, The Freedmen's Bureau, a Chapter in the History of Reconstruction, State University of Iowa Studies, III, no. 1. (Iowa City, 1904); the best single account of its work in North Carolina is in Hamilton, op. cit., ch. VII.

1865, as a bureau in the War Department and operating under the order of a commissioner appointed by the President,
this agency exercised wide judicial powers. A general circular issued by the commissioner on May 30, 1865, indicated the latitude of those powers:

"In all places where there is an interruption of civil law, or in which local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and the laws of Congress, disregard the negro’s right to justice before the law, in not allowing him to give testimony, the control of all subjects relating to refugees and freedmen being committed to this bureau, the assistant commissioners will adjudicate, either themselves or through officers of their appointment, all difficulties arising between negroes themselves, or between negroes and whites or Indians, except those in military service, so far as recognizable by military authority, and not taken cognizance of by the other tribunals, civil or military of the United States."

As the laws of North Carolina did not permit Negro testimony, the State came within the sphere of the bureau’s judicial activity.

Colonel Eliphalet Whittlesey was appointed the assistant commissioner in North Carolina and entered upon his duties on July 1, 1865. On July 15, 1865, he issued a general circular defining the duties of bureau officers. Among other things, they were to protect the freedmen from
injustice;

"In doing this, great prudence and good sense will be requisite. Complaints are often exaggerated; sometimes utterly false. Arrests should not be made until careful inquiry has furnished ground for belief that wrong has been done. This preliminary investigation may be made by requesting the parties between whom difficulties have arisen to meet the officer of this bureau. In ordinary cases an explanation and settlement may be effected at once. But in cases of violence and personal assault, a requisition should be made upon the district or post commander. . . for a sufficient military force to arrest the alleged criminal, in order that he may be brought before a proper court for trial. Civil courts, before which the testimony of colored witnesses is not admitted, are not competent, under existing regulations, to try any case in which the interests of freedmen are involved. The jurisdiction of such courts will not be recognized by officers of this bureau." 135

135. House Executive Documents, no. 70, op. cit., 3-4.

Three months later, he more definitely defined judicial functions of bureau officers by stating that they might punish light offenses by fines not exceeding one hundred dollars or thirty days imprisonment. Cases of grave crime were to be reported to the district commander together with a list of the charges preferred and names of witnesses. When practicable, bureau officers were to have one or two citizens of each county, acceptable to both Negroes and whites, assist them in these duties.

136. Ibid., p. 7.

The agreement concerning civil and military jurisdiction made by Governor Holden and General Ruger af-
feated the bureau also. General O. O. Howard, com-


missioner of the bureau, hoped that civil judges might be
designated as agents of the bureau, as was done in Alabama,
in order that civil methods of procedure, except where
distinctions were made in regard to color, might be employed
in the administration of justice. Governor Holden

138. Ibid., Howard to Holden, September 13, 1865. "In our
country civil courts ought to be preferred the moment their
jurisdiction is commensurable with the rights and necessi-
ties of the people."

replied to this suggestion by referring to the agreement he

had arrived at with General Ruger and added that he pre-
ferred to refer the matter of Negro testimony to the State
Convention which would meet soon. He trusted that the
civil courts would soon be given untrammeled jurisdiction,
feeling confident that, if the whites and Negroes were
left to themselves, the freedmen would receive justice at
the hands of the whites.

139. Ibid. Holden to Howard, September 26, 1865. "Such
when uninfluenced is the natural tendency of the white
and the colored people who have previously lived together
..."
were, for the figures cannot be had in many cases. For the quarter ending September 30, 1865, there were 257 cases of difficulty reported in full, twelve cases of grave character reported for trial, and "several thousand" not reported in writing. For the quarter ending Decem-


ber 31, 1865, there were 325 cases reported in full, thirty-seven cases of grave character reported for trial, and 3,043 cases not reported in writing. In his first

141. Ibid.

report, Colonel Whittlesey stated that many Negroes felt that "freedom" meant leaving their old homes, while others demanded a share of their masters' property. On the other hand, he reported, the former masters looked upon the freedmen with hate and fear, regarded them as idle and insolent, and treated them with unusual cruelty. The bureau, he felt, was needed to restrain excess on both sides, and it had done much to restrain violence and injustice. His report placed emphasis upon cruelty (largely

142. Ibid., 187-199.

in the form of whipping) and economic injustice to Negroes. A noted authority holds that, while the bureau prevented
injustice in some cases it perpetrated injustice in more,
and usually accepted Negro testimony as of more value than
that of whites. Probably much depended upon the charac-

der of individual officers.

143. Hamilton, op. cit., 311.

144. E. g., John Graham, writing to his father, William A. Graham (a man of former national importance), told of difficul-
ties his brother and three others had with a Negro. The Superintendent of Freedmen at Charlotte, was ill when
their case was brought up, and his assistant was about to
fine the whites ten dollars each, when the Superintendent
appeared on the scene and dismissed the case. His letter
indicates that the whites preferred to deal with the regu-
lar Superintendent, Barnett, and avoided the assistant.
John Graham to Wm. A. Graham, September 14, 1865. W. A.
Graham Papers, Southern Historical Collection, University
of North Carolina.

There is a wealth of manuscript material in the
National Archives upon the Freedmen’s Bureau. The writer
had no chance to examine it, as it was not ready for
examination and needed classification. It would make a
fine field for investigation and would undoubtedly yield
the very material hitherto unworked to give a fair idea of
the bureau’s judicial work.

The provisional government terminated December 28,
1865. President Johnson’s proclamation appointing Provi-
sional Governor Holden provided that a Convention should be
held, which was to restore the State to its constitutional
relations with the United States government. Elections for
the Convention were held in September, and it met on
October 2, 1865. In the ensuing election for State officers

145. Its activities are described in Hamilton, op. cit.,
120-133.
held November 9, Jonathan Worth was elected governor.
The newly-elected General Assembly met on November 27, 1865, but President Johnson requested Governor Holden to continue in office, which he did until directed in late December to resign.

146. Ibid., et passim. 139-146.

It was provided by an act of the Convention that the term of Governor Holden's appointees should terminate at the close of the session of the General Assembly.

147. Ibid., 127. The session terminated in December.

The Assembly elected a full set of judges. Five of the provisional superior court judges and two of the provisional solicitors were re-appointed. But it failed to provide


for the appointment of justices, so that there were no magistrates until it met in February, 1866. This was a crippling feature and occasioned much excited comment.

149. Infra, 71-74.
By December of 1865, the State had passed through the opening phase of Reconstruction. It had felt the rigors of economic, social, and political confusion and distress that came with the end of the war. It experienced full military rule in March, April, and May of 1865. Then came the provisional government, the majority of whose officers were not appointed until July and August and whose appointments terminated in December, 1865. Their authority was circumscribed by military pronouncements. In effect, most of the administration of justice was done under military authority, minor matters being handled by the Freedmen's Bureau, major ones by military commissions. Though most of this administration was performed conscientiously, except for the trials of whites accused of offenses against Negroes and for the conflicting character of the Freedmen's Bureau, it irked civilians to be governed by martial law. The problem of trials by military commission

150. E. g., the Sentinel, August 17, 1865, in commenting upon a quotation from the Salisbury Daily Union Banner which was pleased to see that law and order prevailed, reminded people that all civil functions exercised in the State were only by the permission of the military authorities.

was to bulk much larger and to have more serious effects in 1866 and 1867, but much of the background of those years can be seen in 1865, in the very trials themselves. The race question began to loom. The law administered was mainly
An editorial in the Standard of June 26, stated that no suits for debts or damages could be heard and no courts competent to try suits for debts until the legislature appointed judges and magistrates to hold courts in the usual way. "Hence those in debt have the satisfaction of knowing that the present crop and the one of next year can be raised and put into market before their debts can be collected by law."

North Carolina remained a military province, as it were, and the long years of Reconstruction lay ahead.
II

CIVIL-MILITARY RELATIONS DURING THE ADMINISTRATION

OF GOVERNOR WORTH, 1865-1868

After entering upon his duties, Governor Worth issued an address to the people of North Carolina congratulating them upon the discontinuance of the provisional government and upon the restoration of civil government. This address indicated the immediate problems faced in the administration of justice. Judges of the Supreme and Superior courts would be qualified without delay and would hold courts at the times prescribed by law. As no justices of the peace had been appointed by the General Assembly, the next term of county courts could not be held legally in some counties, but the governor felt that if the provisional magistrates held such courts and administered justice, the General Assembly would probably validate their acts. The chief problem to be faced, however, was that of transition from military to civil government. Though, in this transition, the people could not expect that the whole machinery of the new government would be in perfect order at the beginning, yet the General Assembly would soon remedy all irregularities; the governor believed that, in the meantime, all classes would strive to observe law and order.
1. The address, delivered December 30, 1865, is given in *North Correspondence*, I, 457-459. In his plea for observance of law and order, Worth believed that the people would "prove how groundless is the calumny, that there are still among us persons who are disloyal to the Government of the United States."

The first judicial problem faced by the newly-organized civil government arose out of the failure of the General Assembly in December, 1865, to provide for the appointment of justices of the peace. Since the appointments made by Governor Holden terminated with the close of the provisional government, there were, in consequence of this failure, no magistrates. As a result, the entire machinery of county government and local administration of justice was stopped. The situation aroused considerable complaint and comment; not even a marriage license could be issued! As most of the administration of justice had been


3. Newly-elected county officers had to qualify before the magistrates. There being no magistrates, no local officials could qualify!

4. G. P. Worth, 1866, W. A. Albright (Clerk of Alamance County Court) to Worth, Jan. 1, 1866. "I write to ask you to confer upon me the power to issue marriage license as we will have no court until the 1st Monday in March." The governor replied January 8, 1866 (*North Correspondence*, I, 461): "I can confer on you no power to issue a marriage license or do any other official acts — but if you exercise
this power I do not doubt that the Legislature will approve and validate your action."

Samples of complaints may be found in the G. P. For example, B. S. Hedrick, writing to Worth on December 19, 1865, pointed out that it was a terrible mistake on the part of the legislature to omit the appointment of magistrates. An unsigned letter from Winston, N. C., January 3, 1866, stated that a horse thief had been arrested but would have to be turned loose for want of magistrates to investigate his case. And Dr. Cohoon of Elizabeth City wrote January 1, 1866, that the town was without government and needed some municipal law, at least. Worth replied, January 6, that he had no power to appoint officers and that the town would be without government until the General Assembly met. Worth Correspondence, 459-460.

In military hands up to this time, the anomalous condition created no great harm, but civil law could not be administered until the situation was rectified, by action of the General Assembly. Meanwhile, Governor Worth suggested that the justices carry on extra-legally in the belief that the General Assembly would validate their acts. In one case,

5. Supra, 70. See his reply to W. A. Albright, January 8, 1866, supra, 71, footnote 4.

where a horse thief had been arrested and fear was expressed that he might have to be released for want of magistrates to examine him, the governor advised: "You should hold your rogue irregularly if you can't do it regularly." He also made the most interesting assertion.

that all of the justices, commissioned before the War, who did not take the oath to support the Confederacy, and who had not resigned were still in power and could carry on the administration of justice. Immediately a number of

7. Ibid.; also Worth to J. W. Ellis, January 6, 1866. "The only justices we have are those appointed before the war, who never took the oath to support the Constitution of the Confederate States and who have not resigned."

reports came in to the governor of justices who had not taken that oath nor resigned. Some controversy was later

8. E. G. W. M. Shipp to Worth, January 6, 1866. None of the old justices of the town of Lincolnton had taken the oath or resigned. Ibid.; J. T. R. C. Cohen to Worth, January 13, 1866. There were several such justices in Pasquotank Co.; one George D. Hyman wrote William H. Bagley (Worth's secretary) January 13, 1866, that although he had been a captain in the Confederate army and was a "good rebel," he had never taken the oath to support the Constitution of the Confederate States and therefore was eligible to office. He said he was a "loyal citizen now" and had taken the oath of allegiance.

aroused over this suggestion, for some actions taken by such justices were thrown out of court by magistrates appointed later by the General Assembly. As late as 1867,

9. Ibid.; J. T. R. C. Cohen to Worth, March 16, 1866. Certain cases of bastardy and some peace warrants issued by the old justices had been thrown out of court at the March term of the county court held by magistrates appointed by the legislature.

the attorney general of the State contended that magistrates
appointed before the War, who had never resigned or taken

10

the oath to support the Confederacy, were qualified.

10. Ibid., E. B. B. Sloan to Worth, August 28, 1867, and

Sion H. Rogers (Attorney General) to Snow (Worth's private

secretary), August 27, 1867.

However, the Supreme Court of the State had held earlier

that every officer of the State holding office during the

war was politically dead at its close. Governor Worth

11. In re Hughes, 61 N. C. 68-69. The court held that by

Art. VI of the United States Constitution, all Federal and

State officers must take the oath to support the Constitution

of the United States.

further suggested that any superior court judges who had

qualified might administer oaths, as might clerks of

county or superior courts who had been elected and quali-

12

fied. Effective relief, however, was provided by the

12. G. E., Worth, Worth to T. J. Wilson, January 6, 1868.

General Assembly, which, in special session, validated

the acts of the provisional civil officers done after the

discontinuance of the provisional government, continued

the terms of provisional sheriffs and clerks of county and

superior courts, and provided for the organization of

13

county courts under the new civil government.

13. Laws of North Carolina, 1866, ch. 3692-94. (February 1,

1868.)
The next problem was to secure to the civil law jurisdiction over all types of cases, the primary objective being cases involving Negroes, and whites and Negroes. As noted above, the agreement reached by Governor Holden and General Rager in September, 1865, provided that the civil courts would handle cases involving whites only. As


the laws of North Carolina before and during the War prohibited Negroes from testifying against whites, jurisdiction over cases involving Negroes was taken over by the Freedmen's Bureau. Bureau agents were given authority to try cases wherein the punishment did not involve more than a one hundred dollar fine or imprisonment not exceeding thirty days. Cases of grave crime were tried by military commission. This state of things remained un-

15. Hamilton, op. cit., 155; Supra, 63. Whittlesey's circular of July 15, 1865.

16. Supra, 63.

altered until January, 1866.

In December, 1865, Judge Ralph P. Buxton was applied to for a court of Oyer and Termner in Robeson County, principally to try Henry Berry Lowrie, a mulatto
and leader of the famous "Lowrie Gang." Before taking

17. On the Scuffletonians, vide James J. Farris, "The
Lowrie Gang: An Episode in the History of Robeson County,
North Carolina, 1864-1874," in Trinity College Historical
Papers, IV, (1925), 55-93.

any action, Judge Buxton asked Governor Holden if the case
could be handled by a civil superior court. The judge be-
lieved that it could, "inasmuch as upon his trial, under
the laws of North Carolina, colored testimony would be
admissible either for or against him." According to the


laws of the State (passed before the war) free persons of
color were citizens and were entitled to be tried by jury
19 and to prosecute and defend suits. The matter was re-


ferred to General Ruger, who gave his answer to Governor
Worth on January 16, 1866:

"In cases where there is no distinction either as
to evidence or punishment between Whites and Blacks the Civil
Courts will not be interfered with. As I understand the
matter in all cases where the State is a party and a freed-
man defendant the evidence of freedmen will be received for
and against in the State Courts. Such being the case there
is no objection to the trial of Freedmen by the Civil Courts
for Crimes in cases in which the law makes no distinction
in the punishment." 20

This extension of the Holden — Ruger agreement was confirmed by the latter on February 13, 1866, but the military commander notified Governor Worth that criminal cases wherein Negroes were charged with offenses, punishment for which was not necessarily the same for whites and blacks, would be tried by military commissions. He added that Freedmen’s Bureau agents would have jurisdiction over cases wherein the offense, if committed by a white man, was, by the laws of North Carolina, punishable by an imprisonment not exceeding one month and a fine not exceeding one hundred dollars.

21. Ibid. Campbell (for Ruger) to Worth; House Executive Documents, no. 120, 39 Cong. 1 Sess., 10–11. The clause in the extension stating that offenses punishable by imprisonment for thirty days and fine of one hundred dollars apparently referred to offenses committed upon Negroes by whites. Thus, a circular of instructions to bureau officers issued by Colonel Whittlesey on February 16 stated that in cases of offenses upon Negroes by whites, bureau officers would have jurisdiction where the punishment was imprisonment and fine as above, while military commissions would handle more serious cases.

Meanwhile, the whole question of the new position of the Negro and of necessary and advisable alterations in his legal status had come up before the General Assembly.

A vital element of this problem was the position of the Negro before the courts. The Convention of 1865 had

22. It is not the intention of the writer to go into all the provisions of the North Carolina "black code." The code, as passed on March 10, 1866, is given in the Senate

Authorized a commission appointed by Governor Holden to study the question and present a report to the General Assembly. This commission proposed a scheme of legislation which was accepted by the Assembly, with a few minor changes. The major provisions of the legislation, adopted March 10, 1866, ran as follows:

1. Negroes and their issue to the fourth generation, even where one ancestor was white in each generation, were deemed persons of color.

2. Persons of color were placed on the same status as were free persons of color prior to emancipation.

3. Persons of color were entitled to the same privileges enjoyed by whites in prosecuting and defending suits at law and in equity.

4. Persons of color not otherwise incompetent were capable of giving evidence in all cases wherein rights or property of persons of color were at issue or wherein offenses by or against them were involved. Their evidence in all other cases was inadmissible except by consent of the parties of record.

5. Whenever a person of color was examined as a witness, the court was to warn him "to declare the truth."
6. Punishment for crime was to be the same for whites and for persons of color alike, except in cases of assault with intent to commit rape upon the body of a white female. If the crime was committed by a person of color, the punishment was death.

23. If by a white, it was punishable by fine and imprisonment. Hamilton, op. cit., 154.

7. In case of conviction of any person of color for an offense committed before the passage of this code, he was to be punished "in like manner only as if he were a white man."

24. This summary is drawn from Senate Executive Documents, no. 6, 39 Cong. 2 Sess., passim, 197-200.

On its face, the legislation placed the Negroes upon the same status as that of free persons of color before the War. However, it really put them in a far better position by extending to them the right to testify in all cases wherein the issues at law involved their rights and in other cases by consent of the parties. However, this extension was granted reluctantly, for many members of the General Assembly had pledged themselves to their constituents to vote against Negro testimony. To make amends for the violated pledge, the legislators inserted a proviso that the section bearing upon Negro testimony would not take effect until jurisdiction in matters relating to freedmen was committed fully to the civil courts. The lawmakers quite
24. Hamilton, op. cit., 155; Worth Correspondence, I, 509.

definitely felt that Negro testimony was unreliable.

25. Hamilton, 155; for a previous example of opinion
vide supra, 45-46.

Whether the extension was granted upon grounds of justice
to the colored race or upon grounds of policy, in the hope
of securing the withdrawal of the Freedmen's Bureau and of
the restoration to State courts of full jurisdiction in
cases relating to the Negroes, would be hard to say. Prob-
ably, the motives were mixed. Negro testimony was not


placed upon a footing equal to that of whites. In the face

27. One writer, following the views of Du Bois, has held
that the uppermost factor in the minds of the lawmakers was
the preservation of white civilization by making the Negro
"know his place" in the new order of things. He had in
mind the entire "black code" but cited the definition of
"persons of color," the restrictions upon Negro testimony,
and the death penalty in cases of attempted rape upon white
women as examples. J. B. Browning, "The North Carolina
the "black codes" in general were given in his "Reconstruc-
tion and its Benefits," in American Historical Review, XIV.
(July, 1910), 734: "No open-minded student can read them
without being convinced that they meant nothing more nor
less than slavery in daily toil." These views accord with
the Radical interpretation of the codes.

On the other hand, there is the interpretation of
the Dunning school, representing the views of the whites in
the South, that these laws were characterized by justice and
 moderation. Hamilton, op. cit., 156. This view holds that the Negroes, freshly emancipated, ignorant and unlettered, with little or no knowledge of the duties and privileges of freedom, could be granted those duties and privileges only gradually. Followers of this interpretation do not hesitate to show that Northern States, particularly Illinois, had identical and, in some instances, even more stringent laws. Vide Robert Selph Henry, The Story of Reconstruction, (New York, 1938), 104. A good, moderate discussion of all the “black codes” from this point of view can be found in ibid., chs. 13, 14, 17. General discussions, of course, emphasize the Mississippi code, as it was the first one passed, the most stringent, and the one that received most attention by the nation.

Both interpretations could easily be used to camouflage immediate objects, and, therefore, were susceptible to use which cannot be defined as “impersonal.” However, one can hardly see how such legislation could be regarded as a return to slavery per se, unless one admits that similar legislation in Northern states had the same object. If that be true, the whole Radical interpretation of Northern charitable aims falls to the ground. “Charity begins at home.”

of a rising tide of race issue, fostered by various agencies, the fears of the whites, activities of the Freedmen’s Bureau, the reaction against continued military rule, and


by the activities of northern Negroes who came to the State in 1865-1866 to begin a movement for equal rights and privileges, the whites had no intention of considering the Negroes as their equals. It is unreasonable to expect,

29. For the activities of the Northern Negroes vide ibid., 150; Even Governor Holden protested against outside Northern influences which were tending to destroy the confidence of the freedmen in their old masters and were “stimulating them to a course of conduct towards the whites which must engender
a very strong prejudice against them and which if persisted in, must create such a bitterness of feeling as will eventually lead to a conflict of races." — G. B. Holden, Holden to C. O. Howard, September 26, 1865.

Governor North, whose views doubtless correlated with those of most whites, unbent in a letter of September 11, 1865, to his brother: "I have no hesitation that it would be better for you and for everybody else who is a white man to leave North Carolina. The South is never again, -- at least for several generations, -- to be the happy prosperous country it once was. We who were born here, will never get along with the free negroes, especially while the fools and demagogues of the North insist they must be our equals. This will not be tolerated. As an inferior race they will degenerate and retard all prosperity. ... While the two races remain here in any thing like their present proportions, there can be neither comfort nor prosperity here." North Correspondence, I, 417.

in the light of conditions of the times and of past history, that they could have. Viewed from the present perspective, it would have been best to abolish all legal differentiation in regard to testimony. Such action would have helped deprive Radical leaders in Congress of political ammunition, and certainly the admission of Negro testimony would have had no appreciable practical effect upon jury decisions.

30. Judge Campbell of Mississippi stated: "The idea that it is dangerous to admit negro testimony against whites ... will be dissipated in the mind of every sensible man who calmly reflects ... that a jury of white men ... and a white judge with a court house crowded with white spectators, and white men as attorneys in both sides, will not likely be deceived and duped into improper convictions." Quoted in Henry, Story of Reconstruction, 97.

But the legislators did not have the benefit of the experience of today, and they were in no position to judge impartially, for the experiences of war were hard upon them.
The provision of the legislation imposing different sentences upon whites and Negroes in cases of attempted rape upon a white woman was the most indefensible. It is well to note, however, that even military authorities had the same point of view.

31. Supra, 52.

Upon the passage of this legislation, the question of civil and military jurisdiction was renewed. As has been seen, by January or February, 1866, civil courts were permitted to handle not only all cases involving whites only but also those cases in which Negroes were accused of crime and wherein there was no differentiation between whites and Negroes in the punishment meted out. But cases of whites accused of offenses against Negroes were reserved for trial before military tribunals. Also, Freedmen's Bureau agents could handle cases (mostly larceny) wherein white men were punishable by imprisonment not exceeding one month and a fine of one hundred dollars.

32. Supra, 75-77; House Executive Documents, no. 120, 39 Cong. 1 Sess., XII, 4. This document, containing Colonel Whittlesey's report for the quarter ending March 31, 1866, indicates that the bureau agents were permitted to handle such cases because colored testimony was inadmissible. p. 7.

Colonel Whittlesey held that cases of white men accused of larceny and other crimes were for the most part reserved
for military commission trial. Hence, the agreement was

33. Ibid., 8.

indefinite. The State authorities hoped that, with the passage of the new legislation, civil jurisdiction in all cases would pass to the civil courts. In this view they proved mistaken. The stumbling blocks were the proviso that the section referring to Negro testimony should not go into effect until jurisdiction in matters relating to Negroes should be fully committed to the civil courts of the State, the discrimination between Negro and white testimony, and the differences in punishment in cases of attempted rape upon white women.

Governor Worth appreciated the significance of the proviso and disapproved it. He used every legitimate means to have it struck out, even enlisting the aid of President Johnson. His efforts failed. However, he

34. G. P., Worth to Johnson, March 4, 1866. Worth said that sentiment in both Houses favored the proviso, but he thought it would be struck out if Johnson disapproved. Johnson wired, March 6: "Policy at this time would suggest the passage of the bill without the proviso." See also Worth to D. L. Swain, March 16, 1866, in Worth Correspondence, I, 506. "I used every legitimate means to have this proviso stricken from the bill, but a large number of the members who had pledged themselves to their constituents to vote against negro testimony -- now convinced that both justice and policy required the opposite vote, -- thought this proviso a necessary shield between them and their constituents. But for these pledges the bill would have passed almost unanimously without the proviso."
asked David L. Swain and William A. Graham, ex-governors of the State in Washington, D. C., at the time, to endeavor to secure an order committing jurisdiction on matters relating to Negroes to the State Courts. Ex-

35. Ibid.

governor Swain submitted an official copy of the act to General C. O. Howard, Commissioner of the Freedmen's Bureau. General Howard's first reaction was to transfer jurisdiction, but, upon noting the distinctions with regard to the admission of testimony and the proviso requiring the bureau fully to commit jurisdiction, he changed his opinion and instructed Colonel Whittlesey to examine the laws of North Carolina carefully and recommend what action to take. General Howard did not believe there was any need of haste, as the Civil Rights bill had been passed and this provided against such distinctions as made by the act. Colonel Whittlesey decided it was not


prudent to take any steps at once to transfer jurisdiction entirely to the civil courts.

37. House Executive Documents, no. 120, 39 Cong. 1 Sess., 5.
In early April, 1866, Colonel Whittlesey protested against a sentence of whipping imposed upon freedmen by Judge Fowle in superior court. His protest stated that cases of white men charged with larceny and other crimes were reserved for the most part for trial by a military commission, and, since, United States Courts could not inflict whipping while State Courts could, the result was discrimination against the Negro race. He requested Judge Fowle to suspend the penalties. The judge replied, citing an example from Johnston County of the whipping of a white man for larceny, that the civil courts made no unjust discriminations, that punishment by whipping was inflicted upon whites and blacks alike, and that the injustice claimed could be removed by yielding exclusive jurisdiction in cases affecting Negroes to the civil courts. He further stated that he had consulted General Ruger, and was informed that, although the general did not approve of whipping as a punishment in larceny cases, he would not interfere, as long as the law was administered impartially to blacks and whites alike. Judge Fowle refused to stay execution of the laws of the State unless the commanding general officially informed him otherwise.  

38. Ibid. The letters were dated April 4, 1866.

Colonel Whittlesey then took advantage of the judge's
suggestion of transfer of jurisdiction to ask if, in his opinion, the civil courts, under the recent legislation, could receive the testimony of colored witnesses against white men accused of larceny or other crimes. If so, the chief stumbling block to the proposed transfer was removed. Judge Fowle refused to answer the question, upon the ground that "a judge is never expected to express an opinion in advance upon a question that may soon be brought before him for judicial decision." He implied, however, that the legislation extended to Negroes all that they were entitled to, and the tone of his reply indicated that he thought it most unfair to continue military tribunals merely because Negroes were not permitted to testify in cases involving whites only, except by consent of the parties. His reply also protested strongly against

39. Ibid., 7-8. The second exchange of letters occurred April 8. Fowle's statement is as follows (p. 8): "If not permitting negroes to testify in cases affecting white persons alone, where the parties interested refuse to consent to their being admitted as witnesses, is to be considered a reason for interference with the administration of the laws of North Carolina, all right-minded citizens will hail with delight the coming of that hour in which a tribunal thus perpetrated shall be numbered with the things that were."

the degradation of North Carolina's citizenry by the continued use of military commissions. Colonel Whittlesey closed the heated correspondence by refusing to discuss the
character of military tribunals. He hoped that a definite decision upon the status of the Negro would soon come.

40. Ibid., 9.

While Judge Fowle refused to give an opinion, it was clear from the tone of his letter that Negroes under the new legislation could not testify in cases involving whites only except by consent. Indeed, the legislation left no room for doubt. It was equally clear that the bureau refused to transfer its jurisdiction over Negroes to the civil courts until the laws of the State permitted them to testify in all cases. In commenting upon the correspondence, Colonel Whittlesey complained that whipping was exciting much ill-feeling among the Negroes, who regarded it as a relic of slavery.

41. Ibid.

Matters remained at this stage until July, when the Convention abolished all discriminations and made the penalties the same for both races in all offenses; where-

42. Hamilton, op. cit., 156, 310.

upon, General Robinson, who had succeeded Colonel Whittlesey as assistant commissioner, directed bureau officers and agents to refer to the civil courts all cases involving
Negroes, except claims for wages due under contracts approved or witnessed by officers of the bureau. This exception was made for the reason that the condition of the freedmen was such that they could not be submitted to the delay sometimes incident to civil court proceedings.


His order also empowered military officers to make arrests and to detain for trial by proper judicial tribunal all persons charged with crime, irrespective of color, in case of failure, neglect, or inability of the civil authorities to arrest and bring to trial the same.

44. The order (G. O. no. 3, July 13, 1866) is printed in Senate Executive Documents, no. 6, 39 Cong. 2 Sess., 101.

In a later order, General Robinson made it clear that claims for wages made under contracts not approved or witnessed by bureau officers would be turned over to civil authorities for adjudication. However, bureau officers or agents were to attend the trials of such cases and report the action taken, in order that, if the proceedings were unnecessarily delayed to the disadvantage of the freedmen, jurisdiction might be resumed by the bureau.

45. Ibid. G. O. no. 5, August 2, 1866, 102.
During the period of negotiation between the civil and military authorities over this problem of jurisdiction, military tribunals continued to try citizens accused of grave crimes, mostly offenses against Negroes. Of these cases the most famous was that of Mrs. Elizabeth Ball, of Warren County, tried before a military commission in Raleigh in February, 1868, for the murder of a Negro. The evidence upon the trial showed that the Negro had made threats against Mrs. Ball, that he and a white boy came in her yard against her orders, and that they advanced when she threatened to shoot. But, as to the actual shooting, it was less clear. The white boy, whose character for truth was impeached by several witnesses, declared Mrs. Ball fired deliberately. A defense witness said that she killed in self defense. The commission held her guilty of manslaughter and sentenced her to three years imprisonment. General Ruger approved the findings, but mitigated

46. MM'3616.

the sentence to one year imprisonment. The case attracted

47. G. C. M. O. no. 39, General Orders, Atlantic District, 1866.

much attention and elicited several letters in behalf of Mrs. Ball to President Johnson. Among them were requests
for pardon from Governor Worth and former Governor Holden.

48. In MM 3616. Worth held it was a clear case of self defense. Holden refused to go into the merits of the case, but stated that not even the colored people would complain. James R. Moore wrote that both colored and white people believed she acted in self defense.

Although Judge Advocate Holt refused to recommend clemency, holding that Mrs. Ball was clearly guilty, that it would promote law and order to let the punishment stand, and that it would be "a low estimate of the value of the life of a freedman, to hold that the taking of it, under such circumstances, as have been detailed" could be atoned by only two months imprisonment, President Johnson pardoned her in April, 1866. In the other four cases tried, there could be no complaint of injustice to the whites; if anything, the commissions (at Wilmington and Raleigh) favored the whites. In one of them, two citizens received brief im-

50. MM 3460. Benjamin W. Ivey was convicted of assault with intent to kill and was sentenced to ten years imprisonment at Auburn, New York. He had no defense except drunkenness. See G. C. M. C. no. 5, General Orders, Atlantic District, 1866. Several years later, Ivey wrote Governor Holden that he was tried without a witness on his behalf for an accidental shooting, that he was playing with several freedmen and a gun in his hands went off accidentally. His letter was entirely at variance with the facts and is cited here as an example to show how inaccurate later statements could be and how the working of military tribunals might be twisted by civilians. G. P. Holden,

One civilian was acquitted of murder of a freedman shot while stealing corn. There was a good deal of stealing going on, and this trial was indicative of the unsettled conditions of the time. O.O., 1551. In another case a former Union soldier, accused of rape upon a Negro woman, was acquitted. The commission clearly accepted white evidence in preference to that of Negroses. MM., 3908.

prisonment and fine for endeavoring to extort a confession from a Negro, placed in their charge by a policeman of Wayne County, by shooting at him. Curiously, the policeman was not tried for any offense. All of these cases were

51. O.O., 1547; G. C. M. O. no. 60, General Orders, Atlantic District, 1866.

tried before May, 1866.

Six other civilians were tried by military commission during the same period. Of these, only two trials were important; and one of them could be regarded as purely a military case. In the other, Robert P. Waring, editor

52. The trial of Major John H. Gee for violation of the laws of war in his treatment of Federal prisoners at Salisbury, North Carolina. While Major Gee's counsel pled that President Johnson's proclamation of April 2, 1866, removed the jurisdiction from the military to a civil tribunal and sued out a writ of habeas corpus before Judge Fowle, the motion failed, for General Huger declined to obey the writ. Major Gee was acquitted. Hamilton, op. cit., 163-165.

of the Charlotte Times, was fined three hundred dollars for publishing an article tending to arouse hostility to the government.
53. Supra. 33-34.

On April 2, 1866, President Johnson formally proclaimed the insurrection heretofore existent in North Carolina and other states at an end. In accordance with

54. Richardson, op. cit., VI, 429-432.

this proclamation, an order was issued on May 1, 1866, from the War Department directing that trials for offenses committed by civilians were to be committed to existent civil tribunals and were no longer to be held before military commissions. No further trials of citizens by

55. G. O. no. 26, General Orders. This order did not apply to: 1. Camp followers, 2. Contractors or others furnishing supplies for the army and navy, in cases of fraud; 3. Fraudulent claims against the United States Government.

military commissions were held in North Carolina until the First Reconstruction Acts of 1867 went into effect. By this order and the order of General Robinson in July, most cases were transferred to the civil courts.

This arrangement worked satisfactorily, although it was apparent that supreme authority still remained in military hands. Whenever Freedmen's Bureau officers interfered in an unauthorized manner with civil actions, they were reprimanded by General Robinson and the cases were remanded to the courts. General Robinson stated he had
56. E. G. A. B. Shaffer, Assistant Superintendent at Charlotte, took a Negro arrested on a charge of violent assault and battery upon a white man from a deputy sheriff of Mecklenburg County. The Negro had appealed to him for protection against malicious prosecution. Shaffer offered to release the Negro to the sheriff if the latter would show by disinterested witness that the cause was well founded and if the court would accept security for bail. General Robinson ordered Shaffer to arrest the Negro and turn him over to the sheriff of Cleveland County, where the offense occurred. G. P. Worx, W. C. Shipp to Worth, July 20, 1866; Robinson to Worth, July 23, 1866.

H. D. Norton, agent at Morganton, received a reprimand for endeavoring to interfere with civil action in Catawba County in the case of a Negro whipped for larceny. Ibid. L. McCorkle to Worth, August 23, 1866; Report of H. D. Norton, August 31, 1866; Robinson to Worth, August 28 and September 12, 1866.

little cause to regret his action. In his opinion, it had put an end to frivolous and vexatious charges which the Negroes were in the habit of taking before the bureau courts; yet, in sections of the State where Negroes had been treated unfairly, they had been protected by officers of the bureau. Perhaps the most serious difficulty after

57. Senate Executive Documents, no. 6, 39 Cong. 2 Sess., 102; In one instance, wherein Ed. S. Northup reported that a justice of the peace in Bladen County had discharged an offender accused of violence to a Negro and, at the same time, permitted a crowd of loafers to threaten Northup with death, Robinson wrote Worth that if this case were true and similar instances occurred "the military authorities will be compelled to resume jurisdiction as heretofore," and, if necessary, sufficient military force would have to be applied for to protect United States officers from insult. G. P., Worth, Robinson to Worth, August 19, 1866 (with enclosure).

July, 1866, between the civil and military authorities arose
out of the binding of apprentices. The Freedmen's Bureau had exercised authority therein, but under civil law, it was the duty of the county courts. General Robinson, in his report of November, 1866, stated that in some counties the courts had attempted "to re-establish slavery under the mild name of apprenticeship" and that those cases had been promptly examined and no discriminations permitted between Negro and white children. However, the State

58. Ibid. "Children have been taken from their parents, who were able and willing to support them, and bound out to their former masters and owners until they are twenty-one years of age, which can only be regarded as an attempt to re-establish slavery under the mild name of apprenticeship."

Supreme Court, while strictly upholding the laws of North Carolina, emphasized the need of a clear understanding of the rights of apprentices and of masters, in order that the colored people "should be satisfied that they are liable to no unlawful impressments, and that they should see that what is required of them has the sanction of law."

59. Beard v. Hudson, 61 N. C., 183. "It may then be hoped that they will be contented, and will cheerfully submit to what they might otherwise mischievously resist." In this case and that of Ferrell v. Baykin, 61 N. C., 9-10, the apprentices had been bound originally before the War and it was merely a matter of carrying out the law as it stood at the time of the original acts.

In the outstanding apprentice case, in re Ambrose, two Negro children were bound at the September term, 1866, of
New Hanover County Court to their former master, Daniel L. Russell, Sr., but, since neither the children nor their mother were notified of the proceedings until after the decision had been made, General Robinson interfered and ordered the children restored to their parents. This action occasioned considerable correspondence between Russell, Governor Worth, and General Robinson, even to the extent of including General O. O. Howard. The State Supreme Court decided against Russell, holding that persons bound must be present at the time of binding. The court clearly indicated its opinion that where parents or relatives were able and willing to care for children society was not benefitted by giving them to a stranger, interested only in their service. Finally, by the end of the year, civil and military authorities compromised by referring conflicting cases to joint commissions selected for each case. Thus,

60. Robinson called Russell a "designing and unscrupulous man," in effect a kidnapper. Robinson to Worth, October 30, 1866, G. P., Worth; for correspondence between Worth and Russell see Worth Correspondence, II, 827, 828, 832, 830; See also O. O. Howard to Worth, March 12, 1867. G. P., Worth. In this letter it appears that the children had been originally bound to Russell by a bureau officer.


62. G. P., Worth, James V. Bomford to Worth, December 17, 1866; The case of In re Ambrose was referred to a commission composed of General P. D. Sewall (for the bureau) and
W. S. Mason (for the civil authorities). Its report found among the undated papers in ibid., declared the binding illegal and void, partly upon the decision of the State Supreme Court.

cooperation settled this problem. It is evident that the civil authorities endeavored to deal fairly with the Negro.

63. The question of fairness to Negroes by the State Courts is discussed infra, 353-372.

One difficulty between the civil and military authorities, before and after the transfer of cases to State courts, arose out of the prosecution of offenses committed during the war, in which the persons indicted complained that the suits were instituted to "persecute" them for their "loyalty" to the Union cause. As early as January 12, 1866, a general military order was issued from the War Department to protect from prosecution in State or Municipal courts "all officers and soldiers of the armies of the United States, and all persons thereto attached, or in any wise thereto belonging, subject to military authority, charged with offenses for acts done in their military capacity, or pursuant to orders from proper military authority; and to protect from suit or prosecution all loyal citizens or persons charged with offenses done against the rebel forces, directly or indirectly, during the existence of the rebellion. . ." Many complaints of prosecutions of this sort

64. G. O. no. 3., General Orders, 1866.
were made from the western part of the State in 1866 to the authorities at Washington. In April, 1866, General Ruger ordered released from the civil authorities one Jesse Dobbins and thirteen others, indicted for murder while resisting the county militia which endeavored to arrest them for evading Confederate conscription in 1863.

65. Special Order no. 89, April 11, 1869. In G. P., Worth; Infra. 101-102, (and footnote 74). The civil authorities had already released them.

Petitions were sent to President Johnson for protection, asserting that the "rebels" were in control of the civil courts and were wreaking vengeance upon loyal Union men by indicting them for offenses committed during the War, while similar indictments against Confederates were not prosecuted. The petitions were referred to Governor Worth, who, in turn, referred them for investigation to Conservative leaders in the locality from which they came. Their replies indicated that the persons signing the petitions had not been indicted, that, if anything, juries sympathized with men of Union sentiment, and that it was hard for "Southern men" to secure justice. Governor Worth and

66. G. P., Worth, Memorial from Stokes, Forsythe Counties, N. C. and Patrick County, Va., n. d., but undoubtedly about the middle of July, 1866. Thomas J. Wilson, in his report to Governor Worth August 3, 1866, stated that the petition had never been presented to the leading Union men and that Union men controlled the juries, so much so that the Winston Sentinel charged that "Southern" men could not re-
ceive justice. Wilson asserted that he himself had succeeded, as a lawyer, in acquitting several Union men, largely because the juries were prejudiced in favor of them.

A similar investigation by D. D. Ferebee into a petition of May 4, 1866, from Camden County revealed that none of the memorialists had been indicted. Ferebee to Worth, May 24, 1866.

his advisers believed the petitions were got up for political effect. Depositions were sworn out before Captain

67. Worth Correspondence, II, 694. "Master spirits for mischief are at the bottom of it and our poor old State is likely to suffer from the dirty birds willing to foul their own nests to reek vengeance on others."

H. M. Lazelle at Charlotte that Union men were being prosecuted in Moore County for killing a member of a Confederate "conscription party" in 1862. Others were sworn before a

68. Ibid. Depositions by Wilbur Hasty and John Madlin, May 19 , 1866; infra, 102, footnote 74.

Wilkes County justice of the peace that men were prosecuted for impressing horses while acting as recruiting officers in the United States service. General Robinson forwarded

69. G. P., Worth, Depositions of J. W. Hays and J. L. Blackburn before E. W. Welborn, June 23, 1866; Also E. A. Davie to Ruger, July 18, 1866, asking protection against a similar prosecution for highway robbery in capturing a colonel of the Home Guards and taking his pistol in 1863.

copies of these affidavits and requested Governor Worth to show cause why the civil courts should not be restrained
from prosecution. The governor was incensed at these memorials, petitions, and affidavits. He was satisfied that there was "a concerted plan on foot, by imputing partiality to our Courts of justice, to have martial law restored, if it be not already in force," and believed that ex-Governor Holden, Tod R. Caldwell, and other leaders of the Radical party in the State were at the bottom of the plan.

What particularly incensed Governor Worth was a two-week military investigation in certain western counties by Major E. A. Carr and Major Frank Wolcott in late June and early July, 1866. Their reports contained a wholesale indictment of the administration of justice in those counties. A section of Major Wolcott's report is indicative of the whole:

"In these counties, large numbers of union men have been indicted and in many instances for acts committed by authority of their Superior Officers and while regularly enlisted in and moving with the United States, [sic] army. The latter cases are mostly those of soldiers, detached from their commands as recruiting officers and the indictments all for pressing horses for their recruits. During the war until nearly its close, the union men in the Counties referred to were powerless to protect their persons, or property. To avoid conscription they were forced to leave
their homes and conceal themselves in the mountains or cross the lines to the union army, many adopted the latter course. During their absence their property was destroyed by their rebel neighbors. They returned to their homes at the close of the war utterly destitute and have made no effort to obtain redress from the parties who have reduced them to absolute beggary, for the reason that the manner in which, the law has been administered since the partial restoration of the Civil authorities is sufficient evidence to them that a union man can have little hope for justice."72

72. The reports are in G. P., Worth, July 19, 1866.

According to the investigators, no action had been taken by grand juries in offenses against life, liberty, and property of Union men by Confederates. Both recommended further military investigation of Unionist persecution. Major Carr felt that military commissions ought to do this and make reports previous to the autumn sessions of the courts. Governor Worth feared this ex parte investigation as part of a general plan of ex-Governor Holden and his Radical fellows to restore military control. The combination, he thought, was extensive, and the State in "great peril." He submitted the reports to judges and solicitors in the western district of the State, whose replies indicated that there was more error than truth in them. In some of the cases, indictments had been made, but they had been drawn during the War and had since been
dropped voluntarily by the civil authorities before any notice of them had been taken by the military authorities.

74. Ibid. W. T. Caldwell to Worth, July 31, 1866. This applied to the Dobbin and Madlin cases; supra, 98, 99. (Footnote 68).

In the outstanding cases cited by Wolcott and Carr, it was shown that one of them, a homicide case, had been committed after the war; that in a revolting case of murder by the "Home Guards," an indictment had been made, contrary to the charges; and that, in a case of larceny or forcible trespass, the man indicted had never complained to the authorities of any wrong done him and the evidence as seen by the solicitor was quite contrary to the military report.

75. Ibid. W. P. Bynum to Worth, August 3, 1866, 720-727. The writer regards Bynum's testimony as quite accurate. Judging from his testimony in the Ku Klux investigations later and from his record as a Conservative Unionist in politics, the writer feels that his testimony may be accepted as as near impartial as could be expected from anyone at the time.

Where the majors had represented that there were 185 true bills found against Union men out of 180 true bills in Caldwell Superior Court, the solicitor showed that he had sent less than forty bills and some of these were ignored.

76. Ibid. 727-728. He thought the majors had erred in confounding the number of men indicted with the number of bills.
The same solicitor testified that he had brought suit on behalf of Union men in many instances in McDowell and Watauga Counties and had obtained "complete redress" in the cases acted upon. These replies, backed up as they

77. Ibid., 739.

were by substantial factual evidence, gave the lie to most of the military reports, but they also indicated that there was a certain amount of truth in them. In some cases, grand juries had ignored evidence which seemed sufficient upon which to return true bills, and it was quite probable that many malicious indictments had been made against Union men. The lack of indictments against Confederate soldiers could be traced to an ordinance of October 18, 1865, passed by the Convention, saving from criminal prosecution all persons in the civil or military service for acts done in the proper discharge of their duties. Governor

78. Ibid., 728-729.

North submitted these reports to General Robinson.

In August, 1866, Major Wolcott was sent again to investigate the Western counties. This time Governor North sent a civilian, W. J. Mason, with him, and Major Wolcott's second report was much less lurid. The Major indicated that political feeling was running high and that a secret
organization of Union men known as "Heroes of America" or "Red Strings" had obtained control of the militia, whereupon the other party had organized cavalry companies of their own. There was no talk of persecution. The advantage, if any, seemed to lie with the Unionists.

78. G. F., Worth. The report was made August 16, 1866, for Alleghany, Wilkes, Surry, Ashe, and Yadkin Counties.

79. S. Mason, in his report to Governor Worth probably evaluated conditions fairly accurately in saying that there was an extraordinary number of indictments for criminal offenses committed by both sides during the War, the prosecution of which would only keep hatred alive.

80. Ibid. W. S. Mason to Worth, August 17, 1866. Mason said that those who served in the rebel armies felt that General Orders no. 3 protecting Union soldiers and sympathizers might be perverted to protect the latter against the consequences of acts committed from selfish motive, while the former were left unprotected in similar circumstances.

After a rather sharp exchange of letters upon this touchy subject between Governor Worth and General Robinson in the latter part of August, no more was said. The general took the position that it was his duty to protect Union men against unjust persecution and that the civil authorities should aid him by giving information in such cases. These requests apparently continued to irritate Governor Worth, who considered that the complaints were
stirred up by Radicals in North Carolina cooperating with the Radical party in Congress. A careful weighing of

81. Ibid. Robinson to Worth, August 24, 31, 1866. Worth's letters cannot be found, but their tone can be inferred from Robinson's replies and the former opinions expressed by Worth.

all the evidence indicates that there was bitter feeling between persons of Unionist and of Confederate leanings in the western part of the State, that charges and countercharges were hurled by the factions, and that the feeling expressed itself by bringing suit in the courts for offenses committed during the War. Undoubtedly, cases of persecution occurred, and probably the Unionists suffered more than the Confederates, but not always. The House of Commons of the General Assembly investigated the subject and reported that justice was administered in the courts of the State. The whole subject became one of political contro-

82. Hamilton, op. cit., 189.

troversy and was utilized by the group in the State that favored the Congressional plan of reconstruction. Finally, to put a stop to the complaints, the General Assembly on December 22, 1866, passed an amnesty act providing that no members of the military forces of the United States, of the Confederate States, of the State of North Carolina, or of the Home Guard or police forces of the State, were answerable
to any indictment for acts done in discharge of their duty, nor were they indictable for homicides, felonies, or misdemeanors committed prior to January 1, 1866. It further provided that in cases where indictments were pending, proof that the accused was an officer or private in the Confederate or the Union service constituted a presumption that he acted under orders unless the contrary were proved. Superior Judge A. S. Merrimon had recom-

83. Ibid., 182, 182-189; Laws of North Carolina, 1866-67, ch. III, 8-8; A resolution of December, 1866, authorized the governor to extend the provisions of the act by procla-
mation to anyone coming within the spirit of the law. Ibid., 221-222.

mended (in June, 1866) the passage of such an act, on the grounds that "the sooner we can get rid of all disputes and prosecutions growing out of the war, the better for the country." Had his advice been taken earlier, it might have spared the State considerable controversy.

Another controversy between the civil and military authorities arose out of the application of whipping as punishment for crime, a practice of long standing in North Carolina. As has been noted, the Freedmen's Bureau objected to this practice. However, the military authorities

84. North Correspondence, II, 602.

85. Supra, 86.
could hardly complain of its cruelty, inasmuch as they resorted to hanging by the thumbs as punishment for crimes.

86. Hamilton, op. cit., 169; Supra, 60-61.

Yet, on October 1, 1866, General Sickles forbade the use of corporal punishment except by parents, guardians, teachers, or masters of apprentices. For some time this order (which applied to South Carolina also) was suspended in North Carolina, but it was put into effect in early December, 1866. Meantime, Governor Worth had written

88. G. P., Worth, Col. Bomford to Worth, November 27, 1866. "I will certainly suspend action . . . as long as possible . . ." On December 7, 1866, he wrote the governor that he no longer had discretion to delay military interference and requested that the latter inform all civil courts of G. O. no. 15, as he wished to avoid conflict between the civil and military jurisdictions.

Governor Orr of South Carolina to ask whether South Carolina courts were yielding obedience to the order and to state that he proposed to appeal to President Johnson. On

89. Worth Correspondence, II, 345, November 27, 1866.

December 14, 1866, The General Assembly passed a resolution to send a commission headed by the governor to Washington to inquire into the necessity of the military order,
with a view to securing its removal. In accordance


with this resolution, the governor, Nathaniel Boyden, and David L. Swain secured an audience with President Johnson, who directed that the order be suspended. However, this

91. Legislative Papers of North Carolina, in archives of the North Carolina Historical Commission, Box 820, North to General Assembly, December 21, 1866; E. D. Townsend (Assistant Adjutant General) to Sickles, December 19, 1866 (a copy of the order suspending G. O. no. 15); The Laws of North Carolina, 1866-67, 232, contain a resolution of thanks by the General Assembly to the commissioners for accomplishing their object. Passed December 21, 1866.

Hamilton, op. cit., 169, holds that no change in the G. O. no. 15 was made. This is in error.

suspension proved to be but temporary, as will be indicated presently.

92. Infra, 113-114.

The year 1866 witnessed many gains for the civil authorities and much cooperation between them and the military authorities, despite the exasperation of the former over the problem of men of Unionist feeling and the order forbidding whipping. Although it was apparent that the state was under military rule throughout 1866, in the sense that military authority was paramount, and that whatever jurisdiction was exercised by the civil courts was
but "permissive", nevertheless the latter had been granted jurisdiction over most cases and, in matters of dispute, cooperation was achieved, as in the problem of apprentices. The suspension of the whipping order was a real victory for the civil authorities, though it proved to be only temporary. Undoubtedly the civil authorities entertained feelings of bitterness as a result of the protracted negotiations in securing the extensions of power, but, in the light of 1867, the year 1868 stood as one of real achievement for the civil authority.

Meanwhile, at Washington, the Congressional program of reconstruction was rounding into shape. This program, beginning with the work of the Joint Committee of Reconstruction and expressed in the passage of the Civil Rights Act, the extension of the Freedmen's Bureau, and the proposed Fourteenth Amendment to the Constitution, reached a climax in the First Reconstruction Act of March 2, 1867. By

93. Phases of the Radical policy of reconstruction dealing with the administration of justice in North Carolina are treated in the chapter dealing with the extension of national authority. *Infra, et passim*, 387-418.

this act, North Carolina was made part of the Second Military District until it performed certain requirements laid down by Congress; *viz.*, 1. ratification of the Fourteenth Amendment to the Constitution and 2. the formation of a constitution, framed by a convention which must be elected
manhood suffrage, regardless of race, color, or previous condition, providing for similar suffrage, and accepted both by the people of the State and by Congress. Until that time, the State civil government was deemed only provisional: the State was definitely subject to military authority. Two sections of the act laid down rules for the administration of justice:

"Sec. 3. . . . That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have the power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

"Sec. 4. . . . That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district. . . Provided, that no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."94

94. The act is in U. S. Statutes at Large, 39 Cong. 2 Sess., ch. 153, 428-429.

This act was quite acceptable to the followers of ex-Governor Holden, who had become embittered by defeat at the hands of Jonathan Worth in 1865 and who had since become the leader of those in North Carolina who favored
the Radical Republican policy of Congressional recon-
struction. It was, on the other hand, most distasteful

to Conservative whites, who looked to Governor Worth for
leadership. This group, which represented the majority of
the whites, had refused to ratify the proposed Fourteenth
Amendment, and had relied upon President Johnson and the

United States Supreme Court to save the State from con-
gressional schemes. But, after the passage of this act

over President Johnson’s veto, Governor Worth, who at one
time had favored bringing the question before the Supreme
Court, came to the conclusion that it was useless to re-
sist. He feared that the court was “demoralized” and
would drift with the Radical tide. Benjamin R. Curtis,

97. North Correspondence, II, 360, Worth to W. F. Leak,
January 5, 1867. "I have not only hope, but confidence
that the action of the Supreme Court sustained by the
Prest. will shield us from all the proposed schemes of
reorganising our State government, or changing our State
Constitution if our people remain firm in asserting our
rights. —— to W. C. Johnson, January 5, 1867. "I do not
deam it politic under any circumstances, for a people or
a man to accept terms of settling a controversy whereby,
such people or man would forfeit self-esteem." 351;
Hamilton, op. cit., 319.

98. Worth Correspondence, II, 914-915.
Thomas Ruffin, and other outstanding lawyers, to whom he turned for counsel, advised him that it would be practically impossible to get a test case before the Court. Consequently, the governor and his Council decided not to risk an appeal to the Supreme Court. The decisions in


Mississippi v. Johnson and Georgia v. Stanton later in 1867 confirmed the wisdom of this course. Conservative white opposition to Radical reconstruction was dead; it was replaced by resignation. Nevertheless, the act of Congress

100. Ibid., 221.

was generally regarded as unconstitutional.


General Daniel E. Sickles was assigned to the command of the Second Military District, including North and South Carolina. Soon after assuming command, he issued a general order declaring the civil government of the State provisional but authorizing civil officers to continue to exercise their proper functions. He solicited the cordial cooperation of all civil officers and citizens and indicated
that civil courts would be permitted to have jurisdiction in criminal cases, excepting only such ones as he might refer to military tribunals. Civil laws and regulations not inconsistent with United States laws or with regulations that might be prescribed by the military commander were declared to be in force. Post commanders would cause to be arrested persons charged with crime whom the civil authorities failed to arrest and would hold the same for trial by such tribunal as the commanding general would authorize.


Among the first steps taken by General Sickles was one which sweepingly altered punishments for crime as prescribed by the civil laws. As has been seen, the order forbidding whipping had been suspended in December, 1866.

103. Supra, 107-108.

Early in 1867, Congress passed an act making it the duty of officers of the army, navy, and Freedmen's Bureau to prohibit and prevent whipping or maiming as punishment for crime in any Southern State until that State was restored to its normal relations with the United States Government. Military orders were issued in early March, 1867, in accordance with this law.
In his well-known General Order no. 10 of April 11, 1867, General Sickles confirmed these earlier orders and prescribed others of far-reaching effect. The death penalty for burglary was abolished. All persons convicted of burglary, of larceny when the value of the stolen property was twenty-five dollars or over, of assault and battery with intent to kill, or of assault with a deadly weapon were to be deemed guilty of felony and to be sentenced to not less than two nor more than ten years imprisonment at hard labor, in the discretion of the court. Larceny, when the value of the property stolen was less than twenty-five dollars, was punishable up to one year's imprisonment at hard labor in the discretion of the court. One civil judge pointed out that it was a mistake to determine the extent of the punishment according to the value of the article stolen. The order forbidding corporal punishment was later construed to forbid the use of ball and chain for criminals while working on the roads. As the State had
no penitentiary and county jails were insecure and poorly equipped, these orders occasioned considerable inconvenience. To remedy the situation, General Sickles appointed a board composed of the governor, the treasurer, the speaker of the House, the chairman of the Senate Committee on Finances, and the chairman of the House Committee on Ways and Means to consider the problem of erecting a penitentiary where prisoners could be employed in various occupations which would enable the penitentiary to be self-supporting as well as help convicts to learn trades.

General Order no. 10 also contained a far-reaching "stay law." Imprisonment for debt, except in cases of fraud, was prohibited; judgments and decrees on causes of action arising between December 19, 1860, and May 15, 1865, were ordered to be enforced; proceedings in such causes were ordered stayed, and no suit or process was to be commenced thereafter for any such causes. Sale of property was suspended for twelve calendar months upon execution or process on liabilities contracted prior to December 19, 1860, except where defendants intended to remove their property
fraudulently beyond the territorial jurisdiction of the courts; a homestead exemption of five hundred dollars was provided. The order contained other important economic clauses. It aroused a great deal of comment, and several interpretations and modifications were made in the course of the year. The whole matter will be discussed in detail in the chapter dealing with economic and social problems.


Soon after issuing these orders, General Sickles divided the State into eleven military posts and instructed the post commanders to supervise the action of all civil officers within their command. If necessary, they were empowered to assume command of the police forces. A month later, Sickles issued instructions detailing the method of supervising the civil authorities. All sheriffs and police officers were to report their names, salaries, duties, and similar information to the provost marshal of the Second Military District. Sheriffs and police officers were to investigate all serious criminal offenses and make full reports to the same officer of the circumstances and the steps taken. In addition, they were to make consolidated monthly reports. If ordered by the provost marshal to make
certain arrests or to serve writs, the civil officers were to obey under penalty of liability to trial by military commission and subsequent removal, fine, or imprisonment. These duties were to be performed by the civil officers in addition to their regular duties under civil law. Civilians were directed to report crimes to the civil authorities first; if no action were taken, they were to report to the military authorities. Finally, imprisonment for default in payment of court costs or fees was not to exceed thirty days.

111. G. O. no. 34, June 3, 1867. General Orders, Second Military District, 1867.

Meanwhile, the commanding general had assumed the power to remove and appoint civil officers. On April 1, 1867, he ordered post commanders to report all cases wherein incumbent officers were ineligible or wherein there were objections to the continuance of their functions by reason of misconduct. Nine days later, two members of the city police force of Wilmington were removed on grounds of "want of discretion and judgment" and of "unnecessary and unwarranted violence in making arrests." At the same time, the post commander at Wilmington was ordered to assume control of the police, as the force seemed to need reorganiz-
It appears from the evidence accompanying this order that, although there was no complaint to be made against the general discipline and faithful discharge of duties by the police force, the marshal and most of the force were ex-Confederate soldiers. In the case of the men removed, it seems that four citizens of professed Union feeling had made a public nuisance of themselves by drunken singing on the streets at two A. M. on a Sunday morning. The police officers used considerable force in arresting them (one used a knife on an offender), because they resisted arrest and possibly because they were singing such songs as "Marching through Georgia." The offenders were fined for resisting police. It seems also that the culprits were Irish Catholics and that this may have had something to do with the difficulty. Curiously, the affair occurred a good two months before the removal of the officers. The police officers were removed on recommendation of the Wilmington post commander, who praised the conduct and ability of the police force as a whole.

The evidence and reports are given on pp. 25-31. Lieutenant Colonel Frank, in his report of April 5, 1867, stated that Marshal Robert Ransom, in command of the police, had performed his duty acceptably, but was strongly Southern in his prejudices, and that it would be desirable to replace him. The police force, however, was well dis-
ciplined and faithful in discharge of its duty, and he did not know where to secure competent men to supply replacements. 36-37.

During the course of the next two months, several civil officers were removed and others appointed in their stead.

115. Three commissioners of Newport, Carteret County; all the civil officers of Fayetteville; four justices of the peace were appointed for Cumberland County; the election at Wilson was declared irregular and the mayor and five commissioners were appointed. These appointments were made during May and early June, 1867. Senate Executive Documents, no. 14, 40 Cong. 1 Sess., 82, 85, 88.

Elections were suspended in some towns and appointments were made in these instances.

116. Ibid., 88 (Wilson), 79-80 (New Bern); Hamilton, op. cit., 227 (Tarboro).

Governor Worth protested to President Johnson against this military removal and appointment of civil officers. In his opinion, the First Reconstruction Act did not confer upon the military commander the power to remove and appoint at will. Rather, the commander was required to administer the government according to the laws of the State. In this view he was supported by the

117. North Correspondence, II, 979, 983.

United States Attorney General.
General Sickles' course of action received a severe indictment in an opinion rendered June 12, 1867, by Attorney General Stanbery. The Attorney General held that the First Reconstruction Act did not set aside the provisional civil government, nor did it authorize the military commander to change it. Such authority was reserved to Congress and not delegated to the military commander by the act. In the matter of removing and appointing civil officers, the Attorney General could find no military authority for the removal of officers. "Nothing short of an express grant of power would justify the removal or the appointment of such an officer." In fact, section six of the act, by providing for elections to office under the provisional civil government, clearly indicated that the people retained the right of electing their own officers. As for the General Order no. 10 which

118. Opinion of Attorney General Stanbery, June 12, 1867. Official Opinions of the Attorneys General of the United States Advising the President and Heads of Departments in Relation to their Official Duties, and Expounding the Constitution, etc., XII, 188.

The act reads: "Sec. 6. . . . That, until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same." Clearly Stanbery's opinion was correct.

promulgated a stay law, contained other economic clauses, and prescribed penalties for crime different from those provided for by laws of the State, Attorney General Stanbery held:

"The military commander is made a conservator of the peace, not a legislator. . . . He has no authority to enact or declare a new code of laws for the people within his district under any idea that he can make a better code than the people have made for themselves." 120

120. Ibid., 192.

Referring to the fact that Congress alone could alter the State civil government, he dealt a most telling blow:

"He [the commanding general] puts himself upon an equality with the law-making power of the Union. . . . He places himself on higher ground than the President, who is simply an executive officer. He assumes, directly or indirectly, all the authority of the State, legislative, executive, and judicial, and in effect declares 'I am the State.'"

"I regret that I find it necessary to speak so plainly of this assumption of authority. I repeat what I have heretofore said, that I do not doubt that all these orders have been issued under an honest belief that they were necessary or expedient, and fully warranted by the act of Congress. There may be evils and miscarriages in the laws which these people have made for themselves through their own legislative bodies, which require change; but none of these can be so intolerable as the evils and miscarriages which must ensue from the sort of remedy applied. One can plainly see what will be the inevitable confusion and disorder which such disturbances of the whole civil policy of the State must produce. If these military edicts are allowed to remain, even during the brief time in which this provisional military government may be in power, the seeds will be sown for such a future harvest of litigation as has never been inflicted upon any other people."

Finally, the Attorney General held that the section empower-
ing the general to employ military tribunals must be
construed in the light of *ex-parte Milligan*. Congress
had no power to provide for the establishment of mili-
121
tary tribunals in time of peace.


Had this opinion proved effectual, it would have
abolished much of General Sickles' work in interfering
with the State courts. The latter telegraphed immediately
to Washington that it would be "not practicable to afford
adequate security to persons and property unless the com-
manding general of the district is authorized to remove
civil officers who fail to perform their duties. . . .
Without military control, I believe reconstruction is im-
possible." A few days later, he demanded a court of
inquiry to vindicate himself from the Attorney General's
accusations and declared that the ruling "prevents the
execution of the reconstruction acts; disarms me of means
to protect life, property, or the rights of citizens,
and menaces all interests in these states with ruin." The
request was refused by the President. However, the

122. These are found on pp. 34-36 of *House Executive Docu-
ments,* no. 20, 40 Cong. 1 Sess.

Third Reconstruction Act of July 19, 1867, overruled the
opinion by directly empowering the commanders to remove and
appoint civil officers and by confirming such action already taken. It also provided that the provisional civil governments were to be continued, subject in all respects to the military commanders and to the paramount authority of Congress.

123. U. S. Statutes at Large, XV, 14-16.

Shortly after the passage of this act, Superior Judge A. S. Merrimon tendered his resignation on the ground that his oath of office prevented him from obeying military orders, and he preferred to resign rather than to precipitate a conflict between civil and military jurisdictions.

124. G. F. Worth, Merrimon to Worth, July 22, 1867; A. S. Merrimon Papers, Southern Historical Collection, Merrimon to Canby, July 31, 1867; The oath contained the following words: 'In case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or orders notwithstanding.' North Correspondence, II, 1007.

Governor Worth refused at first to accept the resignation, fearing it might lead to consequences disastrous to the best interests of the State; instead, he enclosed a copy of it to General Sickles and suggested that the latter designate a day for free conference with the judges, with a view to induce Judge Merrimon to withdraw the resignation. Governor Worth regretted the resignation but concurred with Judge Merrimon's views. However, several

125. Ibid., 1011-1012.
judicial officers deprecated the action as unwise and harmful to the State. The prevailing opinion seemed to be that it was better to submit than to surrender the entire government of the State into military hands. Solicitor W. P. Bynum presented the best expression of this opinion:

"If possible do not let us lose the circuit for want of a Judge. The only hope almost of preserving good men and impressing upon the people a wholesome & conservative influence, consists in the power which the legal profession has over them & the opportunity to exercise it effectually upon the circuits,— apart from the administration of the laws." 126

126. G. P. Worth, Bynum to Worth, July 30, 1867. "Merrimon has done wrong, & I fear the mischief is irreparable."

Judge W. M. Shipp also felt that "the thinking portion of the community would deprecate a surrender of the government at this time." Nor did these men feel that yielding to

127. Ibid., Shipp to Worth, August 14, 1867.

could subject them to censure for violating their oath of office. General

128. Ibid. "I have not felt any reproaches of conscience in continuing in office — nor in submitting to the military orders."; Judge R. P. Buxton to Worth, August 9, 1867: "It is much easier for a man to see anything more than a Provisional Government, and that too a very precarious one in North Carolina, he can see more than I can. It is a very unpleasant fact to realize, but the fact is so and cannot be blinked. I am sorry it is so, but cannot help it. I conform my action accordingly."; Judge Fowler, who
resigned in November, 1867, because of the military "jury orders," stated that he submitted to military orders restraining the courts from doing certain things required by law and felt that "it was no default of mine than an over-powering force prevented the law from being fully executed." Bow to Worth, November 28, 1867. However, when the military authorities required the courts to participate in overriding the State laws (e. g., in the manner of summoning juries) he resigned. Infra, 131. His reasoning seems like hair-splitting, but it is interesting to note.

Sickles also regretted the resignation but refused to alter his course, feeling that Judge Merrimon's views were untenable and contrary to the legislation of Congress. He advised Governor Worth that, if the latter accepted the resignation, he and his Council were to nominate a qualified successor and send the report to Headquarters for confirmation. As Judge Merrimon persisted in his conscientious scruple and refused to sit as a "military judge," Governor Worth accepted his resignation and nominated Alexander Little. The nomination was confirmed by General Sickles.

130. Ibid. Merrimon to Worth, August 5, 9, 1867; J. W. Osborne to Worth, August 13, 1867; Thomas J. Ashe to Worth, August 16, 1867; Clous to Worth, August 21, 1867; Governor Worth made the significant statement: "I would prefer the merest tyro in law to one not of the manor born." Worth Correspondence, II, 1018.

The resignation of Judge Merrimon indicated that
feeling between the civil and military authorities was approaching a climax of bitterness. Solicitor Bynum, while impressed with the value of the courts as the only means of preserving good government, felt that matters were fast drifting to a point where men's minds would be unsettled and the whole people would demand the cessation of civil government. Governor Worth, while determined to cooperate earnestly with the military authorities in carrying out the Reconstruction Acts, had already protested to the President upon the matter of removal of civil officers, and he agreed with Judge Merrimon's views. To use his own words, he was "utterly bewildered" and felt that there was "no hope save the slight one drawn from the saying that 'the darkest hour is just before day.'" A combination of several issues operated to bring matters to a crisis at the close of 1867: military orders with reference to jury lists, military interference in cases involving Negroes, trial of civilians by military commission, removal
and appointment of civil officers by General Sickles and his successor, General Canby, complaints of ill-treatment of Union men and consequent military action, and the establishment of provost courts to try civil cases.

The first "jury order" was issued on May 30, 1867. In it, General Sickles ordered all citizens who were assessed for taxes and who had paid taxes for the current year to be qualified as jurors. Civil officers charged with providing lists of jurors were ordered to ascertain without delay the names of all qualified persons and to place them on the jury lists. As the laws of


the State permitted only freeholders to serve on juries, this order had a far-reaching effect, especially when, according to General Sickles' interpretation of it, the payment of poll tax was held to be sufficient qualification.


However, Governor Worth secured a suspension of the order until October, 1867, on the ground that the courts could not know who had paid taxes until the sheriffs had made their collection returns for the year, in consequence of which the lists could not be revised until the first courts held after
October 1. Shortly thereafter, General Sickles was
removed for endeavoring to apply his "stay law" to processes
issued by the Federal Courts, and further negotiations
were carried on between his successor, General E. R. S.
Canby and Governor Worth.

The governor endeavored to persuade both General
Sickles and General Canby to modify the military order so
as to allow only freeholders to be put on the jury lists,
as Chief Justice Chase had done when holding the United
States Circuit Court in Raleigh in June, 1867. According
to a decision rendered in August, 1867, by Superior Judge
Fowle and subsequently upheld by the State Supreme Court,
colored freeholders were (without regard to military orders)
qualified as jurors. General Canby not only bluntly re-

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136. Worth Correspondence, II, 1034-1035; G. P., Worth,
Clous to Worth, telegram August 10, 1867.

137. Infra, Sickles was removed on August 26, 1867.

138. Hamilton, op. cit., 228; Worth Correspondence, II,
1049.

139. Hamilton, op. cit., 228. Fowle held that they had
been excluded as jurors prior to 1865 by virtue of the
existence of slavery, which was now abolished. The Supreme
Court decision, overruling an objection to a finding of
guilty by a jury composed of freeholders drawn without re-
gard to color at the fall term of Edgecombe County Court,
is in State v. Taylor, 61 N. C., 508-514.
fused the request but put Governor Worth on the defensive by reaffirming and extending the original order to make the right to vote the basic qualification. Moreover, the fact that a person had not been registered as a voter under the Reconstruction Acts would be sufficient ground to challenge his competency as a juror. This order, in

140. G. P., Worth, Canby to Worth, September 13, 1867; G. O. no. 89, September 13, 1867, General Orders, Second Military District, 1867.

Governor Worth's mind, made the situation far worse than General Sickles had left it, for it disqualified the intelligent men of the community who, under the Reconstruction Acts, were not permitted to vote. It did, however, permit

141. G. P., Worth, Worth to Johnson, December 31, 1867; The matter of qualifications for registration is discussed in Hamilton, op. cit., 235-236.

the civil authorities to purge the lists of persons unfit to serve as jurors. General Canby finally yielded to

142. G. P., Worth, Canby to Worth, October 11 and November 9, 1867; G. O. no. 89, op. cit.; Worth Correspondence, II, 1072.

the governor's urging by permitting all persons who had paid taxes (as per G. O. no. 32) and who were morally and intellectually qualified to be placed on the jury lists, but reserved the right of challenge on grounds of non-registration.
Thus, despite the opposition of Governor Worth, the laws of the State limiting jury duty to freeholders had been broadened by military orders to make the privilege of voting the basic qualification. This was a broad democratic move, but it was also a prescriptive one, for it enabled parties to challenge persons who were ineligible, by the Reconstruction Acts of Congress, to vote, and that challenge included the old leaders of the State. In effect, it shut them out of almost any participation in government. To Governor Worth and Conservative whites, it was an evil move. The governor felt that it made trial by jury "worse than a farce," for it substituted "ability to pay a tax as a better test of fitness to serve on a jury than the possession of a freehold." As for Negroes sitting on juries, his attitude can be seen in his opinion that the Negro was "incapable of permanent civilization and useful citizenship." In this opinion, others concurred. The
145. Ibid., 1155, 1095.

146. G. R., Worth, R. C. Holmes (Chief of Police of Sampson County) to Worth, November 23, 1867. Placing Negro names in the jury box was pretty hard for a Southern gentleman to do. "If unprincipled white persons and ignorant negroes are to control our Country, deprivations of the most vicious kind will be daily committed by them. As regards negroes being moral and intellectual I know but few."; James %. Osborn to Worth, October 27, 1867. "The order to place the negroes on the jury has made reconstruction odious. It operates to destroy the redstring association. . . . and I am satisfied will do so wherever it is used and most effectually so among our most illiterate people."

feeling was general among Conservative whites that these innovations upon the jury laws were unnecessary and offensive. Rather than enforce them, Superior Judge Fowle 147 emulated the example of Judge Merrimon and resigned.

147. Ibid., Fowle to Worth, November 28, 1867.

General Canby, in defense of his course against this feeling, held that, in his opinion, the vital principal of liability to jury duty was intellectual and moral fitness for the performance of that duty. "If this be the issue made by Judge Fowle I cannot regret that he has tendered his resignation." He could not or did not defend the proscription.

148. Ibid., Canby to Worth, January 19, 1868.

character of his rulings.

Military interference in certain cases involving
Negroes aroused almost as much anger among the civil authorities as did the "jury orders." Although in one instance the civil and military authorities cooperated to secure clemency for a Negro, such cooperation was rare. Rather, civil officials tended to think of the military as provoking interferers. Three cases were responsible for most of this feeling.

The outstanding case was that of Henderson Cooper, a Negro convicted of rape on March 6, 1865, in Granville County and sentenced to death. He escaped to Washington, was captured and returned to the State in 1866, and had his sentence reaffirmed by Granville Superior Court at its spring term, 1867. At this juncture, General Sickles declared all the proceedings null and void because "the prisoner was tried and convicted by a court not recognized by the United States. . . escaped from the custody of persons engaged in armed rebellion against the United States. . . [and] was pursued and recaptured. . . without due process of law." An investigation was then held by a

150. S. O. no. 8, April 1, 1867. Senate Executive Documents, no. 14, 40 Cong. 1 Sess., 76; The summary of the case is drawn from Hamilton, op. cit., 229-230 and from various letters in G. P., Worth; W. A. Philpott to Bagley, May 30 and December 23, 1867; Worth to Johnson, December 31, 1867; E. W. Dennis to L. V. Caziaro, March 26, 1868; an official transcript
of the case from Granville Superior Court in the spring of 1867; and G. O. no. 125, November 20, 1867, General Orders, Second Military District, 1867.

court of inquiry composed of Colonel Bomford, post commander at Raleigh, and General Robert Avery, a Freedmen's Bureau officer whom Governor Worth described as one who had "contributed more than any other officer stationed in N. C., to make the unjust impression that our Courts will not act impartially where a negro is concerned." This Court did not summon the victim of the assault, the original witnesses, the court officers at the original trial, nor the lawyers defending Cooper. It reported, upon no evidence, that the character of the prosecutrix was bad and concluded that the crime should be punished but not by death. That the man was guilty there was no doubt; indeed, in October, a court martial, composed of the same two officers, ordered him hanged. However, just when justice was about to be meted out, General Canby ordered the action of the court martial revoked and the prisoner remanded to the civil authorities for trial under a new indictment. Such a trial could have resulted only in a plea of double jeopardy and acquittal. While Cooper was confined in Granville County jail, it caught fire in early January, 1868, and he burned to death. The evidence shows that either he or another
Negro set fire to the jail, perhaps in hopes of escape, although this theory has been discredited. In the end, the county court asked the United States Government to rebuild the jail, since Cooper was imprisoned at the instance of the military authorities. Needless to say, the request was not granted.

In Chowan County a white man by name of Thomas Pratt murdered a Negro in June, 1867. He surrendered himself immediately to the civil authorities and was jailed. A month later, at night, a party released him from jail. Although the sheriff reported the affair almost immediately and soon afterwards requested a reward to be offered for the arrest of the offenders, the local Freedmen's Bureau officer reported that no effort was made by the civil authorities to re-arrest Pratt. As a result, two detectives were sent to ferret out the guilty parties. Six men were arrested and kept in military custody for some time before being discharged. The military authorities claimed that the sheriff requested their aid; he emphatically denied having done so. They seem to have taken a simple report of the shooting, the legal steps taken, and the jail break as a request for aid. When, in reality, the sheriff was only doing what was demanded of him by a military order requiring such reports from sheriffs in all cases of grave crime. It seems also that there was little
evidence upon which to hold the parties arrested. The Freedmen's Bureau and the military authorities obviously acted too speedily and upon insufficient evidence. Pratt and his helpers were never found. This case was almost as

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irritating as that of Henderson Cooper.

Finally, one Carney Spears, a Negro, was convicted at the spring term, 1867, of Buncombe Superior Court of an assault upon a white man as well as on two indictments for horse stealing committed about the close of the war. His counsel, R. M. Henry, a leading Radical Republican, advised the Negro to submit to a verdict of guilty. Judgment was suspended on all the counts upon the payment of costs, because of the unsettled condition of the times when the offense was committed. However, the defendant could not pay the costs and was bound out to one Atkinson for the payment, an arrangement described by Judge Merrimon as one "made every day by white men in the state." Captain Denny, an officer of the Freedmen's Bureau, ordered Spears released from the contract and suspended the action, on the ground
that no one knew the amount of the costs which were, in reality, upon the docket for all to see] and that it was a "virtual selling" of the Negro. He was upheld by the Judge Advocate of the Second Military District.

153. The account is drawn from Ibid. Canby to Worth, October 19, 1867 (containing extract from the Judge Advocate's report); A. S. Merrimon to Worth, October 22, 1867; Worth to Johnson, December 31, 1867.

Several trials of civilians by military commissions were held after the establishment of the Second Military District. Of these trials, that of Henderson Cooper has been dealt with already; another, that of Jesse Griffith, will be mentioned in another connection. Both of these

154. Infra, 149-150.

occasioned much ill-feeling towards the military authorities. Probably the most famous case, however, one which made military rule a by-word of all that was evil to the minds of Conservative whites, was that of William J. Tolar, Duncan G. McRae, Thomas Powers, Samuel Phillips, and David Watkins, all residents of Cumberland County. In early February, 1867, one Archie Beebe, a Negro about to be tried for attempted rape upon a white woman, was shot near the steps of the old market-place in Fayetteville, county seat of Cumberland County, by some party or parties in a crowd
assembled to witness his preliminary hearing. Apparently
the killing was motivated by a desire to prevent the ap-
pearance in court of the woman concerned. It was almost
impossible to say who fired the shot, but William J.
Tolar was indicted for the murder at the first meeting of
superior court after the act. However, the day before
this indictment was returned by the grand jury, the five
men named above were arrested by the military authorities
and taken to Raleigh for trial by a military commission.

155. G. P. Worth, J. W. Clous to Major General Miles,
May 11, 1867; Thomas C. Fuller to Worth, May 22, 1867;
J. T. Warden to Worth, May 27, 1867 (with official copy of
the indictment); The report of the coroner’s inquest is
dated February 12, 1867.

MoRae and Phillips were discharged for lack of evidence
but the other three were convicted by the commission (com-
posed of Colonel Bomford and General Avery). The trial
lasted over three months and aroused much public sympathy
for the accused. A year later all three were pardoned by
President Johnson. Governor Worth was aroused over the

156. Hamilton, op. cit., 165-166; G. O. no. 118, General
Orders, Second Military District, 1867. The commission
sentenced them to be hanged, but General Canby mitigated
this to fifteen years at hard labor.

whole affair, but he was particularly incensed by the treat-
ment accorded MoRae, one of the justices of the peace who
conducted the preliminary hearing of the Negro. McRae, an old man, was first arrested without knowing the charges and was held in military custody for over a month before any witness was produced against him. Only one witness was introduced against him — a woman of known bad character, whose testimony was taken by General Avery to satisfy his personal spite against the justice. There was no

157. G. P., Worth, McRae to Worth, May 17 and December 20, 1867.

158. Ibid., McRae to Worth, December 20, 1867. He was arrested on May 15, 1867; his trial was formally commenced on July 22, 1867, but nothing was said against him until July 29, when the only witness against him was introduced. She was Eliza Elliott, "a woman of such known bad character that no one, white or colored could be found to say, that she was worthy to be believed — Her behavior on the stand, and her willingness to perjure herself was so manifest, that even the judge advocate became ashamed of her, and withdrew her testimony, and asked to enter a nol pros. in my case — which the court unanimously allowed and I was discharged."; Joseph A. Worth (the governor's brother) to Governor Worth, June 28, 1867. Avery and McRae had engaged in a dispute some time previously over the amount of bail required of a defendant accused of an assault upon a Negro. "Avery in the presence of a number of negroes, told him he would make him suffer for his course. "The evidence of the low woman against McRae was taken secretly and to this day his friends cannot get a copy of it. You know I am no admirer of McRae, but I feel anxious that he should have justice."

159. Ibid., Sworn statements made June 1, 1867, by a relative of Beebe, Beebe's lawyer, and the county solicitor.
There were a few other trials by military commissions, none of which aroused much feeling against the military authorities. Of these trials, the outstanding one was the trial of ten citizens of Bertie and Hertford Counties in August, 1867, for the brutal whipping of a colored girl in February, 1867. Three were acquitted; six were sentenced to one to two months imprisonment and fines of fifteen to twenty-five dollars; one received three months imprisonment and seventy-five dollars fine. The sentence could hardly be called unjust.

160. G. O. no. 75, General Orders, Second Military District, 1867; Other trials held are given in the same order and in General Orders no. 112, 158, 162, Ibid. Five persons were tried altogether in these cases, which are not important enough to summarize.

Military commission trials aroused so much ill feeling and popular attention was so often centered upon the most indefensible ones that it will be worth while to notice the procedure actually followed and the rules laid down for military commissions in general. According to an early order, no prisoners were to be kept in confinement without charges being filed against them. At the begin-


ning of a trial, the defendant was permitted to object to any member of the commission. Witnesses could be intro-
duced against him, and he could introduce witnesses in his behalf, but his own testimony was not received, a practice then prevalent in Federal Courts. This defect was, however, alleviated by permitting the accused to question all witnesses even to the extent of asking leading questions which in reality gave him an opportunity to present his own defense. The accused was also permitted to have counsel, and his counsel could present a written defense, which usually contained what the accused would offer as his testimony.

162. This summary is made from general observations by the writer based upon the manuscript records of trials in the files of the Chief Clerk of the Judge Advocate's office. The writer has not found a single case wherein a civilian objected to a member of the commission trying him. Why this was so, he cannot say. As late as 1871, defendants in criminal cases were not permitted to testify in Federal Courts, apparently with a view to their own protection. This is evident in a petition from the Cincinnati bar requesting that such defendants be permitted to testify. Senate Miscellaneous Documents, No. 37, 41 Cong. 3 Sess.

At first, these military courts were rather free from legal technicalities in their methods of presenting accusations, in the conduct of trials, and in making findings. But, as time went on, their procedure more closely approximated that of the civil courts, until, at the close of 1867 and the beginning of 1868, they were ordered to follow the same rules as did State courts. The findings

163. G. O. no. 105, October 21, 1867, General Orders, Second Military District, 1867. Post commanders might admit civilians to bail, of the same amount as required by state
law; no. 13, February 6, 1863: "In trials for offenses at common law or under State statutes, and in trials of civil actions, Provost Courts, Military Commissions and Military Tribunals, organized by virtue of authority under the Reconstruction Acts of Congress, will be governed by the rules of evidence prescribed by the laws of the State in which the case is tried."

and sentences of military commissions were forwarded to Headquarters for approval or disapproval by the military commander, who might mitigate, but could not increase the sentences and who could approve or disapprove, but could not alter, the findings. Not many cases of importance were tried by these commissions. However, the ones that were tried received close attention from the civil authorities, whose protests were made to Governor Worth, and the worst samples of military justice received the most attention, as might be expected from the nature of civilian reaction to continued military control. In consequence, the regular procedure and attempts to administer fair justice were overlooked in the heat of the times, and the military courts were judged by the examples that received most publicity. However, there were enough examples of maladministration to impeach the accuracy of General Canby's assertion that the records of the Second Military District were "a constant denial" to Governor Worth's charges of military despotism.

164. G. P., Worth, Canby to Grant, November 14, 1867 (copy).
The subject of removal and appointment of civil officers by the military has already been noticed. Not

165. Supra. 117-120.

many removals were made by General Canby, but some of them received severe criticism, particularly those in Jones County. On September 23, 1867, he displaced Sheriff Wilcox and seventeen justices of Jones. Several months later, the removed sheriff stated that he still did not know the cause of this action and that he had not yet received a copy of the charges against him nor the names of the parties preferring them. In April, 1868, the mili-

166. G. P., Worth, Sheriff Wilcox to Worth, December 21, 1867.

tary authorities replied that numerous citizens had complained of the utter lawlessness prevalent in the county and of the failure of the sheriff and the magistrates to enforce the law and of their connivance and encouragement of law violation; these statements have been corroborated by the post commander at Newbern and the provost marshal 167 of the State. O. C. Selgrove, a New York carpet-bagger,

167. Ibid. Geo. F. Price (Assistant to the Judge Advocate General) to Caziaro, April 8, 1868 (copy). The writer has been unable to find the petitions or the corroborating statements.
formerly an officer in the 12th New York Cavalry, was appointed in Wilcox's stead. Although his bond was insufficient, the military authorities at Newbern required the county court to accept it. Governor Worth protested against this action several times; the matter remaining a subject of dispute until May, 1868, but the military authorities refused to accede to his protests and continued Colgrove in office. Perhaps the worst feature of this action lay in the fact that insufficient bond was allowed. The military authorities justified their action by the curious argument that, inasmuch as the Reconstruction Acts of Congress and the military orders pursuant thereto were paramount to those of the State, therefore, in case any appointee of the commanding general was found not to possess certain qualifications required by State law, such appointee was to be deemed *ipso facto* as dispensing with so much of the required qualifications as he might lack. However, it was very desirable that State laws regarding sheriff's bonds be complied with, as they were indemnity to the public against official misconduct and so the post
commander at Newbern had not used the best method in accomplishing the desired object of securing law and order by removing Wilcox and appointing Colgrove, without requiring sufficient bond of the latter. Nevertheless,

170. Ibid., Price to Caziarc, April 8, 1868.

the appointment stood. In Craven and Pitt Counties, the old sheriffs were removed and replaced by carpet-baggers.

171. Hamilton, op. cit., 238. /71

Another removal that caused complaint was that of D. J. Coleman, solicitor of the eighth circuit, on charges of partiality and oppression of Union men. Solicitor Coleman wrote Judge Buxton (superior judge of the same circuit) for a letter to use in his defense. Judge Buxton replied that the solicitor had discharged his duties fairly and impartially but that his unfortunate habit of intemperance materially affected his usefulness as a public officer. Governor Worth cited this removal as another cause of complaint.

172. The removal was made November 20, 1867. S. C. no. 311. In G. E., North. The correspondence is found in the R. B. Buxton papers in the Southern Historical Collection; Coleman to Buxton, December 24, 1867; Buxton to Coleman, December 31, 1867.

The General Assembly, in passing an amnesty act in
December, 1866, pardoning all offenses committed during the War by persons in the civil or military service of North Carolina, the Confederate States, or the United States, thought it had buried all complaints of "per-

173. Supra, 105-106.

secution" of "Union" men. It smothered an attempt to limit the extent of this law by rejecting a clause which provided that the amnesty should not be construed to extend to persons committing crime not in the discharge of duty. In its January term, 1867, the State Supreme Court

174. Legislative Papers, Box 320. Such a bill was engrossed in the House of Commons in February, 1867, but was indefinitely postponed in the Senate.

immediately applied this act to persons in the Home Guard and in the United States Service. Judge E. G. Read.


in delivering one of the opinions, upheld the value of the amnesty act and appealed to public sentiment in telling words:

"Criminal prosecutions and civil suits necessarily spring out of such a past [i. e. the Civil War]. The details, not to say the exaggerations of irritating facts, the conflict of witnesses, the discussions between zealous advocates, the denunciations of parties, the hazard of costs
and damages, and the inflictions of punishments, would not only keep alive these evils, but would cause them to spread into a pestilence. While so many have injuries to revenge, quite as many have errors to regret; and it will be a great public good if the past can be forgiven and forgotten."

176. State v. Blalock, 61 N. C., 244-245.

But complaints arose, despite the law and the Supreme Court decisions. In the fall of 1867 the matter became an important phase of the clash between civil and military jurisdictions.

In a letter of November 14, 1867, to General Grant, General Canby stated that the State amnesty act covered the cases of persons enrolled in regular military organizations during the war but not those of loyal North Carolinians who served as guides and spies for the Federal armies. Nor did it protect those who "either singly or in parties — resisted the Rebellion, deserted from the Rebel Army or fled from the Rebel conscription and in so doing, committed acts of war — legitimate under the laws of war, but criminal under the laws of peace." He cited four cases

177. G. P., Worth (copy of letter). "The citizen who remained loyal to the Government of the United States, — who resisted Rebellion, — who recognized a higher allegiance than State allegiance — and obeyed a higher law than State or Confederate law — is not protected by the provisions of the act."

in which he had enjoined proceedings in early November, and
detailed the case of one William W. Johnson as a good example of the necessity of military interference to protect loyal men from persecution in State courts. General

178. Ibid. The writer has not been able to check on the four cases mentioned. There are some cases in ibid. in which men convicted of crime petioned Governor Worth for pardon on grounds of their "loyalty" or action under orders of Federal officers, but it is apparent that they were merely endeavoring to use these pleas as a cover to secure release. E.g., O. P. Meares (criminal judge at Wilmington) to Worth, November 22, 1867, requesting the governor not to pardon several men convicted of wanton plunder. Governor Worth refused the pardon.

A most amusing case was that of one James Johnson of Bladen County. It seems that one John T. Council had erected a distillery on a site used for many years by a Baptist Church. Johnson, who belonged to the church party which opposed Council, burned the distillery and was given twelve months imprisonment. Governor Worth refused a pardon on the grounds that Superior Judge Warren stated that Johnson had made unwarranted attempts to prejudice the chief witness for the State; whereupon Johnson petitioned the military authorities that Council was "one of the strongest pro-Union man and a Holden supporter, and no Union man could secure justice in Bladen County. A military investigation revealed that neither politics nor Unionism had anything to do with the affair. Ibid., J. A. Richardson to Worth, November 9, 1867, and D. Johnson to Canby, May 8, 1868, and report of Lieutenant Cook, June 5, 1868; Governor's Letter Book (Worth), V, 58, 206, 279.

Canby could hardly have selected a poorer example to support the military point of view.

The evidence in the Johnson case was somewhat conflicting, but the viewpoint of the civil authorities was clearly superior to that of the military. In 1863, Johnson, a deserter from the Confederate army, in company with two
others had entered the house of an old man living alone in Rockingham County, robbed him, and left him tied. Whether Johnson fled to the Union lines after committing the crime in order to avoid punishment or whether he committed it in order to secure money to reach the Union lines was debatable. Both the civil and military authorities agreed he was a Confederate deserter. He was indicted for burglary in Rockingham County in 1863, was arrested in 1866, and had his case transferred to Caswell County, where he was convicted and sentenced to death, the sentence being upheld by the State Supreme Court in its January term, 1867. General Camby claimed that Johnson was prosecuted, not for burglary, but for his Union sentiments. However, the State solicitor in the trial, Thomas Settle, a well-known Republican, stated that it was a very outrageous case, proven clearly not only by the testimony but also by the prisoner's confession. Johnson's lawyer, John Kerr, was a well-known Democrat, later to become a superior court judge. He appealed earnestly to Governor Worth for a pardon for the young man on condition that he leave the State. Johnson's pardon petition, signed by citizens of Caswell County and approved by Judge Fowle, a strong Democrat, said nothing about Union sentiments, but based its appeal upon his youth, his family, and the unsettled condition of the time when the crime was committed. The members
of the General Assembly from Caswell County pressed the
 governor for a pardon, which he granted January 31, 1867,
 after considerable hesitation. In October, 1867, upon

179. State v. Johnson. Original ms. record in Supreme
 Court office, Raleigh, N. C.; the views of the civil
 authorities are found in G. P., Worth, Worth to Johnson,
 December 31, 1867 (the best summary); John Kerr to Worth,
 October 21, 1867; Thomas Settle to Worth, October 23,
 1867; and in Worth Correspondence, II, 897, 1056; the view
 of General Canby is in G. P., Worth, Canby to Grant,
 November 14, 1867 (copy). The pardon petition is in ibid.,
 n. d.

complaint of Johnson and his counsel, Albion W. Tourgee,
 already a controversial figure in State politics and de-
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 tined to become even more so, Jesse C. Griffith, sheriff

180. Infra., 157-159.

of Caswell County, was haled before a military commission
 at Charleston, South Carolina, for unnecessary and cruel
 confinement of Johnson. To the protest of Governor Worth,
 General Canby replied that Johnson had been oppressed for
 his Unionism and that the sheriff was one of the agents
 of that oppression. As in the case of Henderson Cooper,
 the general claimed that the indictment of 1863 was found
 by a grand jury under a hostile or pretended government
 and ipso facto was illegal and void; the imprisonment,
 therefore, was false. At the military trial, the charges
 of cruelty were proved groundless, except for the fact that
the jail had no fire; this was true of all county jails at the time. The military commission acquitted Sheriff Griffith. This case was the subject of much controversy between the civil and military authorities and was easily the outstanding case concerning "Union men." General Canby clearly played into the hand of the civil authorities in accepting it as the typical example of "persecution" of men of Union feelings.

181. The trial is in C. O. no. 124, November 20, 1867, General Orders, Second Military District, 1867, and in QO 2610; the civil views are in G. P., Worth, Kerr to North, October 31, 1867; Worth to Johnson, December 31, 1867; and in North Correspondence, II, 1085-96, 1101-02, 1113-14, 1121-22; the military views are in G. P., Worth, Canby to Grant, November 14, 1867 (copy).

Finally, the establishment of provost courts to try civil cases and minor criminal cases aroused the resentment of the civil authorities. The outstanding example was that of a court established at Fayetteville on May 27, 1867, with jurisdiction over five counties. Its proceedings were to be governed by the laws of North Carolina not inconsistent with United States laws or the orders of the commanding general, and its jurisdiction covered all civil and criminal cases referred to it by the post commander at Fayetteville except murder, manslaughter, rape, or arson. The post commander might, upon application of any person sued or prosecuted in those counties, transfer
cases to it from the civil courts. Proceedings in all cases were to be reviewed for approval by the post commander; sentences imposing fines exceeding one hundred dollars or penalties affecting the liberty of any person were not to be executed until approved by the commanding general; and appeals to the commanding general from the action of the post commander would not be considered unless accompanied by printed papers and arguments of the parties or their counsel. Compensation for the judges of the provost court was fixed at four dollars a day; court expenses were to be met out of fines and costs paid by the parties. The court was to establish simple rules and forms of procedure. Similar courts were established in

182. Senate Executive Documents, no. 14, 40 Cong., 1 Sess., 84-85.

other sections of the State. Their scope of jurisdiction

183. E. g., One for New Hanover, Brunswick, Bladen, and Columbus Counties, established in March, 1867. Bryant W. Ruark, "Some Phases of Reconstruction in Wilmington and the Country of New Hanover," in Trinity College Historical Papers, XI, (1915), 92-93; In April, 1868, a similar court with jurisdiction over thirty-two counties was established at Raleigh. Hamilton, op. cit., 239.

was limited in September, 1867, by an order forbidding them to handle cases involving title of land and cases of debts more than the value of three hundred dollars.
184. Circular, September 30, 1867. General Orders, Second Military District, 1867. This circular prescribed that defendants must have ten days notice in cases of debt or damages involving more than twenty-five dollars and fifteen days notice if the value were over one hundred dollars.

Complaints were lodged with Governor Worth soon after the establishment of the Fayetteville Provost Court.

185. G. P., Worth, J. C. Shepherd to Worth, June 12, 1887, protesting that the State courts were impartial and that there was no need of such a court.

and he protested strongly against it. To his mind, it was a caricature upon justice such as had not been heard of "since Sancho Panza's day." Its three judges (one judge

186. Worth Correspondence, II, 1070.

and two associates) he described as "respectable mechanics . . . no one of whom ever [had] studied or practiced law."

187. G. P., Worth, Worth to Johnson, December 31, 1887; G. P., Holden, Judge R. P. Burton to Holden, January 14, 1869, introduced one of the judges as "an architect and builder by profession — and a capital workman, and a reliable, trustworthy man. He is also a staunch Republican . . . . He was formerly employed as an architect of buildings on the Wilmington and Weldon Road, and as I understand, gave entire satisfaction."

This court handled a large number of cases, until its existence terminated with the complete re-establishment of State government in 1889.
The complaints of the civil authorities upon all of these issues were brought together in one broad indictment of military orders and policy and presented to President Johnson in December, 1867. Governor Worth and the Conservative whites were fairly friendly toward General Sickles, because he appealed to them for advice and ignored the Radical leaders in the work of reconstruction. Even so, the governor spoke of "military satraps" and protested vainly against the course of General Sickles. After General E. R. S. Canby replaced General Sickles, Governor Worth had hopes of getting relations between the civil and military authorities on a footing on which he could be of service to the people, but in these hopes he was mistaken.

Not only were General Canby's "jury orders" more stringent than those of his predecessor, but his administration witnessed the decision of the military court in the case of Tolar, McRae et al. and the most important cases of military interference with regard to Negroes and men of Unionist
sentiment. The new commanding general, moreover, made the most obnoxious removals and appointments to office, and refused to remove the provost courts created by General Sickles. Disappointed in his hopes, Governor North at first considered General Canby as an "unostentatious and candid Radical... an honest man, believing in the expediency and constitutionality of the obstruction acts and therefore cordially co-operating with the less vindictive portion of the Radical Congress."  

191. Ibid., 1061.

To his mind, the State was under an "unmitigated despotism."

192. Ibid., 1071.

Later, he referred to the general as being more tyrannical and possessed of less intelligence and consideration for the people of North Carolina than his predecessor, and

193. Ibid., 1085.

finally he felt that "In giving us Canby for Sickles the Pres. [sic] swapped a devil for a witch." Governor

194. Ibid., 1095.

North's anger increased with the volume of correspondence and with reflections upon the military orders and inter-
ference. Finally, he carried the whole matter to President Johnson in December, 1867, and, at the President's request, gathered evidence upon all the subjects of irritation and placed it all in one report to the latter. This letter, covering over thirty pages, contained a summary of all the points of contention illustrated by all the cases referred to above and bitterly stigmatized the entire course of General Canby as "unwise, and cruel Military oppression." It may be regarded as the climax

195. There is a typed copy in the G. E., Worth, December 31, 1867.

of bitterness between the civil and military authorities. For some days afterwards, Governor Worth daily expected that either he or the general would be removed, but

196. Worth Correspondence, II, 1102, 1113, 1138.

neither contingency occurred.

While the acrimony between the civil and military authorities was reaching its apogee, Superior Judge Fowle resigned in consequence of the "jury orders." It was

197. Supra, 131.

very difficult to secure a man qualified to take his place, inasmuch as, according to a military order of August, 1867, all persons appointed to office after July 19, 1867, were
required to take the "ironclad oath." However, Governor

198. G. O. no. 78, August 26, 1867, General Orders, Second
Military District, 1867.

North and his Council agreed to nominate John F. Poindexter
as the successor. Poindexter declined, on January 2, 1868,
on the grounds that he could not accept "under existing
circumstances" and that he could not take the "iron-clad"
oath conscientiously. Upon receiving this refusal, the

199. North Correspondence, II, 1084, 1118; G. F., North,
Poindexter to Worth, January 2, 1868.

governor doubted the wisdom of calling the Council of
State again, as he knew of "no one having any just pre-
tensions to be a judge, who would accept the appointment
under existing circumstances." In fact, he seriously

200. North Correspondence, II, 1110-1111; To use his own
picturesque expression: "If we recommend any body it must
be a super-annuated lawyer or some boy who has not tarried
long enough in Jericho for his beard to grow." 1120.

considered reporting that he could make no recommendation,
thus throwing the responsibility exclusively upon General
Canby. This desire was probably overcome by the knowledge
that, if he failed to act, some army officer or some
Radical leader might be appointed.

201. Ibid., 1111, 1120.
In the meantime, General Canby awaited the governor's nomination. He had requested Governor Worth on December 2, 1867, to nominate a successor to Judge Fowle. Over a month passed and still he received no communication upon the subject. As he had never come to North Carolina since being appointed military governor, communication between him and the governor was remote.


The bitter feeling aroused by the clash of civil and military jurisdiction had separated the two still more. By early January, 1868, the general came to the conclusion that the civil authorities had determined to cause delay and to create difficulties, the responsibility for which might be thrown upon the military authorities. This conclusion was partially correct, although he was unaware of the vain effort made to secure a nominee. In this state of feeling, General Canby wrote Governor Worth that Albion W. Tourgee had been nominated to fill a civil vacancy in North Carolina and would have been appointed except for previous charges made against his character by the governor.


The statement fell like a bombshell in the Conservative camp. Tourgee, a native of Ohio who had settled in Greensboro, North Carolina, had made himself obnoxious to Conservative whites by making before the Southern Unionist Convention in 1868 false reports of deprivations upon and murders of loyal whites and Negroes in North Carolina. These reports constituted part of the Radical "atrocities campaign." His activity in the W. W.

205. *North Correspondence*, II, 772-776. The statements made were that seven hundred loyal men had petitioned President Johnson for redress from rebel depredations, that twelve hundred United States soldiers who had settled in North Carolina had been forced to leave the State and sacrifice their property, and that a Quaker had seen fifteen drowned Negroes taken from a pond.

Johnson case and the arrest of Sheriff Griffith had intensified Governor Worth's dislike of him. The fact that General Canby, in his statement concerning the nomination of Tourgee, requested the governor to furnish him with names and addresses of persons from whom he derived his low estimation of Tourgee did not alleviate the latter's feelings; finally, on January 11, 1868, Governor Worth

206. Governor Worth set about securing names and addresses, meanwhile characterizing Tourgee as "the meanest Yankee who has ever settled among us" and a man "of most 'destitute character.'" *Ibid.*, 1114, 1116, 1120, 1122. In a short time, he furnished General Canby with thirty-three names, mostly Conservative whites, but also some United States army officers and some Republicans. 1124-1127.
wrote General Canby that, inasmuch as it was apparent that the latter intended to appoint Tourgee, no North nominee would be treated with consideration; in consequence, the governor did not deem it expedient to cause the State treasury useless expense by calling the Council of State together to make a nomination, especially as it was improbable that a respectable person could be found who could take the "iron-clad" oath.

207. **Governor's Letter Book, LIV, 55.**

General Canby, upon receiving this letter, learned for the first time of the efforts made by the civil authorities to secure a nominee. Moreover, he apparently had become satisfied that Tourgee was not the proper person to nominate: Governor Worth had furnished him abundant proof. Several days later, he replied that any nomination made by the civil authorities would be treated with every consideration. However, he refused to recede from his position upon such a point as the "jury orders," and he could not accede to Governor Worth's standards of qualification for judges. Meantime, several members of the

208. **Supra, 158, Footnote 206.**

209. **G. P., Worth, Canby to Worth, January 19, 1868.** Governor Worth's statement that he was unable to find any man
of respectable pretension to fitness was "so little in accord with the established reputation of the bar of your State for intelligence & patriotism, & with my official knowledge of some of its members, that I have been and am still entirely unable to account for it, unless the solution is to be found in the standard of qualification which appears to have been established. . . . If devotion . . . to a Rebellion that was waged for the destruction of the constitution of the United States and judicial but exparte denunciation of the laws of the United States and of the Congress that made those laws, are in the estimation of the Governor and his Council essential elements of 'respectable pretensions to fitness,' for judicial appointment in North Carolina, I cannot accept your standard for qualification." 

Council of State deemed it unwise not to make an effort to find a nominee and urged Governor Worth to reconvene the Council for that purpose. This advice, together with what


Governor Worth termed General Canby's "courteous letter," led him to reconvene the Council. Upon consultation with the Council and with the members of the Supreme Court and other prominent lawyers, the governor nominated Colonel Clinton A. Gilley, a former Freedmen's Bureau agent and post commander at Salisbury, North Carolina, who had been very popular among the Conservative whites, had settled at Salisbury to practice law, and had become a Democrat in politics. The nomination was accepted and Gilley was appointed on March 7, 1868.

211. Ibid., 1145; Hamilton, op. cit., 338; C. P., Worth, Gilley to Bagley, February 22, 1868, Canby to Worth, March 7, 1868 (telegram).
After the severe indictment made by Governor North in December, 1867, against the whole course of General Canby, attention was diverted, except for the problem of securing a replacement for Judge Fowle, from the relations between the civil and military authorities to such political features of Reconstruction as the formation of a State constitution and the election of State officers as provided for by the Reconstruction Acts of Congress. The Conservative and Republican conventions were held in February, 1868; the Convention which framed the new constitution met from January to March, 1868; and the elections for the new government were held in the latter part of April the same year. In the heat of bitter political strife and the problems aroused by the new constitution, attention of all parties turned from the military authorities to the issues of the future. The results of

\[\text{212. This is discussed in Hamilton, op. cit., passim, 252-293.}\]

these issues upon the administration of justice will be analyzed in the next chapter.

As attention was diverted to these political questions, feeling between the civil and military authorities softened. The accommodation in the appointment of Clinton A. Gilley as a superior judge, although he was "not of the manor born," helped bring this about. Also, on
February 6, 1868, orders were issued requiring all
military courts to be governed by the rules of evidence
prescribed by State laws and definitely limiting the
jurisdiction of provost courts to three types of cases:

1. Cases involving matters of difference between
employers and employees respecting rights under provisions
of military orders;
2. Cases wherein the civil authorities had refused,
unreasonably failed, or were unable to protect person or
property;
3. Cases in which there was "good ground for be-
lieving, upon facts shown, which must be preserved of record,
that impartial justice cannot be secured in the State courts,
by reason of prejudice on account of race, color or former
condition."

213. G. O. no. 18, General Orders, Second Military District,
1868.

Military commission trials continued to be held, but none
involved such issues as those of Tolar, McRae et al or
Sheriff Griffith of Caswell County. No cases arose con-
cerning Union men or Negroes which involved such feeling as
did those of W. W. Johnson, Henderson Cooper and the other
provocative ones of 1867. Nor did military removals from
office occasion dispute. All these were things of the past.

Nevertheless, General Canby held his ground
firmly on these past issues, although giving no further
causes for offense. It has been shown that he refused to
alter his orders dealing with the subject of juries.

214. Supra, 159.
Likewise, he felt that the removal of Sheriff Wilcox of Jones County was proper. As late as May 6, 1868, he issued an order enjoining attachments against persons who sought to avoid Confederate conscription during the war.

215. Supra, 142-144. G. P., Worth, Canby to Worth, May 1, 1868.

216. G. O. no. 61, General Orders, Second Military District, 1868. "In every case of attachment pending in any Court of the State of North Carolina, or the State of South Carolina, upon proof that the absence of the defendant, which constituted the ground of issuing such attachment, was occasioned by his seeking to avoid conscription into any military organization engaged in armed rebellion against the United States, the Court shall, on motion, dismiss such attachment; and all proceedings in prosecution and enforcement of such attachment are hereby declared null and void."

In April, 1868, he established a provost court at Raleigh with jurisdiction over thirty-two counties. What was more,


in the same month, he empowered post commanders to appoint military commissioners with powers of justices of the peace of districts or counties or of police magistrates of cities. These commissioners might have troops placed at their disposal and were given power to command all police forces and police officers; in addition, they were empowered to summon civilians to their aid, and all cases of refusal or neglect to obey said summons, whether by civilians or
civil officers, were punishable by military tribunals. The commissioners were to be governed in the execution of their duties by the laws of North Carolina, excepting wherein the laws conflicted with those of the United States or with military orders of the Second District. Their jurisdiction, however, was not to extend to cases involving ordinary personal relations between civilians, unless the civil authorities refused or failed "to suppress insurrection, disorder, and violence -- and to give all rightful protection to persons and property." Cases of mistreatment

218. G. C. O. no. 61, April 6, 1868, General Orders, Second Military District, 1868. "The Military Commissioners will promptly report all cases in which they assume jurisdiction, and the disposition made of each case."

to Negroes continued to receive trial by military commission,

219. Ibid., no. 114, June 25, 1868; QQ 3295. Before a Goldsboro commission, W. W. Pepper of Northampton County pled guilty of whipping a colored boy in his employ for refusing to obey orders and also the boy's mother for endeavoring to stop the punishment. He was sentenced to a twenty-five dollar fine or fifteen days in jail in default of fine.

although there seemed to be more of a tendency to refer reported cases of outrage or unfairness to the civil authorities. Finally, the military authorities continued to arrest

220. G. P. W., North, E. E. Harris to Canby, May 18, 1868. Case of white boy wanted for rape upon a colored girl, referred to the Attorney General by the Provost General; J. W. Ludtke to Lieut. A. Geddes, May 20, 1868, and enclosures --
reported case of murder by whipping of a freedman in 1864; Petition of Jerry McDaniel to Canby, January 16, 1868, referred to Governor Worth.

civilians for military trial, although there were not many such cases, nor were they of much importance; most were turned over to the civil authorities after the State returned to its proper relations with the United States Government. It was clear that the military authorities

231. Two cases in particular stood out upon which there are a number of letters in the G. E. Worth for 1868. One Daniel M. Elkins was arrested and tried for placing an obstruction upon the Wilmington and Weldon Railroad. There are too many items (affidavits, letters, and notes) to list individually. It may be noted that General Canby issued an order providing a fine of two hundred to one thousand dollars and imprisonment from six months to one year for obstructing railroads, with the provision that if anyone were injured fatally, the offender was to suffer the death penalty. Apparently, such activities were too common! G. O. no. 120, November 17, 1867, General Orders, Second Military District, 1867; Then there was the case of Daniel L. Pressal, arrested for murder in Henderson County and held in Buncombe County jail. Again there are many items. Both of these cases were later transferred with several others to the civil authorities.

continued the course of 1867, but no outstanding cases were involved and there was more cooperation between them and the civil authorities. Meanwhile, state political issues overshadowed these relations.

During the years 1868 to 1888, there were a good many trials by court-martial of soldiers accused of offenses
upon civilians or of conduct prejudicial to civil law and order—a good many more than occurred in 1865. For the most part, these offenses in 1866 consisted of being absent without leave from camp at Raleigh and conducting themselves in a disorderly manner upon the city streets or in homes, which usually meant boisterous conduct and occasional drunkenness. Generally a small fine of five or six dollars was imposed in such cases with occasional sentences involving a brief imprisonment, or, perhaps, a larger fine. In one case, a soldier was discharged. Three cases of robbery are recorded; punishment varied from six months imprisonment and a fine of sixty dollars to one year in prison and dishonorable discharge. Three cases of assault and battery upon civilians drew thirty to sixty days imprisonment, and one soldier received six months imprisonment for shooting at a Negro. The great majority of these cases occurred at Raleigh, a few occurring at Salisbury, Greensboro, and Wilmington.

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222. It would be impractical to note the individual sources for all the cases. They are to be found for 1866 in the General Court-Martial Orders for the Atlantic Division in General Orders of the same for 1866. The writer has summarized from these and from a judicious sampling of the manuscript records found in the Judge Advocate General's Office.

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A most serious case involved rape upon a colored girl under ten years of age in Granville County. The court-martial
sentenced the soldier to death, but General Sickles mitigated the sentence to dishonorable discharge, forfeiture of pay, and imprisonment at hard labor until the end of his term of enlistment. In a still more serious case, four colored privates were tried for rape committed upon a young white girl near Fort Macon in late December, 1865. All were acquitted, but the remarks of the judge advocate in regard to two of them are worthy of note: "the findings are not in accordance with the evidence. The identity of the prisoners seems to be established beyond a reasonable doubt and it is a shame that such an aggravated offense should go unpunished." But the findings were unalterable: the men were released. The records show also that there was a good deal of disorderliness among the colored troops stationed at Wilmington in the latter part of 1865 and January and February, 1866. One officer was cashiered for drunkenness while on city guard duty; a private was sentenced to forfeit a month's pay for striking and seriously injuring a boy; another private received a
year's imprisonment for larceny. But, in the two most
serious cases -- a trial of five privates for taking two
colored youths out of the hands of a Wilmington policeman,
November 7, 1865, and a trial of four soldiers for the
murder of Thomas Picket and injury to his two daughters --
the accused were acquitted. It is only fair to say that,
in the latter case, there could have been no other verdict
in the light of the evidence; however, the murder was the
work of colored troops. In the trial of the five who took
the colored youths from the policeman, it was evident that
there was laxity of discipline. These cases were of im-
portance in view of the fact that many complaints reached
the military authorities of disorderliness on the part of
colored troops in the State in 1865-1866, discontent which
did not disappear until the last regiment of colored troops
was mustered out in September, 1866.

In 1867, while there were no cases involving
Negro troops, the number of serious charges against soldiers
increased. There were two or three cases of disorderly com-
duct, one of them involving an assault and battery, for which punishment ranged from a five dollar fine to six months imprisonment and seventy-two dollars fine. Two cases of larceny resulted in six months imprisonment and dishonorable discharge; one case of petty larceny was punished by a twenty dollar fine. A robbery conviction merited dishonorable discharge and a year's imprisonment.

Eight soldiers were convicted of entering three homes in or near Raleigh, behaving in disorderly or boisterous manner, assaulting inmates and, in some cases, being disrespectful to officers in the process. Their punishments ranged from a sentence of three months imprisonment and a fine of thirty dollars to dishonorable discharge, two years in prison, and forfeiture of pay. The average imprisonment was six months. Three were dishonorably discharged.

Another soldier, convicted of stabbing a woman inmate of a house of ill fame in Wilmington, was given six months imprisonment, forfeiture of pay, and dishonorable discharge.

Two men were convicted of resisting the city police of Wilmington while intoxicated; they were punished by twenty dollars fine and two months in prison. Threatening to shoot citizens, in trivial cases, merited a small fine and two or three months imprisonment, but, when a soldier at Kinston shot at a citizen, he received a year in jail and a heavy fine. And when a soldier at Goldsboro attacked and
endeavored to rob several citizens, he was punished by one year imprisonment and forfeiture of pay and was drummed out of the service wearing the placard "Robber." Punishments were more severe in 1867 than in 1866. As in 1868, most of the indictments occurred at Raleigh, a few at Wilmington and Salisbury, one each at Goldsboro, Kinston, and New Berne.

The number of cases in 1868 was smaller, perhaps owing to the knowledge that punishment was sure. Of the relatively few cases occurring between January and July, most were petty cases of A. W. O. L. and disorderly conduct. As usual, they merited a small fine and imprisonment. However, when the soldiers resisted arrest while being delivered to the civil authorities and endeavored to break down the door of a colored woman's house, as happened in Beaufort City, the parties received one or two years imprisonment. And stealing, if only a hat, was punished by forfeiture of all pay and allowances except the dues of a laundress, accompanied to the tune of being drummed out of the service wearing the placard "THIEF."

The trials are found in General Orders, Second Military District, 1868.
In such fashion did military courts-martial punish soldiers guilty of offenses affecting civilians or of breaches of public order — many of which were but natural aftermaths of the tension of war.
III

THE REPUBLICAN ADMINISTRATION
OF WILLIAM W. HOLDEN
1868 - 1870

After the new constitution had been framed from January to March, 1868, in accordance with the Reconstruction Acts of Congress, it was submitted to a vote of the people. At the same time, an election for officers of the first "Reconstruction government" was held, in which, after a bitter political campaign, William W. Holden, erstwhile secessionist and provisional governor and now leader of the Radical Republicans in North Carolina, was elected governor. Two months later, Congress enacted a

1. The work of the Constitutional Convention of 1868 and the political campaign are discussed in Hamilton, op. cit., passim, 253-288.

law whereby North Carolina with four other states would be entitled to representation in Congress when its State legislature ratified the Fourteenth Amendment to the Constitution, provided that its constitution would never be amended to deprive of the right to vote any citizens of the United States to whom that right was accorded by said constitution.

The same day, Congress removed the disabilities of seven hundred citizens of North Carolina, many of whom had been elected to office. This enabled the State government to be organized. To facilitate this organization, General Camby

3. Hamilton, op. cit., 288-289; a majority of the newly elected officers and legislators were "banned" by the Fourteenth Amendment.

ordered the newly-elected police officers to perform the duties prescribed for the existing provisional officers and directed that court records under the old government be transferred to the proper authorities under the new one. To effect the same end, he removed Governor Worth from office and replaced him with Governor-elect Holden, to whom Worth surrendered his office under protest. Meantime,


the State remained under military rule, as the State legislature had not had the opportunity to ratify the Fourteenth Amendment to the Constitution and this amendment had not yet become part of the Constitution, two conditions which were made by the First Reconstruction Act fundamental to admission to representation in Congress and termination of military supervision.

On July 2, 1868, the newly-elected State legislature ratified the Fourteenth Amendment. When notified by
a telegram from Governor Holden of this action, General Canby promised to instruct post commanders not to interfere in any civil matters, unless the execution of the Congressional Act of June 25, 1868, should be obstructed "by unlawful or forcible obstruction to the inaugural of the new State Gov [ernmen] t," and to abstain from exercise of military authority except to close up unfinished business. Three days later, he issued a general order pro-


viding for the approaching termination of military authority. The order provided that, upon proclamation of the President announcing the ratification of the Fourteenth Amendment, post commanders would cease to exercise all authority conferred under the Reconstruction Acts of Congress, except such as was necessary to inaugurate the new State government and to complete unfinished business. With reference to administration of justice, this order contained several far-reaching provisions. Upon the date of the aforesaid presidential proclamation, all military appointments such as military commissioners and election officials would terminate, while the tenure of military appointees to civil office in the State would end when their successors, elected or appointed under the State Constitution or laws, were duly qualified. Provost courts
were abolished and their records ordered transmitted at once to Headquarters. All civilians held by the military authorities for trial for offenses cognizable under the laws of the State of North Carolina were to be turned over to the custody of the proper civil authorities; on the other hand, prosecution against citizens held for military trial for violation of the Reconstruction Acts of Congress or of military orders pursuant thereto were ordered dismissed, and these civilians were discharged. However, civilians already sentenced by military commissions were to remain in military custody until discharged by virtue of the expiration of their sentence. Curiously, this order provided that writs of habeas corpus issued by the United States Courts for the benefit of civilians sentenced by military commission were to be honored by the military authorities, whereas similar writs issued by State courts were to be respectfully but firmly disobeyed.


Finally, upon proclamation by Secretary of State Seward and a Congressional resolution declaring the Fourteenth Amendment to be in force, General Canby ordered all authority conferred upon him remitted to the civil authorities.

7. Ibid., G. O. no. 145, July 24, 1868; On August 5, 1868, he relinquished command of the Second Military District and
ordered officers therein to report to the Department of 
the South. G. O. no. 150.

With this action, twelve civilians held for offenses against 
the laws of the State were transferred to the civil govern-
ment.

3. An abstract of these cases is given in G. E., Holden, 
Cogswell to Coleman, August 11, 1863.

In the constitution of this civil government, 
established under authority of the Reconstruction Acts of 
Congress, several very important changes were introduced 
in the organization and procedure for administration of 
justice. Of these, perhaps the most important was one a-
bolishing the time-honored distinction between actions at 
law and suits in equity, together with the abolition of 
feigned issues. Another most important alteration was the 
abolition of the county court, its functions being divided 
up among other agencies. A third, one which aroused con-
siderable resentment among Conservative whites, increased 
the number of superior and Supreme Court Judges and made 
their offices elective by the people rather than by the 
General Assembly as in the past. The office of justice of 
the peace was deprived of some of its dignity, and justices 
were made elective. Finally, the types of punishment for 
crime were limited to death, imprisonment, fines, and re-
moval from office, while only four crimes were punishable
by death. The constitution endorsed the principle that the object of punishment is not merely to satisfy justice, but to reform the offender. Altogether, this constitution, by means of these changes together with certain economic clauses and provision for universal manhood suffrage, embodied some of the most progressive social, political, and economic ideas of the time.

9. Economic clauses such as abolition of imprisonment for debt and homestead exemption are treated in the chapter dealing with social and economic problems.

The change that aroused perhaps the most controversy at the time was the one abolishing the distinction between actions at law and suits in equity and replacing them with a uniform procedure, under which all actions involving private rights were denominated "civil action," while prosecutions against persons charged with public offense were termed "criminal action." This alteration.


Together with the clause abolishing feigned issues, necessitated the formation of a new Code of Civil Procedure, a requirement which the constitution met by providing for a commission to report to the General Assembly a code of law. Until the new code was adopted, suits pending at the time of the adoption of the constitution were to be deter-
mined according to the old practice. The commission

11. Ibid., Art. IV, secs. 2, 3, 4.

appointed by the Constitutional Convention and composed of V. C. Barringer, W. R. Rodman, and A. W. Tourgee (who was perhaps most responsible for the idea of abolishing the distinction between equity and actions at law), selected

12. There is a manuscript, drawn up by Tourgee, in the Legislative Papers for 1888, providing for a system based upon this idea.

the code of the State of New York as the best standard and guide for the new code of North Carolina for the significant reason that New York was "one of the most intelligent commercial and enlightened States of the Union" and the first State to advance the idea of a code system. In its own words,

"The Commission did not impliedly admit our inferiority, by conceding that a system suited to the highest civilization would be unsuitable to ourselves; and, in adopting the New York Code as the basis of their own labors, conceived the idea that they were but following the example of wise law-givers in all ages, in studying for imitation and use the laws of all nations."


This frank acceptance of a commercial and industrial point of view met with much disfavor among the bench and bar of the State, who had been nurtured on the old system and were
distinctly opposed to uprooting it. The feeling of many
was undoubtedly expressed by Bartholomew F. Moore, a dis-
tinguished lawyer of strong Unionist feelings and one who
had co-operated with the Republicans until estranged by
what he considered their radical tendencies:

"It [the judicial system of 1868] was framed for
the introduction of a particular code, and the . . . code
commission was greatly influenced by gentlemen then in
power, who had recently become citizens of North Carolina,
and had none of the sympathies of North Carolinians in re-
gard to their laws or their welfare; took almost an exact
copy of the code of New York practice, and undertook to
engraft it on the laws of North Carolina. Two codes of
law could not well be more irreconcilable than these."


The commissioners, while feeling that the code, which was
adopted in 1868, worked no revolution in jurisprudence and
that it possessed greater merits than the old system, can-
didly admitted that there were imperfections in it and
later willingly acceded to changes suggested by the bench
and bar. A meeting of the bar of the State was held at
Raleigh at which objections were made to the code — objec-
tions which the commissioners claimed were heeded by
changes introduced between 1868 and 1870-1871. By that
time, all were agreed that a new code was necessitated by
the abolition of the distinction between law and equity.

15. Legislative Documents North Carolina, 1869-1870, no. 28
3 (Report of Code Commissioners March 2, 1870). Public
Documents North Carolina, 1870-1871, no. 5. (Report of same,
November, 1870). In these reports the commissioners admitted the imperfections, but held that a return to the old code was impossible and stated that, in making suggestions for a new code, they had deferred in a great majority of instances to the opinions of the bar; an example of imperfection in the code was the failure to provide for the very important writ of recordari. Marsh v. Williams, 63 N. C., 372.

This distinction has never been restored, and one of the severest critics of the constitution has admitted that the change was, on the whole, wise. The adverse reaction to


such sudden alterations can be appreciated, but the verdict of time and practice favors those who engineered the constitutional change. Moreover, it is most important to note that, in interpreting this change in the constitution, the State Supreme Court held that the essential principles of rules of pleading had not been abrogated; rather, they had only been modified as to technicalities and matters of form:

"The object of pleading, both in the old and new system, is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty."17

17. Parsley v. Nicholson, 65 N. C., 210. This decision was rendered by Judge Dick in January term, 1871.

Consequently, the courts continued to give relief to the extent and in the same cases heretofore given both by courts of law and of equity. Accordingly, the principles
of law and equity were preserved, the only change being
that those principles were applied in one court and by one
mode of procedure.


The abolition of the county court came as part
of a wholesale change in the form of county government.
As has been seen, prior to 1868 the county court exercised
wide civil and criminal jurisdiction and was the governing
body of the county. Under the new constitution, its

19. Supra, 22-23.

functions were divided among three agencies: 1. Its non-
judicial duties of local government were vested in a
newly-created board of county commissioners, five in number;
2. Its probate jurisdiction was transferred to the clerk
of the superior court acting as a judge of probate; 3. Its
judicial functions were given to the superior courts.

20. County Records, I, 62-63. The constitutional provisions
are found in Articles IV and VII of the Constitution of
1868.

These thorough-going innovations deprived the justices of
the peace of their erstwhile dignity. Where, sitting as a
county court, they once exercised wide judicial and govern-
mental powers, they now found themselves limited to juris-
diction over civil actions founded on contract wherein the sum did not exceed two hundred dollars and wherein the title to real estate was not in controversy, and to criminal matters arising within their counties wherein the punishment did not exceed imprisonment for one month or fine of over fifty dollars. One should hasten to add

21. Ibid., Art. IV, sec. 33.

that they were granted control over a new creation of the constitution: the township. However, this authority did

22. Ibid., Art. VII., secs. 3, 4, 5, 6.

not make up for the losses suffered. The justice of the peace, while still an important officer, had suffered a severe injury to his dignity and prestige.

Under the new constitution, the number of Supreme Court justices was increased from three to five, and the

23. Ibid., Art. IV., sec. 8.

number of superior court judges from eight to twelve;

24. Ibid., Art. IV, sec. 12.

furthermore, the offices of both were made elective by the people for the term of eight years, whereas they had formerly been elective by the General Assembly for life terms.

25
The Conservative party opposed this increase in numbers as useless extravagance and excess patronage for Republican lawyers (of whom there were but few), although in reality it was necessary, since the dockets of the courts were overcrowded. They felt also that election of judges by the people would corrupt the fountains of justice. This objection was but part of the general repugnance on the part of the Conservatives to universal manhood suffrage without regard to color: they refused to "confide the power of making laws to those who have no property to protect, and to bestow the right to levy taxes upon those who have no taxes to pay." It is interesting to note, however,

that with the return of the Conservatives to power the
constitutional provision for election of judicial officers remained unaltered.

The new judicial structure thus provided for a hierarchy of officers, elected by the people. At the bottom stood the justices of the peace, who handled petty criminal cases and lesser civil cases. Next came the superior courts, possessed of exclusive original jurisdiction over all serious civil and criminal cases, excepting the administration of estates and claims against the State; the last-named cases were reserved to the Supreme Court whose decisions therein were subject to final approval by the General Assembly. The administering of estates, probating of deeds, and apprenticing of orphans were given to the clerks of the superior courts, elected every four years, who were made "the chief ministerial officer [s] of the Superior Court, with extensive powers to act for the court in the interval between terms." The State was divided into twelve districts, each superior judge residing in his district while holding office, but the judges might exchange

29. Constitution of 1868, Art. IV, Sec. 11.

30. Ibid., Art. IV., sec. 17, 21, 22; County Records, I, 82-83. The superior court clerk was "an independent judge of 'special proceedings' not involving a regular suit and of probate matters."
districts with each other with the consent of the governor. Superior court was to be held in each county at least twice a year. Superior court judges had appellate juris-


diction of all issues of law and of matters of fact wherein the matter in controversy exceeded twenty-five dollars.

32. Ibid., Art. IV, sec. 16.

In each district, a State solicitor, holding office for four years, was elected. At the apex of the hierarchy

33. Ibid., Art. IV, sec. 29.

stood the State Supreme Court, composed of a chief justice and four associate justices, holding court twice a year and possessed of appellate jurisdiction only, excepting cases of claims against the State. Such was the machinery

34. Ibid., Art. IV, sec. 8-11.

for administration of justice established under the new civil government.

The first justices of the peace under the new government were appointed by Governor Holden. The constitution, in providing for the establishment of townships, required the newly-elected county commissioners to divide
the counties into districts and report the same to the General Assembly before January 1, 1869. Upon the approval of their reports by the General Assembly, these districts should be known as townships, and each township would be entitled to two justices of the peace, who, together with a township clerk, would constitute a board of trustees for the supervision of local government. Until these acts were effected, the governor might appoint a sufficient number of justices of the peace in each county who would hold office until the townships were legally constituted and justices elected therein. After this organization was completed, justices of the peace would be elected biennially. In accordance with these constitutional provisions,

35. Ibid., Art. VII, secs. 3, 4, 5, 11.

the General Assembly passed an act approving the districting of the counties and designating the first Thursday in August, 1869, as the date of the first election for justices of the peace. Those elected were to be qualified within five days. The following election would be held the first Thursday in August, 1871. Accordingly, Governor

36. Laws of North Carolina, 1868-69, ch. 185:472-480. This act provided that in every township in which a city or town was situated the number of justices would be two more than the number of wards of such city or town; if it were not divided into wards, then it might have one additional
justice for each five hundred inhabitants; if there were less than five hundred inhabitants, it might have one additional justice.

Holden's appointees were to hold office until the regularly-elected justices qualified.

Governor Holden's appointees have been regarded as notoriously poor and incompetent, often unable to read or write, of the type to make the office of justice of the peace "a by-word and reproach." The classic statement of


this view was given by B. F. Moore, a well-known conservative Republican lawyer, before the Select Committee of the United States Senate investigating Southern Outrages:

"A great many of the new appointments were men of known bad character, men convicted of theft, or accused and believed to have been guilty of theft, and men who could not read or write. Why, sir, precepts have been brought to me issued by justices who were not able to sign their names, but who made their mark. Justices who tried important cases, involving misdemeanors for which the parties might be sent to jail, could not write, and had to make their mark for their signature." 38

38. Senate Reports, no. 1, pt. 1, 42 Cong. 1 Sess., 207.

In his opinion, the administration of justice before justices of the peace had become "contemptible", and that was "one great source of demoralization in the State."

39. Ibid., 207-208.
There can be no doubt that many such appointments were made; considerable evidence is to found within the Governor's Papers for 1868 and 1869 to substantiate this conclusion. If ability to read and write correctly be presumed to be a basic necessity for qualification, many were obviously more than unqualified. A few illustrative examples of communications from such justices may be cited:

"there is sum Disput about whether I have awright to lay the penalty when I try the case or not. ... 
"Sum of our lawyers want me to bind all of my cases over to our Surcoit Court." 40


"I Shall Endevor to make the Repetes to you about the outrage and the Desterbance that has Been Done in Caswell County. ... the civil officers which has Been appointed are in Dainger at thare homes of a night on account of surch theretsy as has Been made by this Ku Klux murderers Band." 41

41. Ibid., G. T. F. Glamaway to Holden, December 28, 1868.

"Dear Sir

After a corletion of shvel authority I went to Halifax for advice and Esqre Solimon Lavender Gregery Cirk of Court and Esqre Webb all concur in one opinion viz; that your proceedings are all null and void as regard that tryal; and they advise that wee compromise the mater if posable, as wee was all rong more or less. ...

42.

42. J. J. Judge to Geo. B. Curtis; March 25, 1869; There are several similar letters. See also Hamilton, op. cit., 344; A most humorous communication is found in G. P., Holden, Thos. Branton to Holden, March 10, 1868: "the
shiveraldry [chivalry] of Shelby is caving in [caving in]
One of Seymours Electors has had the Misfortune to have an
heir Sworn to him by a very dirty looking colored girl
and it looks just like the Elector himself also an other
prominent pro Slavery man has met with the same misfortune
in the same town. ... Dear governor it is hard and I
fear will be harder to enforce the Laws in this County if
there is an election allowed. ... Now govnr I am not
scared nor I am not a coward [coward] ... but I wou'd
be glad to get out of this stinking reble hole if our
superintendent of pub [lic] works needs any foremen or
drivers in his depeartment where there is alittle money
to be made I wish you would tell him that there is such a
man as me in old Cleaveland. ..." Branton was the justice
before whom the bastardy affidavits were sworn; hence his
urgent desire to leave.

Presumably, a justice of the peace ought to be able to
read the laws! A good many complaints were registered
with Governor Holden of incompetency on the part of the
justices for drunkenness. One Holden supporter was espe-
cially worried over the fact that a justice of Martin
County could be swerved to please Conservatives when drunk,
and the man was drunk most of the time! Although the
justice complained of was described as a "dribling [sic]
drunkard. ... siding with Conservatives," he was retained
in office at least eight months after the complaint was
made. The Conservative party made good use of such
examples. In Halifax County, one J. J. Judge, formerly

43. Ibid., J. J. Smith to Holden, September 12, 1868.
Smith reported that A. A. Crookstone, the magistrate in
question, was the only magistrate in the township (Village
of Jamesville). "I am teased and worried [sic] by persons
saying that is Republican rule, that is one of your repub-
lican appointees." Same to Same, May 19, 1869. Holden ap-
pointed Smith a justice soon after. For other examples,
see R. R. Gettys to Holden, February 25, 1869 (McDowell County) and D. S. Miller to Holden, April 22, 1869 (Alexander County).

A sergeant in the Confederate army and a most illiterate person, had associated himself with the Republican party and had taught a freedmen's school in Enfield in 1869. Quick tempered and lacking in education and manners, he inspired a fellow justice to remark: "If such as he, are to lead and advise the colored people, I can only say God help them." Still other complaints referred to

44. Ibid., Geo. B. Curtis to Holden, March 26, 1876; For Judge's illiteracy, see supra, 188.

Justices or their deputized officers as men guilty of crime, such as stealing and taking bribes. Perhaps the

45. G. F., Holden, C. A. Smith to Holden, September 17, 1888 (Pitt County); James Sinclair and E. L. Proctor to Holden (n. d. - Robeson County); John Robinson to Holden, May 3, 1869 (Wayne Co.)

Outstanding example was the appointment of one John J. Everett of Halifax County. Regarded as a criminal, Everett apparently exercised too much favoritism toward Negroes while a Holden appointee and, as a result, was forced to flee the State to escape the Ku Klux Klan. Returning to the State in 1869, he was convicted of larceny and receiving goods stolen from the Raleigh and Gaston Railroad. After fleeing the State again, he was returned and sentenced by Judge Watts to five years in the Pen-
tentiary. After repeatedly asserting his innocence and, backed by similar protestations from his wife, claiming he was "framed" for political reasons, he became converted while in prison and made a clean breast of the thefts; whereupon, after some two years in prison, upon the recommendation of the authorities and the heads of the Railroad Company, he was released. A good many other complaints

46. The citations are numerous, but a few, illustrative of the history of the case, may be given: Ibid., M. H. Watson to Holden, October 16, 1868; Everett to Holden, November 13, 1868, April 23, 1869, February 7, 1870; Jesse Carter to Everett, November 8, 1868; G. P., Caldwell: Pardon petitions of Everett, January 17 and June 13, 1872; Mrs. Everett's petitions to Caldwell, March and September 11, 1871.

were registered with Governor Holden either on grounds of lack of education or of general unfitness, and Mayor W. H. Porter of Fayetteville (a Holden appointee) resigned because members of the Republican party demanded an immediate revolution in the town office, a demand with which he refused to comply.


This evidence of unfitness in so many instances is peculiarly valuable because it came from supporters of the Holden administration or from letters written by the appointees themselves. Moreover, the evidence was spread over enough counties to indicate that unfitness was
fairly general. The truth of the matter is that it was virtually impossible to secure qualified appointees from within the ranks of the Republican party only. As one person put it:

"I herewith send you a list of names. ... in some of the Districts it will be impossible to get Republicans to serve as magistrates as there is none in the Districts that can act as magistrates. Gov [ernoX] Holden informed me that he should not appoint any on the other side, [sic] I think he will have to change his mind upon the matter, as some of the most moderate might be appointed." 48

48. Ibid., B. W. King (Lenoir Co.) to Wallace Ames, July 10, 1868. In one district King was unable to find even a moderate Conservative!

Other reports testified to the same difficulty. Yet

49. Ibid., J. E. Eldredge to F. W. Foster, August 3, 1868; John Robinson (Goldsboro) to Holden, February 27, 1869. "Now there is not a white man in Goldsboro capable of writing his own name who did not vote against you."

Governor Holden had pledged himself to appoint to office only friends of Reconstruction and of the new State constitution, a pledge which obviously excluded Conservatives.

50. Legislative Documents, North Carolina, 1868 session, no. 2, 4. Inaugural address, July 4, 1868, Holden stated that the principles contained in the constitution were too dear to afford opponents an opportunity to pervert, distort, or misapply them. 4-5.

The importance of securing efficient justices of the peace for the good of both the people and the Republican party
and, on the other hand, the effect of poor appointments
was strongly revealed in a letter to the governor from
a conservative Republican of New Hanover County:

"As I am the only white man of this vicinity
who ventured to declare his sentiments frankly and openly
in favor of Gen [eral] Grant in the late election and at
the same time, in a public speech, avowed my determination
to do all I could to better the condition of the coloured
man, because the interest of the white race demanded it, I
feel that it is my duty to communicate with you freely
on the subject of our present condition here. . . . We
today occupy a critical and alarming position — men here,
without character, and without qualification in any one
particular, are aspiring to and pressing their claims for
positions upon mere party grounds, which require and call
into exercise all the energies of the most highly culti-
vated and best gifted minds of the country — There is
not a more important and responsible position in the gift
of the people than the one of magistrate, and yet men who
can scarcely write their names — whose honesty has always
been questionable and whose conduct, (not upon political
grounds) has been obnoxious, are pressing their claims
as superior and entitled to the support of the poor
deluded colored man —

"One word from you would put the whole confusion
at rest — I may be in error, but my honest convictions
are, that the best means to perpetuate party power would
be to disarm the opposite party, by dealing fairly and
justly with them — by showing to them that we will not in-
flict a wrong upon them to gratify party spleen or revenge
— but . . . will exclude them from no position which the
public good demands they should occupy. . . . We have not a
man of the Republican Party in Lower Black River Township
or District who is qualified for either of the offices now
soon to be filled by the suffrage of the people — This
Sir is a fair and honest statement — Then why jeopardize
the public good, by empowering men to do business for which
they are utterly and hopelessly disqualified? The Repub-
lican Party, both in strength and character will have
everything to lose and nothing to gain by it — My policy
would be, in the election of a magistrate, Constable and
Clerk, to select the most honorable, intelligent and com-
mandable men of the country, regardless of their political
opinions, and by that means you can add strength to your
party, which I assure you today (owing to the inefficiency
and oppression as exhibited and practiced by some of the appointees, on some of the colored people here) has de-
preciated at least 50 per cent since the last election. —
The more intelligent colored men here say they have none of their color qualified for these positions; and they are willing to take good men from any party in order to restore peace, harmony and prosperity to the country. — They are annoyed to death by the low and debased white man who has seized upon this, as his only opportunity to get position — You know, sir, such men are dangerous, that they cannot be trusted — In the name of justice and for the sake of our people's welfare and happiness aid us with your influence to the end proposed. "51


The writer of this letter touched upon another important factor in mentioning the appointment of Negroes to office. Quite a number of Negroes were appointed as justices of the peace by Governor Holden. In view of

52. Ibid., Several instances are cited: e. g.: Burke County — four colored justices; Caswell County — at least four. (n. d.); John A. Reid to Holden, August 17, 1868 (Halifax County); Many citizens to Holden, December 14, 1868 (Orange County); Holden Private Collection in archives of the North Carolina Historical Commission, H. H. Pritchard et al to Holden, June 25, 1868, nominating twenty-two persons, four of them colored. Endorsed "appointed."; B. F. Moore testimony in Senate Report, vol. pt. I, 42 Cong. 1 Sess. "In very many of the townships you will find colored men and white men acting as magis-
trates." 207.

their lack of educational opportunity, many of these appointees were clearly unqualified. In some cases the

53. G. P., Holden, John A. Reid (sheriff of Halifax County) to Holden, August 17, 1868. Two colored men had
been appointed who could not read or write correctly; David Johnson (a Negro J. P. for Caswell County) to Holden, February 25, 1859: "Dear Sir I Shall attempt to drop you A few lines in which I hope these few lines may find you in good health I have been getting very well Every Gience you have appointed me J. P. Some of my friends of the union L L L of N a met in the School House and made up a petition to send you to point them a New J. P. Sempley because I give Every man in my Judgment right And the main reason why because I will go to Mr George N Thompson for in Struction he is a Lawyer. . .""}

Negroes refused to qualify or else intimidated they had no 54 qualified nominees to suggest. Negro appointments

54. Ibid., John A. Reid to Holden, August 17, 1867; R. Beverly Frayser to Holden, December 28, 1868.

aroused complaint both from Republican and Conservative 55 whites. In general, these appointments gave opportunity

55. Ibid., Henry A. Walker (Mayor of Milton, N. C.) to Lieutenant Dawes, September 7, 1867; "Many citizens" (Orange County) to Holden, December 14, 1869; "Many Republicans" to Holden, July 13, 1869; "As regards the appointing of a colored man for Magistrate in the Thomasville District we think it will certainly be a great injury to the Republican party in this section of N. C."; Silas N. Stillwell to Holden, July 14, 1869; The Republicans had lost the elections in Mecklenburg largely owing to the issues of negro equality and high taxes. "I met these gigantic Aristocrats [Governor Vance and Judge Osborn] on the stump and tried [sic] to make the people believe that the [sic] would not be drilled in the same cos, and Regiments with colored [sic] men and that white and Colored Children would not be taught in the same schools, but I might as well have sung psalms to a horse. . . I hope our Legislature will make the Distinction in militia co. and Schools. . . if they will do this our Republican party will gain a number of Vascela- ting [sic] Conservative votes, and bring back a great number of half witted, and weak kneed, republicans that
has left our ranks." This letter had nothing to do with appointment of magistrates, but it shows the general trend of thought.

for criticism.

Governor Holden's appointments for justices of the peace were clearly subject to grave criticism both by the Conservative party and by members of the Republican party. However, it is possible to carry this criticism to unreasonable lengths, as has been done by some writers.

56. E.g., Hamilton, op. cit., 343–344.

After all, inability to read and write correctly need not necessarily constitute prima facie evidence of total disqualification for office as a magistrate. If it were, evidence can be produced that there were justices of the peace in North Carolina before the War who were disqualified for office. A few examples of letters from ante bellum justices may be cited:

"Dear I feel it a duty to write this note, you are appised no dout of the [word illegible] of the 2 young Adars & Barnard who is condemed to be hanged on the 14th of June on what I consider poor evidence I... was an actingjustice of the Peace in the town of Rutherford for near 20 years and at no time during the time I was doing business would of token her oath. . ."57


"I am a candate for Magistrate in golds Boro
Township some say that I am Band because I was a magistrate. Before the rebellion, I have always bin a union man & was a magistrate before the rebellion. But I never raised arms. . .58


"My dear Friend. I now ask you as the Election for officers in all the Townships is to be Alected by vote and Sum is banded by the Howard amendment I wish to no if it Enterfare with those who helte office of Justice of the Peace before the war and who did note ade nor Aisate in no way during the Rebellion and war opposed to the Cause and were A Union Man all the war."59

59. Ibid., Congate Clark to Holden, July 8, 1869. It is evident that he was such a magistrate, for people were saying that he was ineligible for office.

It was not precisely a new thing to see unlettered men grace the office of justice, although there was a decided increase in their numbers in 1868. Furthermore, despite his pledge to appoint Republicans only, there is considerable evidence that many of Governor Holden's appointees were Conservatives, if the many complaints that came to the governor in 1868 and 1869 may be trusted. Several persons protested against the appointment of Conservatives, opponents of Reconstruction. In one case in particular, a

60. Ibid., Four colored persons (Edgecombe County) to Holden, August 20, 1868; Petition from Union League of Gaston, March 13, 1869; John A. Reid (Sheriff of Halifax County) to Holden, August 11, 1868; Officers of the Hillsboro Union League to Holden, April 26, 1869; H. M. Waugh (Surry County) to Holden, August 4, 1868. All complained that bitter opponents of the Republican party had been appointed.
Mrs. H. J. Moore of Massachusetts, who had some business investments in Carteret County and who engaged in teaching Negroes, complained that two justices of the peace of Carteret County practically aided and abetted attacks upon her person and destruction or confiscation of her property. Finally, there is some evidence of collusion

61. Ibid., Mrs. Moore to General Miles, December 28, 1868, January 6, 1869; O. D. Bidwell to Holden, January 9 and February 7, 1869; E. D. Moore (Boston) to Holden, March 4, 1869; These letters all favored Mrs. Moore. The other side of the case was presented in W. J. Daughtry to Holden, December 5, 1868, and John D. Davis (Sheriff of Carteret County) to Holden, January 9, 1869. From the conflicting evidence, it seems that Mrs. Moore and W. S. Bell (the man accused of attacking her) both claimed title to a steam saw and grist mill. After an altercation, Mrs. Moore claimed that Bell broke one of her ribs and threatened her life and that the civil authorities prosecuted her and her associates instead of prosecuting Bell. Bell said that he had been attacked and his life threatened. In the end, Mrs. Moore returned to Boston. The evidence is quite contradictory and involved. Probably, Mrs. Moore’s activity in teaching Negroes had much to do with the case.

between nominal Republican officials and Conservatives in which the interests of the Republican party were sacrificed.

62. Ibid., B. D. Morrill to Holden, May 5, 1869; John Robinson (Goldsboro) to Holden, February 27, 1869: “Indeed some of our officials are so complaisantly condescending as to be willing that (—and through their influence!) any of our godly aristocracy—no matter how anti-Holden or opposed to reconstruction—should be recognised by you.” Supra, 183 (and footnote 43).

Governor Holden’s appointees held office until the elections were held in August, 1869. The evidence upon
the character of the officials elected is not as full
and conclusive as is that concerning the ones appointed
by the governor. However, there is enough to indicate

63. Probably this is due to the fact that Governor Holden
had the power to appoint justices before 1869; consequent-
ly, complaints were referred to him and these complaints
were preserved in the Governors' Papers. After 1869,
the appointive power in case of vacancies lay with the
clerks of superior courts, and evidence through complaints
to them is difficult to secure.

that quite a number of persons who lacked proper qualifi-
64
cations were elected. Complaints arose of bad and designing

64. B. F. Moore's testimony, referred to above, indicated
that many unfit persons were elected to office. Senate
Reports, no. 1, pt. 1, 42 Cong. 1 Sess., 207; G. P., Holden,
J. S. Shaw to Holden, December 21, 1869: "Please informe
me to whether a magistrate has the right to try out a
case of an, assault and assault and battery where their, was,
no dedly weapons used nor serious damage dun. . . ."

men receiving office, particularly in the city of Wilmington,
were some justices seemed to resemble "ambulance-
65
chasing" lawyers of to-day. Also, Negroes were elected

65. Ibid., D. J. Atkinson (Bladen County) to Holden, Sep-
tember 16, 1870; N. and B. Turner (Northampton County) to
Holden, July 22, 1869; of Wilmington, M. London, a well-
known conservative Republican lawyer, wrote Governor Caldwell,
November 26, 1873, that a bill was to be introduced
in the General Assembly to establish a special criminal
court for the city, partly "to rid us of the insupportable
taxation arising from the malpractice of justices of the
peace in the City. . . ." When it became apparent that the
bill would not pass, he wrote on December 12, 1873: "It
is much to be regretted that some relief cannot be afforded
the people here. Corrupt Justices of the Peace in the
city are 'running' their office as they call it, to the oppression of the poor and ignorant in the most shameful manner. They each have special constables of their own appointment who 'hunt' up the cases, & divide whatever they can extract from their victims. Why are they not prosecuted I think I hear you ask. Who is to do it? An election takes place in August for solicitor, these justices of the peace really have, or are supposed to have great political influence." G. P., Caldwell.

to office, although not as many were elected as had been appointed by Governor Holden. However, if the many com-

66. B. F. Moore, Supra, 192, footnote 64; R. A. Graham Papers, Southern Historical Collection; James A. Graham to W. A. Graham, August 3, 1868. Only two Negro justices were elected in Alamance County; Henry T. King, Sketches of Pitt County; a Brief History of the County, 1704-1910. (Raleigh, N. C., 1911), 178. One Negro justice, when he appeared before the proper official to be qualified, was met by the remark that "he could be sworn in but that 'all h---l couldn't qualify' him." Another Negro, one Dennis Atkinson, after fining a white man fifty dollars and costs, winked at the white man and, after court was dismissed, told him he did not have to pay -- that he had "appeared" to fine the white man only to fool the Negroes.

plaints made by Republicans to Governor Holden can be ac-
cepted as trustworthy evidence, the office of justice of the peace was often captured by Conservative candidates, sometimes either by trickery or by compulsion.

67. There are many such complaints in the G. P., Holden. Representative examples are: Hilliard Gibbs (Hyde County) to Holden, August 31, 1869; Geo. Peters and B. Moore (Gaston County) to Holden, July 4, 1870; Kinsey Jones (Duplin County) to Holden, August 23, 1869; S. L. Curtis et al (Granville County) to Holden, August 11, 1869. The writer was not concerned with the truth or falsity of the charges of intimidation, etc., but the fact that the Conservatives were elected was clear.
Throughout 1868 and 1869 there was a great deal
of confusion and uncertainty in the administration of
justice rendered by justices of the peace. With the ex-
piration of the civil provisional government under Governor
North, the justices of the peace of that government ceased
to act, and, since appointments were not made speedily
enough by Governor Holden to fill the vacancies, a large
number of complaints were registered with him, stating
that justices either had not been appointed or had failed
to qualify, to the great detriment of the welfare of the
people. Reports of this type were most prevalent in

68. A few representative examples may be cited from ibid.:   

1. The President of Davidson College et al to Holden, 
   July 22, 1868. The lack of a justice was causing great
   inconvenience to the village.

2. J. M. Newsom to Holden, September 9, 1868. No mag-
   istrates had yet been appointed for two districts in Halif-
   fax County.

3. Hayes Lennon (chairman of the Columbus County Board)
   to Attorney General Coleman, September 9, 1868. Had any
   new justices been appointed and, if so, who? "None have
   been sworn in that we know of."

   again tell you that we must have officers to enforce law
   & order or mobs — & violence will soon be on us."

5. Citizens of Fallstown (Iredell County) to Holden, 
   October 7, 1868: There was "no magistrate in this portion
   of the county, and we are often at a loss and much incon-
   venience on this account, in having the interests of the
   peace, and other civil business attended to."

6. J. F. Rains (Chairman of County Commissioners of
   Polk County) to Holden, October 12, 1868. Not a single
   magistrate for the county had yet been commissioned.

1868, but a goodly number reached the governor for several
months in 1868. As might be expected, many such requests

were necessitated by the resignation of justices, and
therefore were only incidental matters; but, on the whole,
they indicated that in 1868 and 1869 a good many townships
and sometimes entire counties were not provided with magis-
trates for a considerable period of time. This failure
could not be laid to the door of Governor Holden alone.
Under the new Code of Civil Procedure adopted in August,
1868, justices of the peace appointed by the governor were
required to qualify within ten days of appointment before
the clerk of the superior court. A large number of magis-
trates — sometimes for entire counties — failed to meet
these requirements, either because the time limit was too
short or because, unaware of the new law and accustomed to
qualifying before the county court in the past, they quali-
fied before the county board of commissioners instead of
the clerk of the superior court. A lengthy communication
from W. D. Pearsall to the governor upon this subject well
illustrates the problem:

"I was at Onslow Court last week & heard consider-
able discussion relative to the qualification of Justices
the Peace. It was ascertained that there was not a Justice in Onslow Co. who had qualified within ten days after his appointment as provided for by the Code, Section 546, Chap. 7, Title 20. On my return home I examined the Clerk's Office yesterday & found nearly all the appointments in Duplin in a similar condition. My own appointment which was filed could not then be found.

"My qualification before the Clerk was on the 17th of Sept., 1868 & Registered same day. The provision of the Code above alluded to was ratified Aug. 24th, 1868 & several of the appointments were Aug. 17th 1868 so that it was impossible under the present mail facilities for appointees away from the lines of Rail Road to get their appointments & qualify within the time. Indeed it could not be expected of them to comply with the requirement of the Code which was not ratified at the time of their appointment. This difficulty may be removed, it seems to me, by the passage of an Act by the present Legislature declaring that the provision of the Code above alluded to applies only to Justices of the Peace who have been elected by the people or appointed by the Clerks of the Superior Courts to fill vacancies or unexpired terms & that all Justices of the Peace appointed by the Governor of the State & who have taken & filed the prescribed oath & qualified before the Clerk of the Superior Court of their respective counties are & shall be considered legally constituted officers in the Capacity of Justices of the Peace."70

70. Ibid., Pearsall to Holden, March 9, 1869; Jasper Etheldridge (Onslow County) wrote Holden January 3, 1869; that justices had qualified before the County Board of Commissioners and later found this was the wrong procedure. They were in "an awful fix," for the justices would refuse to act in the future.; There are many other similar communications: e. g. S. S. Summons to Holden, November 8, 1868; W. M. Moore to Holden, December 21, 1868; Robert Brinkley to Holden, December 21, 1868.

The justices elected in 1869 did not learn from the experience of their appointed predecessors; many of them similarly failed to qualify correctly. In the end, the General Assembly validated the acts of such illegally-71 qualified justices, but this law could not erase the un-
71. Laws of North Carolina, 1870-1871, ch. 87: 149-150; An attorney-at-law residing in Raleigh, North Carolina, informed the writer that it is not unusual for justices of the peace to perform "official" acts after their term of office expires and, consequently, the legislature periodically has to validate such acts.

certainty and confusion of the years 1868-1870.

In addition to the above difficulty, many an appointed or elected justice was ignorant of the laws and the changes of 1868. Bewildered, such justices often wrote to the State capital for advice. It is not an unusual thing to find such requests as these:

"I am as yet absent of any law to work by as Justice of the Peace. I have applications for warrants and I yet do not know how to proceed with law as far as I know we are all so in this County [sic]." 72


"I would be glad if I could get some of the acts that was passed [sic] in relation to the duties of the Justices Courts as all of them are new and the Rebbles [sic] do all they can to make it appear [sic] that they are not competent." 73

73. Ibid., J. J. Rea (Washington County) to Holden, September 25, 1868; J. C. Weeden (Wake County) to Holden, December 9, 1868; "Please send me some of the acts Passed in order to Give me some instructions in the laws [sic]."

"I therefore Beg [sic] leave [sic] from the Republican party some assistance [sic];" A. S. C. Powell (Sheriff of Sampson County) to Holden, October 16, 1868: "PS well be Glad to Git some of the acts of the assembly as soon as we can I dont now what my fees is we ar in the Dark completely as to Law but we have the Gospel!! Powell had been a justice of the peace during the Civil
To make this uncertainty worse, a good many justices thought that, because the Constitution of 1868 prohibited persons from holding more than one office of profit under the State, they were ineligible to continue in office while holding other State positions, although the Constitution distinctly excepted justices of the peace from this prohibition. This belief exhibited both ignorance of the law as it stood and inability to comprehend even its plainest terms.


There can be little doubt that the administration of justice by the magistrates appointed by Governor Holden or elected in 1869 must have been marked by much ignorance and uncertainty. At the very moment when far-reaching changes were made in judicial ideas and structure, a large number of incompetent persons were appointed or elected to office; and in many cases offices went unfilled either through failure to appoint or failure of appointees to qualify; justices were often unaware that they were competent to fill office; and many a justice, whether laboring under the handicap of near illiteracy or not, did not have copies of the law to read! In the light of these facts,
it was well that the office of justice of the peace was bereft of much of its dignity.

Several interesting developments were noticeable in a creation of the Constitution of 1869 — the office of clerk of the superior court. For one thing, at least fifteen of these officials elected in 1869 and belonging to the Republican party were banned by the Fourteenth Amendment to the Constitution and had to be recommended to Congress for removal of their disabilities. Another matter

75. Ibid., List of names of Republicans elected and banned by the Fourteenth Amendment, n. d.

of political interest concerned the bond required of clerks. By the Code of Civil Procedure of 1869, sureties of the clerk’s bond each had to swear that they were worth one thousand dollars over and beyond their debts and homestead exemption; also, the number of such sureties must be sufficient to guarantee fifteen thousand dollars, the penalty of the bond. This requirement roused the anger of Jonathan W. Albertson, later to be a superior judge and to be Republican candidate for Secretary of State in 1876:

"This law was a trick of the Copperheads in the last legislature, aided by the weak kneed and dish-water members of our own party, (and we had too many of this disposition)... In this section [Perquimans County] there are very few republicans who have property and if the law is rigidly enforced three fourths of our republican Clerks will be displaced and the offices filled by Copper-
heads, who notoriously insolvent & their bondsmen the same, can nevertheless command any quantity of requisite oaths. This office in any County is worth from 100 to 300 votes . . . . I hope your Excellency will think of this matter and endeavor at once to have this odious restriction removed."

Albertson had heard that Judge W. B. Rodman was the author of this "obnoxious qualification," by which Chowan County had already been lost to the Conservatives. Perhaps

77. Ibid., Albertson to Holden, November 10, 1868; Governor's Letter Book (Holden), 61:371, Frank D. Irvin (clerk of Burke Superior Court) to Holden, May 25, 1870. The Conservatives were endeavoring to oust him by requiring his sureties to show they were worth one thousand dollars each above their liabilities and homestead exemption.

the most interesting political quarrel concerning superior court clerks occurred in Fayetteville in the fall of 1868. One John C. Callahan, a Republican, had been elected clerk for Cumberland County, but had failed to qualify by giving bond within the required time; whereupon Judge R. P. Buxton declared the office vacant. However, upon being informed that Callahan was then prepared to offer satisfactory bond, Judge Buxton appointed him clerk. Approximately two weeks later, the Fayetteville Eagle, a Conservative paper edited by W. J. McSween, assailed the judge bitterly for upholding a carpet-bagger of the most ultra and incendiary radicalism. As for Judge Buxton,

"He would sacrifice the honor of our humiliated but noble old State for his own promotion; Let an outraged, innocent and confiding people show no violence to this
smiling and pious traitor, but let us show him we have the
nerve to treat him with utter contempt and to speak of his
treachery as it deserves."

These remarks called forth a libel suit against the editor
and the publisher of the Eagle, who retracted their state-
ments.

73. The documents are to be found in the R. F. Buxton
Papers, Southern Historical Collection. The article was
dated October 8, 1868, and a copy of it is found in the
papers, as is the retraction. However, in publishing
the retraction, the editor subjoined remarks which Judge
Buxton felt violated the agreement; there are several
letters in the G. P. Holden, upon this matter. Holden
to General Miles, October 24, 1868: Mrs. Buxton had
appealed in person for protection, and Governor Holden
requested a special guard for the Buxton home in Fayette-
ville.; Holden to T. A. Byrnes (Mayor of Fayetteville),
October 23, 1868. The governor thought Judge Buxton and
his family were in terror of their lives, a fear which
was not founded on facts; Byrnes to Holden, October 27,
1868. A Democratic convention had stirred up the public
mind a few weeks before, but now all was quiet, except
for the article in the Eagle. There had been no threats
against Judge Buxton's family.

The character of the superior and Supreme Court
judges elected in 1868 has been severely criticized as
being "somewhat better as regards morals and worse as
regards ability" than other State officials of the Repub-
lician regime, who have been characterized as hopelessly
incompetent and corrupt. The accepted opinion of the
bench views the Supreme Court as an able body but one ac-
tively engaged in politics, and the superior judges as a
conglomeration of incompetent or dishonest men, with one
or two exceptions. To prove the last contention, it has been shown that, in 1870, out of one hundred and fourteen cases carried to the Supreme Court on appeal, decisions of superior judges were reversed in seventy cases.

79. This summary is drawn from Hamilton, op. cit., 348-349; 414-415.

This view is well sustained in some cases. The most objectionable judges elected were to be found on the superior bench. Of these, the worst was Edmund W. Jones, whose habitual drunkenness and indecency (even to the extent of deliberate exposure of his person upon the streets) finally led to his impeachment in 1871; he escaped conviction by resigning. Another who received very severe

80. Ibid., 348, 414, 562.

criticism was George W. Logan, judge of the ninth judicial district. Born of a family whose ancestors ranked among the best families in Rutherford County, he was a prominent man of some property, being a member of the Confederate Congress during the Civil War. He became a leading member


of the Peace Movement in North Carolina and turned Republican
after the war ended. It was claimed that he was partisan

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82. Ibid. He was a "turncoat" and an office-seeker according to this writer. See also North Correspondence, I, 463, footnote.

and incompetent as a judge, letting Negroes get off with light sentences while punishing Democrats heavily. In

83. Davis, "Reconstruction in Cleveland County," loc. cit., 23.

1871, when feeling in his district ran high against him on account of his refusal to hold court for fear of Ku Klux violence, a memorial indicting him severely was presented to the General Assembly, signed by thirty-two lawyers, including two of the three Republicans practicing in the district. In its own words:

"Resolved, That . . . George W. Logan . . . is not qualified, either by learning or capacity, to discharge the duties of the office he now holds, and that by reason of his incompetency the course of justice has been impeded, and in many cases justice itself is virtually denied; public confidence in the efficiency of government and the laws has been impaired; crimes have multiplied, and the administration of law rendered needlessly expensive, as well to the public as to the parties litigant."84

84. Quoted in the Ku Klux Testimony, N. C. 370. Solicitor Synum, the third Republican lawyer, endorsed the memorial.

At the same time, several requests from lawyers and county commissioners of Cabarrus and Mecklenburg Counties were sent to the governor, indicating that they preferred no court
to one held by Judge Logan. A resolution of impeachment

85. G. P., Caldwell, S. W. Guinn et al to Caldwell, June 17, 1871; Joseph Young (chairman Cabarrus County Commissioners) to Caldwell, June 19, 1871; T. L. Vail (chairman Mecklenburg County Commissioners) to Caldwell, June 30, 1871. These requests were for some judge other than G. W. Logan to hold a special court. W. A. Moore was appointed.

was introduced against him in the General Assembly but was
defeated chiefly upon grounds of expense attendant upon a
trial and of the possibility of its being regarded else-
where as a Ku Klux prosecution. The solicitor for the

86. Hamilton, op. cit., 569-570.

district, W. P. Bynum, a conservative Republican who, by
virtue of his position, had better opportunity to know
Judge Logan's course at first hand, endorsed the memorial
but did not sign it; his official position prevented such
action. In 1874, moreover, he said publicly: "I am re-

87. Ku Klux Testimony, N. C., 370; David Schenck, a Democratic lawyer cited by Judge Logan for contempt of court in 1871, gave some interesting examples of the latter's maladministration. Ibid., 371-372.

solved not again to cast a ballot for a grossly incompetent
judge whose blunders may involve the reputation, the prop-
erty, and the life of every citizen in the district." It

seems fairly clear that Judge Logan was both incompetent and partisan, unfit for so important an office. Still

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89. For further evidence see the testimony of Plato Durham, Conservative lawyer of Shelby, North Carolina, who charged that Judge Logan released colored men convicted of larceny upon payment of costs and imposed very light fines upon Republicans convicted of serious offenses. Ku Klux Testimony, N. C., 305. Vide 313–314 for accounts confirming the statements of David Schenck. It must be remembered that both Durham and Schenck were Democrats and bitter opponents of Logan, but the fact that Republican lawyers and Solicitor Bynum joined in the denunciation clinches the case against the judge.

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another judge, Samuel W. Watts, has been characterized as ignorant and corrupt, guilty of receiving bribes from such notorious carpet-baggers as Milton S. Littlefield and John T. Dewees, and bitter as a political partisan. The evi-

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90. Littlefield was one of the most prominent of those engaged in railroad frauds in North Carolina; Dewees was expelled from the United States House of Representatives for selling a cadetship. Hamilton, op. cit., 490–491; 430 et. seq.

91. Ibid., 415, 445–446.

dence of corruption is sustained, but the charge of igno-
norance of the law is not tenable, since, over a two year period (1874–1876), the State Supreme Court affirmed his decisions in slightly over fifty per cent of appeals, a record which, while not the most commendable, contrasted favorably with that of Judge Kerr, a well-known Conservative. He
91. Beginning the June term, 1874, and running through the
June term, 1876, the writer has found Judge Watts upheld
in forty-four cases and reversed in forty-two; From January
term, 1875, through June term, 1876, Judge Kerr was upheld
in twenty-five cases and reversed in forty-two.

may be regarded as a man of average ability, but one who,
when reversed by the Supreme Court, did not repeat his
errors -- a corrupt, plodding judge. These three judges,
Jones, Logan, and Watts, received the severest criticism;
they certainly reflected no credit on the judiciary.

Of all the superior judges elected in 1888,
Albion W. Tourgee received the most publicity and excited
the most controversy. A native of Ohio, he had served
for three years in the Union army, both in Virginia and
in the western campaigns, but resigned the service because
of difficulty with his superior officer; after his return
to Ohio, he had been admitted to the bar in 1864. In

92. The standard life is Roy F. Dibble, Albion W. Tourgee,
(N. Y., 1921). While appreciative, this biography is
critical enough to note some of Judge Tourgee's failings,
such as his tendency to "play up" happenings in his life
and his intense partisanship and inexcusable scurrility
in political writings.

July, 1865, he went South for his health, acted as counsel
for parties tried before courts-martial or military com-
missions at Raleigh, and, after an extensive tour of North
Carolina and Georgia, went into the nursery business at
Greensboro, North Carolina, with a capital of five thousand dollars. Always a failure in business ventures, he found himself several thousand dollars in debt by 1867. In the meantime, he had entered politics and was a delegate to the Southern Unionist Convention at Philadelphia in 1866, where he delivered a speech bitterly assailing the South for its treatment of the Negro. In this speech he made false "atrocities" reports, which were used to speed the Radical program of Congressional reconstruction. He took

93. Supra, 158 (footnote 205) et seq.

an active part in the Convention of 1868 and in the political campaign. Perhaps he was the person most responsible for the abolition of the distinction between actions at law and suits in equity. Elected a Superior Judge and

94. Supra, 178.

also appointed one of the code commissioners, he was criti-
cised severely for drawing double salary. Impetuous and

95. The summary thus far, except for the references to supra, is drawn from Dibble, op. cit., passim, 1-43.

headstrong, a believer in the Northern cause without re-
serve, a man who knew not prudence or restraint, he was possessed of "uncompromising carpet-bagger traits, which were shown in giving preference to negroes over whites
whenever suitable opportunity offered." By virtue of

96. Ibid., 34, 44.

these traits and of the reputation incurred by the Phila-
delphia speech and his activity in the W. W. Johnson case,

97. Supra, 149-150.

he had earned the wrath of Conservative whites and become
the object of many Ku Klux threats and plans, none of
which materialized. This enmity of Conservative whites
had effectually prevented his appointment as superior judge
by General Ganby. Of his partisan political conduct at

98. Dibble, op. cit., 44-45; Supra, 157-159.

election time, there can be no doubt. He was, for example,
grand master of the day at the Republican Convention of
September 16, 1868, and he was reported as making stump
speeches from the bench in that year. In 1871-1872, he


wrote a series of newspaper articles entitled "God's
Anyted Phew," in which he attacked the pride, the clannish-
ness, and the class hatred which he attributed to Southern-
ers in general. In 1873, he wrote his famous "G" letters,

100. Dibble, op. cit., 47.
which embraced attacks upon the Klan and satirized Democratic politicians and candidates for the judiciary in a style which his biographer describes as possessed of "intense partisanship, inexorable personal securrility and mud-slinging" qualities throughout. For these remarks, Judge Fowle administered to him a fistic defeat. 101

101. Ibid., 57-58. The "C" letters were published in The North State, a Greensboro paper.

Meanwhile, he had written Toinette, the first of several novels, in which he stressed the theme that the Civil War had merely lopped off a few branches from the tree of slavery, leaving the roots and trunk untouched, and in which he impossibly idealized the slave and the poor white. On the whole, it may be said that Judge Tourgee was possessed of considerable ability in seeing broad principles and in meeting difficult situations. For example, he had much to do with the abolition of the distinction between law and equity. When confronted with the impossibility of identifying persons accused of Ku Klux Klan violence, he continued the cases, "believing that an impending trial would have a better effect than trial at once without conviction," — an intelligent move. His biographer credits

102. Ibid., 48-50.
him with being responsible for the installation of heating systems in all the jails of his district. Certainly this was a most practical and creditable achievement for the 104 times. And in the conclusion of his well-known Fool's Errand that it was a fool's errand to try to force a


proud, aristocratic people to accept a system of government opposed to all their traditions and that the only hope of ultimate success lay in education, he exhibited an ability to accept gracefully and to understand defeat — a conspicuous achievement for a man who had immersed himself in the struggle and who had taken so active a day-by-day part in it. Likewise, he was able to analyze clearly some of the basic reasons for ultimate Republican defeat 106 in North Carolina. However, when faced with the concrete


problem of applying the law and the code which he helped
create, he failed, for the State Supreme Court overruled almost two-thirds of his decisions. Of all the superior judges, he was the most colorful and versatile.

The remainder of the superior judges were either men of average ability or quite capable judges. Not much is known about Judge Cannon, save that he was opposed to the use of troops by Governor Holden in Alamance and Caswell Counties, and that he was a man of moderate ability. Likewise, little is known of Judge Charles R. Thomas except that, born in Carteret County in 1827, he graduated from the University of North Carolina, studied law, and settled in New Bern. In 1864 he was elected Secretary of State. A Republican politician after the

107. Twenty-one reversals to eleven affirmations in June term, 1874, and January term, 1875; Professor Hamilton states, however, that he was a most capable judge in cases where politics could not enter, and says that a number of able lawyers, political opponents of Tourge, certified to his unusual ability. Hamilton, op. cit., 414-415 (footnote).


109. Josiah Turner, Jr., referred to him as an "ignorant man." Senate Reports, no. 1, 43 Cong. 1 Sess., 377. However, the Supreme Court, in 1874-1876, upheld him in eight cases and reversed him in nine. This record would stamp him as about "average" ability.

War, he was elected superior judge, 1868 to 1871, and
member of Congress, 1871 to 1875. He was regarded as a
judge of average ability. Judge Daniel L. Russell had

111. Hamilton, op. cit., 415.

barely come of age when elected to the bench, and his

112. Jerome Dowd, Sketches of Prominent Living North
Carolinians. (Raleigh, N. C., 1888), 136.

interests leaned primarily to political rather than to
judicial fields, as is attested by the many political
letters addressed to him in the manuscript collection of
his papers in the Southern Historical Collection. One of

113. At the University of North Carolina. Letters in the
Daniel R. Russell collection relate primarily to the cam-
paign of 1874.

his followers wrote him that he had many admirers on ac-
count of his legal decisions; on the other hand, one

114. Ibid., W. E. Pearsall to Russell, October 7, 1874.

semi-conservative Republican criticised him severely for
failing to hold the fall term of Robeson Superior Court in
115 116
1869. As will be noted, he was critical of the failure

115. G. P., Holden, James Sinclair to Holden, September 3,
1869; Sinclair wrote Russell on May 11, 1874: "You are
bitterly assailed for the stand you have taken against the
Ku Klux and we must hold up your hands in this campaign . . ." Russell Papers, op. cit.

116. *Infra.* 263.

of State authorities to bring Ku Klux Klan cases to conviction, feeling that it was their own laxity, rather than forces beyond their control, that caused such failure. As a judge he seems to have exhibited mediocre capacity,

117. In 1874 and 1875, the Supreme Court upheld his decisions in 9 cases and reversed them in 8.

but his main interests were political. In 1896 he was elected governor of the State. Two men who possessed little previous education in law proved to be rather good judges. One of these, James L. Henry, had been editor of an Asheville paper at an early age and saw considerable service in the Confederate army. It is said of him that he pre-


sided as a judge "with great acceptability," and the


records of the State Supreme Court indicate that his decisions were upheld in over fifty percent of appeals taken from them between 1874 and 1876. This was a fairly good
record at the time. Judge Henry opposed the use of
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troops in Alamance and Caswell Counties, and was re-


garded unfavorably by some of the more radical members of
121
the Republican party. However, he received the hearty

121. G. P., Holden, A. H. Jones (then a member of Congress)
to Holden, October 16, 1869: "So far as Judge Henry is con-
cerned I know that he is politically dead in the Republican
ranks."

support of the great majority of Republicans in his region
(the western part of the State), and by his learning and
industry won the respect and admiration of some leading
Democratic members of the bar of the tenth and eleventh
122
judicial districts. The other, John M. Cloud, was an

122. G. P. Caldwell. When Judge Dick resigned from the
Supreme Court bench in 1872, Republicans of all shades of
opinion recommended Judge Henry to succeed him. E. g.,
J. J. Mott to Caldwell, June 18 and September 5, 1872; D.
F. Davis to Caldwell, June 15, 1872, V. P. Lusk, Marcus
Erwin, S. Carrow et al to Caldwell, August 23, 1872, J. A.
Reed to Caldwell, August 31, 1872; When Judge Settle re-
signed from the Supreme bench in 1876, outstanding Demo-
cratic lawyers, including B. S. Caither, A. C. Avery,
Clinton A. Gilley, and Geo. N. Folk wrote Governor Caldwell
on August 19, 1876, requesting the appointment of Judge
Henry as, in his judicial capacity, he had displayed
"great courtesy, quickness and despatch of business —
learning and industry." Ibid.

honest and fearless man "whose knowledge of law consisted
mainly in his knowledge of human nature, and in his own
good sense." Nevertheless, the Supreme Court upheld

123. John Preston Arthur, Western North Carolina, a History, From 1730 to 1913. (Raleigh, N. C., 1914), 344.

almost two-thirds of his decisions during the period from 1874 to 1876, a very good record — one of the best. A Republican compatriot thought him quarrelsome and disagreeable, but he seemed possessed of the "joy of living;"


125. Ibid., Judge Cannon to Judge Cloud, June 15, 1871, "I will also say by way of encouragement to you [to exchange circuits], there are several sprightly widows on this circuit."

Solicitor A. H. Joyce felt that Judge Cloud endeavored to make his judgments uniform. No complaints were registered


against Anderson Mitchell, a man who was nominated by both the Conservative and the Republican parties, who had reached


advanced years, and, who, judging from the fact that the Supreme Court upheld him in fifty percent of appeals from his decisions, was a judge of moderate attainment. Of all the superior judges, the ablest and best was Ralph P. Buxton. Born in Beaufort County in 1826, the son of an
Episcopalian minister, he was educated partially in New York and partially at the University of North Carolina before beginning his law practice in 1848. Politically an ardent Whig before the War, he became mayor of Fayetteville in 1857 and was elected State solicitor by the General Assembly in 1863. After the War, he became a warm and consistent Republican and held the office of superior judge from 1865 to 1881. Although he was accused of dabbling in politics, several of his own letters and writings indicate that while on the bench he refused to take part in political activities. In one case wherein he was charged

128. Dowd, Sketches, 126-127.

129. The statement of his political activities is made in Hamilton, op. cit., 415, 633, without reference to authorities; G. P., Caldwell, Buxton to Caldwell, January 20, 1871: In re a meeting of the Western North Carolina R. R. stockholders, Buxton remarked in passing that he was not present as he had made it a practice to "keep aloof from all public meetings, of an excited character," since becoming a judge.; R. P. Buxton Papers, Southern Historical Collection, Buxton to J. W. Schenck, May 13, 1872 (copy): He would accept a seat in Congress "if elected to it without being obliged to engage in the political excitement of a canvass, as I have always held and freely expressed the opinion, that a Judge should hold himself aloof from political discussions whilst in office."

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openly of using his office for political benefit — appointing a carpet-bagger as clerk of Cumberland Superior Court — he defended his conduct ably by showing that he was merely
appointing a man once elected but temporarily disqualified and that he had suffered similar abuse from Republicans for permitting Conservatives to remain in offices to which they were elected. As a matter of fact,

130. Supra, 207-208. Buxton's defense was printed in an article labeled Justitia, the ms. of which is in the Buxton Papers, op. cit.; infra, 235. Worthy v. Barrett.

he was accounted a Conservative, together with Judge Cloud, by a leading Republican of Wake County. His record upon appeals from his decisions to the State Supreme Court from 1874 to 1876 was excellent: fifty affirmations to thirty-two reversals. No other judge could boast as good a record. He, too, had the respect of members of

131. Timothy Lee (sheriff of Wake County) in Senate Report, no. 1, 42 Cong. 1 Sess., 77.

132. Unless it be Judge Cloud. The real test of a judge's merit is: "How do his decisions stand before the highest court?" The writer has used the years 1874 to 1876 as the fairest years in which to follow the record of superior judges in the Supreme Court for the following reasons. By 1874, the main judicial problems of Reconstruction and the seemingly endless wrangling over technicalities in the Code of Civil Procedure were settled. Judges had a fair chance to know what the law was after several years of interpretation. Also, by this time Conservatives had been elected to the superior bench, men like Judge Kerr. It is possible, therefore, to compare the record of Conservatives and Republicans alike, for the Court treated them with equal consideration. If it reversed Judge Kerr's decisions in almost two-thirds of the cases, it handled Judge Tourgee's decisions as severely; yet, at the same time, it upheld such Conservatives as Judges Eure, Seymour, and Schenck in the great majority of their decisions. Professor Hamilton, in
selecting 1870, choose the one year when the superior judges suffered most, a year when the many vexing social and economic problems were being settled judicially and when there were many technicalities of the Code of Civil Procedure of 1868 to be worked out. The years 1874 to 1876 are much fairer ones to use as the basic test.

both political parties.

133. Plato Durham, a leading young Conservative, stated that he was "certainly a man of some ability as a judge." Ku Klux Testimony, N. C., 333. Vide also the G. P., Caldwell, W. A. Guthrie (Fayetteville) to Caldwell, June 30, 1872: Judge Buxton was just and impartial and had votes from both parties. A petition to Governor Brogden, n. d., but obviously 1876, voiced the same general opinion. Mrs. Buxton wrote her husband March 10, 1888, (Buxton Papers, op. cit.) that she believed he was popular with both parties. This was after his troubles with the Fayetteville Eagle.

The superior bench, then, was graced by three figures who cast reflection upon it and by one controversial figure who lent it much color and talent although he failed to meet success in the test of concrete application of the law. Three of its members were judges of outstanding achievement, one of them particularly receiving high acclaim. The remainder were men of moderate ability, of whom two, Judges Russell and Thomas, were more gifted in political than in judicial capacities. It was not a bench of unusual brilliance, and it lost much esteem by reason of its poorest members, but it merited a better characterization that it has usually been accorded.

The Supreme Court elected in 1868 was certainly an
able body, although somewhat inclined to take an active part in politics. Chief Justice Richmond C. Pearson was supported by both political parties. Already in his sixties, he had been a superior judge from 1836 to 1848; from 1848 to the time of his death (1878), he was a member of the Supreme Court, acting as Chief Justice the last twenty years of this service. In politics, he was an old-time Whig, opposed to nullification and secession.

During the Civil War, his steadfast opposition to conscription and to suspension of the writ of habeas corpus earned him much criticism. He has been regarded as one of the ablest judges of his day; and, although he re-


135. J. G. deR. Hamilton, "North Carolina Courts and the Confederacy," in North Carolina Historical Review, IV. (Oct., 1931), 389-374, 389, 394-399. Professor Hamilton shows that Pearson opposed secession and did not love the Confederacy, but that he was not actively hostile towards the latter in his official capacity.


received considerable criticism for his role in the "Kirk-Holden" war and in the famous "Protest of the Bar" case, and for his public support of General Grant in the election of
1869, he nevertheless was quite conservative in his outlook upon social and economic questions.

137. For his support of Grant vide Hamilton, op. cit., 349, 361-362; For his course in the "Kirk-Holden" war and the "Protest of the Bar," vide infra. An example of his conservative social outlook is seen in his sturdy dissent from Justice Reade's opinion in favor of the homestead laws. Hill v. Kesslar, 63 N. C., 451: "I am aware that in several of the States decisions have been made sustaining homestead laws. These cases all rest on the fallacy of assuming the power to make exemptions to some extent, and then, on the idea of legislative discretion, the amount is swelled up to thousands; and it is justified on the ground of 'keeping pace with the progress of the age' — a progress in this particular, I fear, of dishonesty and fraud."

Justice Edwin G. Reade likewise was supported by both Republicans and Conservatives. Born in Person County in 1812, he was elected a Whig member to Congress in 1855, where he was the only Southern member who voted to censure Representative Brooks for his assault upon Charles Sumner. A strong opponent of secession, he


accepted it as a practical reality during the Civil War, holding office as superior judge from 1863 to 1865. After the War, he was appointed a provisional judge by Governor Holden, only to become an associate justice of the Supreme Court in 1866, an office which he retained until 1878.

139. Dowd, Sketches, 94-95.
There is some question about his political activity while on the bench. Testifying before the Select Committee of the Senate on Southern Outrages in 1871, he stated that he had taken no part in politics after coming to the bench, and an early writer praised him for his political inactivity; but a recent writer has accused him of being the worst offender upon the Supreme Bench on this score. His decisions 140

140. In citing the report of this committee, the title Senate Report will be used. Its full title is Senate Report no. 1, 42 Cong. 1 Sess. Justice Reade, in his testimony, stated: "I interfere so little with politics that I really do not know much about them. I have not attended a political party meeting in eight years — since I have been upon the bench." 413; Dowd, Sketches, 95: "He took no part in politics while on the bench nor since, not even voting, and although twice nominated for Congress he declined,"; Hamilton, op. cit., 414, characterizes him as the worst offender upon the score of politics although very successful in concealing his activity; he supports his charge by stating that a leader in the Republican party named Justice Reade as co-author with John Pool of a most incendiary address in 1868. Ibid., 364-365.

upon economic questions, particularly with reference to homestead laws, were quite liberal and were framed with a 141

view to appealing to all classes, although those very 141

141. Jacobs v. Smallwood, 63 N. C., 112-118; Hill v. Kessler, 63 N. C., 446-447; Dillinger v. Tweed, 66 N. C., 210-211; Garrett v. Chesire, 63 N. C., 399-401. In these decisions, he held that stay laws were unconstitutional hindrances to society, but that a homestead exemption was in the cause of humanity and civilization, the extent of the exemption being a matter for each state legislature to decide. He held this course in the face of the United States Supreme Court, assailing the latter strongly, until directly overruled.
decisions were prejudicial to his own pecuniary interests.

142. Garrett v. Cheaire, 69 N. C., 406. "The opinion in Hill v. Kessler... was against my former impressions and prejudices and against my pecuniary interest, but I was satisfied then, as I am now, that the decision was right."; Dowd, Sketches, 93-94. He had invested all his fortune in the Raleigh National Bank of which he was elected president in 1878. He was a successful financier, a man of distinction and wealth.

The other three members of the Supreme Court were not supported by the Conservatives. Of these the best known was Robert P. Dick. Born in Greensboro in 1823, he graduated with distinction from the University of North Carolina in 1843, was admitted to the bar in 1845, and became a Democrat. As a reward for his activity in the presidential campaign of 1852, he was appointed United States District Attorney for North Carolina in 1853, an office which he held until 1860. He supported Stephen A. Douglas and was a member of the executive committee of the Douglas wing in 1860. A prominent Union man in the Secession Convention of 1861, he signed the State Secession Ordinance after a verbal protest. During the Civil War,

143. Dowd, Sketches, 109-110; Cyclopedia of Eminent and Representative Men of the Carolinas of the Nineteenth Century, 2 vols. (Madison, Wis., 1892), II, 634.

though a member of Governor Vance's Council of State for some time, he was better known as a leader of the Peace
Movement. After the War, he supported Governor Holden’s

provisional government, was appointed United States Dis-

trict Judge for North Carolina but could not take the

"iron-clad" oath, and was one of the leaders in the forma-
tion of the Republican party, in which he belonged to the

Conservative section. He held the office of associate

district from 1868 to 1872, when he was appointed United

States District Judge for the newly-created Western District

of North Carolina. In economic affairs he showed much con-
cern for internal improvements, concrete evidence of which

we find in his large stock holdings in the North Carolina

Railroad Company both before and after the Civil War.

Like Justice Reade, he was an earnest supporter of the

homestead exemption. Thomas Settle, Jr., was also a well-

known Douglas Democrat, who opposed secession but joined the
Confederate army upon the outbreak of the War. After a
year of military service, he was elected State solicitor
for the fourth judicial district and later supported W. W.
Holden in the Peace Movement. After the War, he became

61.

one of the founders of the Republican party and was an
associate justice from 1866 to 1871, when he was appointed
minister to Peru. Returning to his native state in 1872,
he was again appointed associate justice to succeed R. P.
Dick, but resigned to run for governor against Vance in
1876; he was defeated in a close but well-conducted and
fair campaign and received the consolation prize of appoint-
ment as United States District Judge for the Northern
District of Florida. Justice W. B. Rodman had been an

149. Ibid., 244, 552, 586, 648-653; Wheeler, Reminiscences,
390.

able lawyer and an earnest advocate of secession with a
150
record of service in the Confederate army. After the War,

150. Ibid., 19; Clark, North Carolina Regiments, II, 748,
V. 8; Hamilton, op. cit., 254.

he became a Republican and was a member of the Constitutional
Convention of 1868, which elected him a member of the code
commission, an office which he filled reluctantly at the instance of several members of the bar. As a judge, he entertained democratic economic and social opinions.

152. E. g. his dissenting opinion urging the constitutionality of the stay laws. Jacoby v. Smallwood, 63, N. C., 118-128.

Such was the composition of the Supreme Court, a body noted for its ability and possessed of liberal economic and social ideas.

To this judiciary fell the lot of interpreting the changes effected by the new constitution and the laws and the code pursuant thereto, in addition to applying judicial solutions to the many social and economic problems of Reconstruction. The constitutional provisions disposing

153. The latter problems are treated in Chapter V.

of the jurisdiction of the old county courts (their judicial powers being assigned to the superior courts and their administration of estates to the clerk of the superior court acting as probate judge) occasioned numerous technical difficulties. Although the constitution clearly indicated that the clerk of the superior court was the proper officer to settle estates, parties insisted upon instituting such
actions before the judge at regular session of the courts. To overcome the embarrassment, the General Assembly in 1871 validated all such improperly instituted proceedings. Likewise, the transfer of the judicial powers of the old county courts led to great confusion and technical uncertainties. The Code of Civil Procedure of 1868 provided that all suits pending at the time of ratification of the Code would be tried under the old laws and rules of procedure; that was quite understandable. How-

ever, the process of instituting, after the ratification of the Code, suits in which the action was based upon debt or contract incurred before said ratification was not so clear. One example will illustrate the nature of the difficulties involved. In 1868, one Smith instituted proceedings against one McLain, the cause of action being upon a contract made October 11, 1865. Since the code provided that actions upon contracts made before ratification of the code were to be prosecuted according to the old procedure, Smith began proceedings with a summons and a warrant of attachment returnable before the judge at fall
term of Mecklenburg Superior Court. This action indicated confused thought. The Code required that new proceedings should be instituted by summons but before the clerk of the superior court, who would make up the pleadings. Our plaintiff, Smith, seeing that the code provided for summons but also provided for the old order of procedure, confused his action by beginning pleadings by summons before the judge, thinking that this would satisfy all requirements; it did not. He should have instituted proceedings either by original writ of attachment and affidavit showing that the ordinary process could not be served (the procedure in this type of case under the old law) or else by summons before the clerk. But the defendant and Judge Logan, who first heard the case, confused matters still more by holding that the Code of Civil Procedure did not apply, as the cause of action was on a contract prior to 1868! Chief Justice Pearson clarified the whole matter by showing that the action ought to have been begun by summons returnable before the clerk, from which point proceedings would be conducted according to the laws and rules of procedure in vogue in 1865. This case indicates some of the technical difficulties of the time.

156. Smith v. McIlwaine, 63 N. C. 95-98.
More interesting than these technical difficulties, however, were political cases that came before the courts. One question which interested everyone was: "Who were disqualified from office by the Fourteenth Amendment to the Constitution?" Attorney General William M. Coleman reported to the General Assembly on November 16, 1868, that a number of ineligible persons had been elected; he had filed information against them, but it was imperative to have some decision from the State Supreme Court, since the superior judges were far from unanimous in their opinions. The definitive case upon this subject was *Worthy v. Barrett*, decided by the Supreme Court in January term, 1869. According to this decision all office-holders before the Civil War who were required to take an oath to support the United States Government and who afterwards engaged in insurrection or rebellion against the same or gave aid or comfort to its enemies were disqualified from holding office under the State. However, persons in the State, *Worthy v. Barrett*, 63 N. C. 199-205. By this decision the following officers were excluded: governor, attorney general, Supreme Court justices, public treasurer, secretary of state, superior judges, state and county solicitors, clerks of county and superior courts, clerks and masters in equity, all county police officers (sheriffs, constables, coroners), county officers, mayors, justices of the peace, and several smaller officers.
In this case, the county commissioners of Moore County had refused to qualify E. N. Worthy, sheriff-elect, upon the grounds that he was disqualified by section three of the Fourteenth Amendment to the Constitution. Worthy had been sheriff before and during the Civil War. He sued for a writ of mandamus, claiming that his right to office should be tested by quo warranto, that the commissioners could not inquire into his qualifications. Judge Buxton granted the writ.

County, or city employ who were not required to take oaths were to be considered placemen, not officers, and hence were not disqualified. This case was carried to the United States Supreme Court, which held that it had no jurisdiction in the matter. However, the State Supreme Court held that

158. Worthy v. Barrett, 75 U. S. XIX, 566. The Supreme Court held that no decision by the State Supreme Court against the validity of any act of Congress or in favor of any State act or statute alleged to be repugnant to the supreme law of the land was in question.

a man indicted for murder by a grand jury and convicted by a special venire, both summoned by a sheriff-elect so disqualified, was properly convicted, if he failed to register his objection by challenging the array before the trial; whether the officer was a de facto or de jure sheriff was immaterial. These were the leading cases. In 1871,

159. State v. Douglass, 63 N. C., 501. The sheriff was K. H. Worthy.

However, United States Circuit Judge Bond, in his charge to the jury in the case of U. S. v. A. S. C. Powell, held
that neither the holding of the office of justice of the peace under the Confederacy nor the hiring of a substitute by one who was conscripted under Confederate law constituted giving aid and comfort to the Confederate government.


Several cases involving offenses committed by soldiers or persons claiming to be soldiers during the Civil War came before the Supreme Court during this period. It has been noted that this subject had been one of great dispute between the civil and military authorities and that the amnesty act of 1866 had been passed to rid the State of ill feeling occasioned by prosecutions for such offenses.

161. Supra, 97-106, 144-150.

In cases of homicide or acts clearly of a military nature, the court applied the amnesty act, holding that it was wise and good and in the interests of public policy.


On the other hand, where the offenders were guilty of trespass or burglary, the Supreme Court upheld their convictions. Finally, in a case wherein Confederate soldiers
163. State v. Cook, 61, N. C., 535-537; Wilson v. Franklin, 63 N. C., 259-260. Two Federal soldiers were convicted at spring term, 1868, of Mitchell Superior Court of a trespass committed May 16, 1865. Although they pled parol orders of a superior officer, the Court, upholding Judge W. M. Shipp, held that there was no armed resistance to the United States in North Carolina at the time. Justice Rodman, who delivered the opinion of the court, added: "If it should be conceded that the laws of North Carolina for the protection of private rights were suspended during the war, as regards the government and the military authorities of the United States, upon the suppression of the rebellion those laws resumed their original vigor, at least as against the unauthorized acts of the soldiery." Ibid. 260.

requisitioned mules and wagons for use of the army, it decided that military officers might take private property for public use only if the necessity were urgent and that the burden of proof lay with the defendants. A parol order could not be construed as such proof. In its rulings, 164 Bryan v. Walker, 64 N. C. 141.

the Court treated Confederate and Union men alike.

Two decisions rendered by the Supreme Court had purely political import. One, which really was not a decision, although it had something of that effect, concerned the legislative term of office. The Constitution of 1868 was sufficiently vague upon this point to permit the interpretation that the first legislature elected might sit four years. The General Assembly asked the Supreme Court for an opinion upon the point. Justices Reade and
Settle refused to give any opinion and Justice Rodman replied that the subject was exclusively political and so beyond the purview of the judiciary. However, Justices Pearson and Dick claimed that they had both a right and a duty to give an opinion as justices, thought not as a court, citing Maddell v. Berry, 31 N. C., Appendix, as authority. These two justices concurred in stating that

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the term of office ended in 1870. In the other case, a

165. 64 N. C., 785-784.

large number of lawyers in the State signed an article written by S. F. Moore in which a severe protest was lodged against political activity on the part of the justices, several of whom had come out openly for Ulysses S. Grant in the presidential campaign of 1880. The article, which attracted wide attention, greatly deprecated this judicial impropriety and dishonoring of the ermine and stated that partisan political judges could not be impartial. It was published in several papers in early 1889, and drew the wrath of the Supreme Court against Moore, who was cited for contempt of court in June term, 1889. Upon Moore's disavowal of intention to commit contempt (although he clearly indicated that his purpose was to express disapproval of the conduct of individual judges and that he did not believe the Court could exercise jurisdiction in the
case), Chief Justice Pearson ordered the rule discharged and later accepted the disclaimers of the other signers. The case aroused considerable interest and excitement; and by its attitude the Court suffered a loss of prestige.

166. The whole case is discussed in Hamilton, op. cit., 389-394; In re Moore, 63 N. C., 398-409.

At the close of 1889, Judge E. W. Jones disbarred William Biggs for publishing an article in the Tarboro Southerner, in which the latter indicated that there was little or no good in Judge Jones. Biggs disavowed any intent of committing contempt of court or of impairing its authority or the respect due it, but insisted that in publishing the article he acted as an editor and that his position as an attorney did not deprive him of his right as an editor to freedom of the press. In spite of Biggs' disavowal, Judge Jones disbarred him. The Supreme Court overruled the judge, holding that the disavowal was sufficient and the other remarks were superfluous. This reasoning was

167. Biggs ex parte, 84 N. C., 206-207.

flimsy, but the action was for the best. Again, the judiciary suffered in prestige.

One of the most controversial issues of the administration of justice during Governor Holden's adminis-
tration was the matter of pardons. A stock defense or palliation of the Ku Klux Klan was the belief that justice could not be administered in the courts, inasmuch as the governor was in the habit of using his pardoning power freely for the benefit of "needy" Republicans, especially Union Leaguers. It is nearly impossible to get at the

168. E. g., Ku Klux Conspiracy, Minority Report, 492. "We could show that the system of granting pardons by the wholesale when convictions were obtained, coupled with the ignorance and corruption of the judicial officers, had made legal proceedings, even when allowed, almost a farce, and that much of the lawlessness which existed was the result of the absence of everything like justice in the administration of what was called law." These assertions were made with reference to North Carolina; Testimony of George Laws (clerk of Orange Superior Court), Senate Report, 191. "As to the penitentiary, well, our governor pardoned some of them before they got inside the gate," B. F. Moore testimony, 207. "I do not know that Governor Holden was in the habit of pardoning colored persons who were convicted. . . . I do not know that he has been in the habit of pardoning thieves because they are colored people. I have frequently heard him accused of it, but it may be an unjust accusation."; Jacob A. Long testimony, 272. It was stated in the papers that Holden pardoned a great many, but he knew of no instance personally.; Daniel B. Goodloe (conservative Republican) testimony, 231. Governor Holden had pardoned notorious offenders convicted of crimes of violence.; Hamilton, op. cit., 419.

truth or falsity of such charges; most of them were based upon rumor and common report, as is indicated by the statements cited above. The best that can be done is to analyze such materials as Governor Holden's pardon reports to the General Assembly and the petitions for pardon, sometimes seconded by recommendations, to be found in the Governors'
Papers. However, all such material must be used with extreme care, for petitions are not noted for their truth and accuracy, and too often they are signed only by persons interested in securing release for some relative or friend or by persons who sign they know not what. Moreover, there are often no records of petitions for pardons which were given.

Governor Holden issued one hundred and fifty-eight pardons during his term of two and one-half years in office. Of the larceny cases, sentences in which

169. This figure is based upon the lists of pardons, commutation, and repitites for 1868 to 1870. Public Documents, North Carolina, Sess. 1869-'70, Doc. no. 24; Sess. 1870-'71, Doc. no. 20. Hamilton, op. cit., 419, gives 175 pardons. It is quite possible that more pardons may have been issued than are recorded in the documents. The writer has found one such: Israel Birkhead, pardoned August 13, 1868. G. F., Holden.

ranged from four months to two years imprisonment, it may be estimated that those pardoned had served from one-fourth to one-half of their sentences. This, of course, is only a rough estimate; in some cases the length of imprisonment or else the term served is not given. Also, there were exceptions to the rule. On the whole, however, 170 most persons had served that amount of their time. In the

170. Sixty-nine pardons were granted in larceny cases. Those granted in 1868 were for sentences ranging from four months to two years imprisonment, the great majority being for one year or less. The persons sentenced to two
years in prison had served from four to fourteen months; those sentenced to one year or less had generally served about one-half of their term, although it is impossible to state precisely how long they served in some instances and in other cases it is impossible to state what the full sentence would have been. The sentences for those pardoned in 1869 ran from four months to a year's imprisonment, two having received two years. Again, one may say that the great majority had served out a goodly portion of their time, although it is difficult to decide how long the sentence was or how long persons had served in several instances. In 1870, the figures are more precise and the sentences were for longer terms. Of eight persons sentenced from eighteen months to five years imprisonment, five had served but a few months; the remainder served seven months to one year. The remaining thirteen, sentenced to one year or less, had in the great majority of cases served one half of their time at the very least.

four cases of burglary pardoned, three had served from five to fifteen months in prison; the fourth, one John Ledbetter, a Negro sentenced to twenty-five years imprisonment, was pardoned a few months after his crime, upon grounds of extreme youth and idiocy. Of this lad, Josiah Turner, Jr., editor of the Raleigh Sentinel, testified that he was at least twenty-six or twenty-eight years old, 171 a full-grown man. In the two pardons for murder in 1868,

171. Senate Report, 369-370. But Turner said he was pardoned before he got to the penitentiary, whereas the petition for his pardon is dated July 25, 1869, and the date of pardon is December 12, 1869. G. P., Holden, R. H. Henry to Holden, July 25, 1869. Turner said he saw the man himself.

the pardon petition in one case was signed by eight members of the convicting jury after the man had been in prison
for some years; in the other case, the petition was signed
by the mayor of Wilmington, the commissioners of New Hanover
County, and other officers and prominent citizens. In


the one pardon for murder in 1869, the pardon petition was
endorsed by Solicitor J. R. Bulla and J. W. Leach, later to be a Conservative candidate for Congress. On the other

173. G. P., Holden, Bulla to Holden, March 27, 1869; Leach to Holden, April 5, 8, and September 1, 1869.

hand, Holden commuted to life imprisonment the death sen-
tence of a man who committed a rather blood-thirsty murder,
to put it mildly, although it must be admitted that the
governor was besieged with a flood of petitions from many
respected individuals. There are a large number of

174. Case of John Owens in 1867, who after murdering a man mistreated the body revoltingly. For sample letters see ibid., L. A. Mason to Holden, May 27, 1868 and several other letters of the same date. Many letters were sent to Governor Holden upon this subject in 1868. In 1871, Owens escaped, and was caught in South Carolina in 1873. Governor Vance, who defended Owens in the courts, later said the murder was a desperate and causeless one. G. P., Vance, Vance to Hampton ( penciled note on letter of Hampton to Vance, February 18, 1877).

petitions for pardon in the Governors' papers which appar-
ently went unanswered, testimony to the fact that pardons
were not handed out freely. Particularly commendable

175. The writer has found at least thirty such petitions for 1869. Undoubtedly many others were simply sent back to the petitioners.

was the manner in which Governor Holden withstood a perfect flood of importunities to spare the life of one Augustus Baker, colored, convicted of murder. He did grant one respite, which arrived dramatically as the man and a confederate of his were on the scaffold with the ropes adjusted around their necks; but, satisfied of their guilt, he refused further delay. On the whole, the charges that

176. Ibid., The execution was set for June 1, 1869, at Enfield, Halifax County. The many letters and telegrams upon the subject are in Ibid., dates of May 17 – June 3, 1869. The letters are from Sheriff Reid, Edward Conigland, M. McMahon, and Holden.

Governor Holden pardoned too freely and in the interests of his party are not sustained by the evidence above, but it must be remembered that this conclusion is based upon evidence which cannot be accepted as reliable without careful and minute checking. One cannot, for example, accept at face value the statements of even county commissioners, solicitors, and sometimes judges that pardons should be granted for any one of a variety of reasons: youth, ill-health, good behavior, insufficient evidence, indigent families, self-defense, contrition, old age and infirmity,
etc. — not in a period of political strife when the individuals recommending the pardon might or might not have political motives in view. The best one can do is to say that the evidence available indicates that a large number of those pardoned actually had served a good portion of their sentences and that, in the great majority of cases of severe crime, pardon or commutation was granted only upon good grounds and upon urgent representation of respected persons. However, if this evidence be checked against the facts that one or two specific instances of wrongful pardons were cited by the governor's accusers,

177. The Ledbetter case, supra, 243; B. F. Moore and B. R. Goodloe both mentioned an instance of an attack by Union League Negroes upon a Negro for voting the Conservative ticket, in which the persons convicted were pardoned. Names not cited. Senate Report, 206-207, 231. It is beyond the scope of this work to make the careful and minute research necessary to check all cases.

(neither of which involved extreme offenses such as manslaughter or murder) and that five persons who were pardoned in 1870 had served but a very small portion of long terms of imprisonment, one comes to the conclusion that, while the pardoning power was not abused, there was some reason for complaint. Allowance must, of course, be made for a certain amount of error which any governor might make. Probably the wrongful pardons received ample publicity; probably
also, people of Conservative feelings read, heard, and believed reports that agreed with their preconceived ideas -- ideas which the extremist course of Governor Holden's paper, the Standard, helped create. In this case, the things that people believed had more effect upon the course of North Carolina history than the reality. It should be added, with reference to accusations of pardon before the gates closed upon the criminal, that the State penitentiary was not ready for occupancy until early January, 1870, at which time it could house only one hundred twenty-five convicts. As late as November, 1870,


it was housing only some two hundred convicts, as the main building had not yet been finished. In consequence,


prisoners were kept in county jails until they could be sent to the penitentiary. This may explain why some convicts were pardoned "as soon as they reached the penitentiary" -- they had already served part of their time.

Finally, contrary to general opinion, Governor Holden did not pardon an unusual number of criminals. Governor
Caldwell, who succeeded Governor Holden after the latter's impeachment and conviction, strove earnestly to avoid having the same charges of abuse of the pardoning power placed against him. He pardoned but nineteen persons in his first year of office. However, in 1872, he pardoned seventy-three persons, and thereafter, the average annual total was between fifty and sixty a year. Governor

180. Public and Legislative Documents, North Carolina, 1871-1877. The lists of pardons and commutations will always be found as an appendix to Document no. 1 (Annual message of the governor) in each volume.

Holden's record of thirty-six in 1868 (one-half year), seventy-three in 1869, and forty-nine in 1870, cannot be regarded as excessive.

A matter which aroused even more controversy than the use of the pardoning power was the relation of the Ku Klux Klan to the administration of justice. It is not within the scope of this work to survey the origins of and the motives behind the formation of the Ku Klux Klan and its predecessors, the White Brotherhood and the Constitutional Union Guard, nor to relate the outrages attributed to the Klan, subjects already fully dealt with by other writers. It is well-known that the Klan was regarded by many as a necessary "vigilante" organization for the suppression of crime which the courts either could not or would not handle.
According to this view, crime and violence were rampant throughout the South as a result of the backwash of war and of racial bitterness following emancipation—problems which were intensified by the fact that the administration of justice lay in the hands of carpet-baggers, scalawags, and Negroes. As a result, the Negroes, alienated from their former masters and friends and led on by unprincipled adventurers, debased liberty into license and threatened to uproot civilization. To save society from anarchy, the Ku Klux Klan appeared and accomplished the desired end, after which it degenerated from its original high level and fell into the hands of reckless men. However, it had saved the South from ruin.

181. Summarized from Hamilton, op. cit., 452-453. Organization, membership, and activity of the Klan in North Carolina are discussed in Ibid., ch. VII.; Mrs. T. J. Jarvis, "The Conditions that Led to the Ku-Klux Klans," in North Carolina Booklet, I, no. 12, (1901-2). "It was only when mean men got into its ranks that the germs of decay began to ripen and caused disaster to the order. It served its purpose well and brought relief to the people. Governor Holden, to a great extent, broke up the organization in the State, but he could not stop its influence for good; our people will never know to what extent they are indebted to these daring men for the relief which came at a most important period." 15.; Stanley F. Horn, Invisible Empire, The Story of the Ku Klux Klan, 1865-1871 (Boston, 1939), 190-213. This is the latest treatment of the subject; but it adds nothing new and is marred by several inaccuracies.

Conservative white witnesses called before Congressional investigations of the Ku Klux Klan placed much stress upon the prevalence of crime in North Carolina, es-
pecially that committed by Negroes. When asked what avowal of purpose was made by members of the Klan, Dr. Pride Jones, well-known for his work in bringing activities of the Klan in Orange County to a halt, replied:

"The purport of it was this: That barns were being burned, women were afraid to go about the country for fear of being ravished by Negroes, and the law would not punish them; there was inefficiency somewhere; they could not get protection, and they got up this organization to protect themselves by punishing a few who were obviously guilty, and thereby preventing others from committing that sort of offenses."182


He further testified that the Negroes, who in distress or want would naturally apply to Conservative whites, were being alienated from their former masters and friends by improper foreign influences; as a result, they had become disposed to take liberties and to do things they had never done before, and the amount of crime had been increasing. It was apprehension of lawless conduct by the Negroes, together with the failure of the authorities to punish them and the undue exercise of the pardoning power in their favor by Governor Holden, that underlay the Ku Klux 183 Klan movement. He also felt that the formation of Union

183. Ibid., 3-4, 9-11.

Leagues, by binding the Negroes in secret political unity,
had contributed toward their changed conduct, although he did not believe that the Leagues as organizations ordered or committed crime.

184. Ibid., 10-11.

Throughout the testimony of other Conservative whites the same strain prevailed: The Ku Klux Klan was organized to punish those who were guilty of outrages and who escaped just retribution either through the connivance of the courts or by means of pardon; the prime cause of the White Brotherhood was the thievery along with other misdemeanors of the Negroes, just released from slavery and encouraged in their activities by the Republicans; there was no difficulty in convicting Negroes of crime if one had the proper evidence, but there was no penitentiary or corporal punishment — only the jail — hence they went practically unpunished; the penalties provided by the laws were not strict enough, and, when Negroes were put in the penitentiary, "our governor par
doned some of them before they got inside the gate."
187. Ibid., 191, George Laws.

After the formation of the Union Leagues, theft became so common that livestock and movable property of all descriptions were unsafe, acts of personal violence increased, and barn burnings became common occurrences. It became very difficult to arrest and hold members of the League, who, if punished, were almost certain of a pardon from Governor Holden. There was practically no protection to be had from the courts — of administration of justice there was none. However, no proof was ever adduced to

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show that these crimes were ordered or sanctioned officially by any league. These acts were regarded as products of

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Senate Report, 88-89. Lewis Hanes: Many acts of violence were committed by members of the Union League, but "I have never seen any satisfactory evidence that it was carrying out the orders or decrees of any league."; ibid., 132, 158-159, 200.

individual violence encouraged by the feeling of protection offered by membership in a powerful political organization.

It is difficult to say to just what extent these views were correct as far as they related to the administration of justice in the courts. It being admitted that
there was no proof of crimes being committed by order of the Union League, it becomes very puzzling to decide whether that organization actually hindered the meting out of justice to Negroes. There is no doubt about the wide extent of crime, but to what degree this was due to the failure of the courts to punish would be impossible to say. There was much crime during the entire period of Reconstruction; reports indicated that it was as prevalent in 1876 as it was in 1866. In view of this fact, it be-


comes impossible to fix the blame upon any one cause. It is known that Judge Logan exhibited favoritism to Negroes,

191. *Spru*, 212 and footnote 89.

as did Judge Tourgey. Judge Thomas has been shown to have exhibited partiality at times, yet in one case he refused to endorse a pardon for a Negress convicted of killing, stating: "The certainty of punishment . . . is the thought which will most surely deter from the commission of crime. . . ." It would hardly be said that such men as

Judges Buxton, Henry, Cloud, and Mitchell would exhibit partiality. Also, although Governor Holden issued some 
pardons to which exception could clearly be taken, he 
nevertheless refused to take action in other cases. How-

193. Supra, 243-245; G. P., Holden, pardon petitions for 
murder refused; A. M. Moore to Holden, December 20, 1869; 
Holden to C. R. Thomas, May 15, 1869; petition of Ben 
Douglas, August 30, 1869. All were refused. There are 
several other petitions in the G. P., Holden for 1869 which 
were not acted upon.

even much crime was committed which went unpunished for 
one reason or another. Solicitor W. P. Bynum stated that, 
though in his opinion the Ku Klux Klan was political in 
origin, many of its outrages were committed upon persons 
who were no doubt violators of the law and deserving of 
punishment; but he himself refused to approve of "vigilante" 
methods.

194. Senate Report, 54.

If the Conservatives upheld the Klan as a great 
"vigilante" committee necessary to restrain crime because 
of the failure of the regular administration of justice, the 
Republicans countered with the reply that it was a political 
organization, designed to wreak vengeance upon persons who 
dared vote the Republican ticket and possessed of a ritual 
and oaths which were framed to protect its members from com-
viction in the courts. The Majority report of the Select Committee of the Senate stated this view concisely in con-
cluding:

"1st. That the Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, has sought to carry out its purpose by murders, whippings, intimidation, and violence, against its opponents.

"2nd. That it not only binds its members to carry out decrees of crime, but protects them against conviction and punishment, first by disguises and secrecy; second, by perjury, if necessary, upon the witness-stand and in the jury box." 195

195. Ibid., xxxi.

In answer to these charges, men of Conservative views stoutly denied that the administration of justice was ham-
ered and insisted that the tales of Ku-Klux outrages were but part of a 'cut and dried' plan to maintain in power a set of worthless and corrupt politicians headed by Gov-
ernor Holden. Here again, it is very difficult to decide

196. Ibid., pt. 2: 3, 32, 38-39. Report of Minority com-
mittee. For the benefit of the reader, a brief political background may be given here. W. B. Holden, once a rabid secessionist but as rabid a Radical Republican by 1868, was elected governor of the State in that year. The constitu-
tional changes of the same year have been discussed fully above. The Republican regime under Holden has been characterized as hopelessly corrupt and incompetent. It represented quite definitely the poorer whites and the Negroes and was led by the familiar 'carpet-bagger, scalawag, and Negro' combination. That there was a great deal of corruption during its two years of existence (1868-1870) there is no doubt. Opponents of this administration, who desired the return to power of the Conservative white mul
(sometimes called today "Bourbon" rule), fought the Republican regime bitterly. Believing that corruption, misrule, crime, and oppression were rampant, the Conservatives, led by such men as Governor Vance, Josiah Turner, Jr., and others, secured control of the General Assembly in 1870; whereupon they impeached and removed Governor Holden from office for declaring Caswell and Alamance Counties in insurrection and calling out the State militia. (March - August, 1870). Each side developed its own political organization, the Republicans forming the Union League, the Conservatives relying upon the Ku Klux Klan. Both sides bitterly accused each other of violence, intimidation, and obstruction of justice; the Conservatives (or Democrats) also pointed to the corruption and ignorance of many Republicans. The Republicans relied upon their national leaders to keep them in power — by means of Ku Klux investigations and national laws. Vide, ch. VI, infra.

the truth or falsity of the charges and counter-charges.

Some testimony of persons who had belonged to the Ku Klux Klan and related orders showed that members were under oath and instructions to defeat the administration of justice when fellow-members were implicated in crime.

197. Testimony of Joseph G. Parrott (member of the Constitutional Union Guard), of Lenoir County, taken before Judge Thomas in 1869: "We were instructed that it was our duty to assist each other under any circumstances; if any member was on trial in court it was our duty to put ourselves in the way of the sheriff so as to get on the jury and acquit him; if there was a member in serious trouble, it was our duty to stand his bail so that he could make his escape; we were instructed that it should be our duty to prove an alibi for any member who was arrested charged with a crime; I understood that if any officer instructed me to kill a man who was opposing the organization, I ought to kill him." in Senate Report, 51; similar testimony was taken from George W. Tillon: 49.

Depositions taken in Alamance and Caswell Counties during
the "Kirk-Holden" war indicated that the organizations intended to take the law into their own hands for political purposes. Such testimony, however, must be evaluated in the light of the fact that it was elicited at a time of political bitterness and fear. More valuable and conclusive were statements of leading Republicans and Conservatives that it was virtually impossible to secure indictments or convictions under the State law of April 12, 1869, making it a misdemeanor for any person to disguise himself with intent to frighten and terrify people.

It was impossible to secure convictions under the State "Ku-Klux Acts" for several reasons, one of which was that grand juries either refused or failed to present
true bills or, if they did no, petit juries would not
convict. Solicitor W. P. Bynum testified that he had


succeeded in getting only one or two bills from the grand jury in his district (the ninth) and that he had never succeeded, up to 1874, in bringing a single case to trial:

"I have sent bills before grand juries in several counties upon evidence that I regarded as sufficient to find bills upon and evidence that was uncontradicted before the grand juries, but, in most instances the grand juries have ignored the bills."

201

201. Ibid., 54.

Where he had succeeded in securing indictments, the prosecutors had been forced to flee the country; in other instances, where parties had come to him "wounded, beaten, and bruised," they agreed to appear before the grand jury, "but, when court came, they did not return." In other cases, the injured parties were afraid to tell what they knew. Judge Henry testified that he had heard similar

202. Ibid.

reports from solicitors all over the state. When pressed

203. Ibid., 109.

by the Senate Select Committee to state why grand juries
failed to return true bills, Solicitor Bynum said that he did not know what motives influenced them and that he had no direct evidence of membership of the grand jurors in the Klan. Speaking quite candidly, however, he was of opinion that, since most of the offenses were committed upon Negroes, the fundamental difficulty lay, not in Ku Klux Klan oaths and instructions, but in a universal repugnance, shared by both Republicans and Conservatives, to civil and political racial equality. On the other hand,

204. Ibid., 54-55.

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one must consider carefully the statements of two most distinguished lawyers, W. H. Battle and B. F. Moore, who defended the prisoners taken in the "Kirk-Holden" war and were therefore anathema to the Holdenites. When asked whether he felt he could secure justice if he himself were a Ku Klux victim, the former remarked: "Well, I should have my doubts whether they could not pack a jury who would acquit them." The latter averred, from his knowledge of human nature, that members of the Ku Klux Klan on a jury trying a fellow Klansman would be strongly inclined to forget their oath as jurors and adhere to the oath of their order.

205. Ibid., 161.
206. Ibid., 204; the following interesting testimony was
elicted from S. F. Moore:

"Question. Can you say that in Orange, Alamance,
and Guilford Counties a party who was a member of the Ku-
Klux organization could be brought to justice as freely as
those who were not?

"Answer. No sir; I would not say that, for I have
witnessed in the bygone times of whigism and democracy
enough to satisfy me that party spirit often had much
weight with the jury." 201.

"Let me be understood, I think these outrages are
generally committed by squads of young men having a large
connection in the immediate vicinity. . . . and the friends
of these young men would be favorably disposed to them, and
they would be very apt to endeavor to get them on the jury.
I suppose you are very well acquainted with the power and
facility of particular sheriffs and officers in packing a

On the whole, the State Ku Klux Act was a dead
letter; only one conviction was secured under it, that of
four Negroes in Alamance County who were sentenced for
"Ku Kluxing" others of their color. Oddly enough, the
judge under whom they were convicted was Tourgee. This
case was cited again and again by Conservatives in their
207 testimony before the Select Senate Committee in 1871.

207. Ibid., 170, 215, 360; A convenient summary of the
number of alleged Ku Klux outrages in North Carolina is
given in Hamilton, op. cit., 477. Professor Hamilton has	tabulated therein the number and types of outrages from
1867-1868 through 1871, together with the counties in which
they were committed. These figures, gleaned from the
Congressional investigations and the impeachment trial of
Governor Holden, reveal that there were two hundred and
sixty outrages, of which the great majority were whippings.
Not a white man was convicted under the act; grand juries failed to indict, petit juries failed to convict, and alibis seemed easy to prove. And, of course, there was

208. Senate Reports, 86, 88, 186-187, 360; T. B. Keogh, a Republican lawyer, stated: "An alibi is proved in nearly every case. Now, it is very singular that in all that class of cases that should be the general line of defense, and they always prove an alibi without any difficulty." Ibid., 126. For similar examples vide 30-31, 83.

the most important difficulty of identifying a person wearing a disguise! However, there were several men who were willing to state that it would be quite possible to secure convictions and that the blame for failure to convict lay in the courts, which were manned by Republican officials. Conservative lawyers and politicians united in asserting that there was ample security for life and property in North Carolina and that adequate remedy could be had, without distinction as to race, for wrongs suffered.

209. Ibid.; David W. Kerr, 339; Joseph H. Wilson, 236-237; Daniel Worth, 304; D. A. Goodloe, 224-225.

One early leader of the Constitutional Union Guard even claimed that it would be possible to convict members of that order or of the White Brotherhood, although he admitted the difficulty of identifying persons wearing disguises.

These statements must be weighed in the light of the politics of those making the assertions. However, they were reinforced by similar statements from leading Republicans. Timothy Lee, Sheriff of Wake County, for example, had no difficulty in serving processes no matter what hour of the day or night. Judge Henry stated that

211. Ibid., 77.

there was no difficulty in obtaining one's rights before the courts of his circuit, the eleventh, which contained a majority of Republicans. He had never had any difficulty in executing the laws in his district. He could

212. Ibid., 109.

not say as much for other districts, notably the seventh. Judge Logan made the most interesting assertion (in the light of later troubles) that a fair trial could be had in Rutherford County if the evidence were sufficient for conviction. Judge Thomas believed that there was no im-

213. Ibid., 186. But he would not say the same for Cleveland County, which he did not know as well. It is noticeable that both Judges Henry and Logan were free to say that their own districts, which they knew well, were noted for fair administration of justice, but, like the man of the middle ages, fields out of their ken were bad!

pediment to the administration of justice in his district save passions left by the war and prejudice toward the
Negro. Upon this subject, he testified:

"But I would not desire to give the committee an impression that it was a very general thing that justice could not be administered in any case. It is true that there was a very strong prejudice in the State, especially two years ago against the negro. And I sometimes watched the course of a jury in a case where a negro was on trial. I think such suspicions as I had of bias on the part of the juries were gradually removed, and that juries are becoming better and better accustomed to the trial of such persons, and to colored persons themselves being put on the juries, and that everything is inclining to a fairer administration of justice in the jury box."214

214. Ibid., 94.

Finally, Judge Russell laid the blame for failure to suppress the Ku Klux Klan squarely upon the shoulders of State officials. Referring to the fact that a State law permitted cases to be removed from one county to another at the instance of the State, he declared:

"There were numerous bills of indictment found, with evidence sufficient in some counties, I am entirely satisfied, but there was an utter failure on the part of the governor to employ counsel and prosecute those cases by removing them to such forums as would have afforded a fair trial; in consequence of which no convictions were had."215

215. Ibid., 180. Other witnesses made similar assertions, 96, 405.

Apparentl y, the law need not have become so completely the dead letter that it was.

Political feeling in the State regarding the Ku
Klux Klan and the administration of justice reached its height in the famous "Kirk-Holden" war. As early as March 7, 1870, Governor Holden proclaimed Alamance County to be in a state of insurrection, a step which was extended to Caswell County on June 8, 1870; and, in the latter part of June, 1870, he appointed George W. Kirk, a Tennessee freebooter, to head a militia company to place these counties under martial law. Kirk and his militia, whose indefensible conduct earned them the title of "Kirk's lambs," arrested a large number of citizens and detained them for military trial, meantime treating several of them with physical cruelty. Immediately, several of those arrested sued for the writ of habeas corpus, but Chief Justice Pearson, while acknowledging their right to the writ, refused to execute it in opposition to the governor, upon grounds that the judiciary did not have the physical power and that such action would plunge the State into civil war. For this course the Chief Justice received severe criticism from several quarters. Finally, the defendants appealed to United States District Judge Brooks, who granted the writ. This action, supported by the National Administration, broke the power of Governor Holden and General Kirk, who surrendered the persons arrested to the civil authorities. It is generally accepted that Governor Holden's use of military force was made for political
purposes and that it was a most unwise move. All that
was gained from the "Kirk-Holden" War was a number of
suits in Federal and State courts against Governor Holden,
General Kirk, and Colonel Bergen, much ill feeling in the
state, the election of a Conservative legislature, and
the impeachment and conviction of Governor Holden in 1870-
1871. With the election of a Conservative General Assem-

bly and the removal from office of William W. Holden, the
period of Radical Reconstruction came to an end in North
Carolina. The Republican Party held the office of
governor for six more years, but after 1870 the State
returned to Conservative hands.

216. The entire subject is fully discussed in Hamilton,
op. cit., 482-533, 540-558.
IV

THE CLOSING YEARS OF RECONSTRUCTION

1870–1876

With the removal from office of Governor Holden, the major political problems of Reconstruction were considered settled; those that remained were but secondary and were primarily concerned with consolidating the Conservative victory of 1870–1871. However, the final triumph of the latter was not achieved without a struggle: The State Republicans had been defeated, but the National Administration had to be reckoned with. Consequently, the chief political issues presented before the courts in this new phase of Reconstruction in North Carolina were handled by the Federal judiciary under the famous Enforcement Acts. Nevertheless, several interesting political matters were decided either by or for the State courts after 1870.

After the conviction of Governor Holden, the Conservative General Assembly, elected in 1870, turned its attention to the judiciary. One of the first acts passed was aimed at its conduct in the contempt cases arising out
of the "Protest of the Bar" and the editorial written against Judge Jones by William Biggs. An act of April 10, 1869, had defined the types of acts for which a person might be punished for contempt of court, but the court had decided in re Moore that this law did not deprive the Supreme Court of its power under common law to punish contempts not specified therein. An act of April 4, 1871, deprived the judiciary of such authority and specified that no person could be disbarred permanently or temporarily or deprived of his license to practice law unless convicted of some criminal offense as defined in the act of 1869. The constitutionality of the new law was tested

2. The contempt cases are discussed in supra 239-49; Laws of North Carolina, 1868-'69, ch. 177; 428-429; Ibid.,1870-1871, ch. 216: 336-337.

promptly when Judge Logan disbarred David Schenck for reputedly writing an article assailing the judge's character. The State Supreme Court, without investigating the facts of the case (a wise move), reversed Judge Logan and held that the Act of 1871 was constitutional.

3. Ex parte Schenck, 65 N. C., 389. The article in question was a letter written to Senator Francis Blair from Lincoln- ton, North Carolina, April 21, 1871; it was published in the Daily Patriot, April 25, 1871, under the signature of D. Schenck. The writer of the letter denounced Judge Logan for his failure to hold the spring term, 1871, of Cleveland Superior Court because of alleged fear of Ku Klux
violence. He further stated: "This Logan is an ignorant, vile, corrupt man... for whom the whole bar have a sovereign contempt." Quoted in ibid., 355.

The General Assembly also considered further impeachments. Judge E. H. Jones was actually impeached for public drunkenness at a time when he was holding court,

Articles of impeachment, March 28, 1871.

but he escaped trial (and the State was spared the cost) by his immediate resignation. Demands were made for the impeachment of other officials; the conduct of Judges Watts and Logan was investigated by the General Assembly, but proceedings were not instituted, probably because of the expense involved. There was talk of beginning pro-

ceedings against Chief Justice Pearson for his failure to take active steps to execute the writ of habeas corpus in the "Kirk-Holden" war, but no action materialized. Instead, the General Assembly passed an act making wilful refusal by a judge to grant a writ of attachment (to render effective the writ of habeas corpus), or connivance in any way by a judge to render such writ ineffective, an impeachable offense. A resolution was introduced in 1874 to impeach

6. Laws of North Carolina, 1870-'71, April 4, 1871, ch. 221:
348; Chief Justice Pearson expected to be impeached, but was saved by his old students. Hamilton, op. cit., 541, 562-563.

Solicitor J. C. L. Harris (of the sixth district) for official misconduct, but the House of Representatives' committee of investigation reported that the facts did not warrant any action.

7. Legislative Papers, 1874-1875, Box 944, 941.

Having rebuked the judiciary, the legislature attempted to limit the appointive power of the governor. The General Assembly took from him the power of appointing State proxies and directors of railroads and State institutions and transferred it to the president of the Senate and the speaker of the House. This act, however, was declared unconstitutional by the Supreme Court. The matter


was a subject of much political dispute in 1872, when Governor Caldwell endeavored to replace directors of State institutions, appointed under this law, with appointees of his own, in order to remove such offices from the sphere of politics. A large number of Conservatives, who held

9. E. g., Caldwell's form letter to prospective appointees for the state penitentiary, the insane asylum, and the institution for the deaf, dumb, and blind, sent February 31,
1872: "Enclosed herewith I send you a Commission . . . I am exceedingly anxious to take the Charitable Institutions of the State out of the pool of politics, and, as far as I can, engender a better state of feeling among our people. In order to accomplish this desirable end, I have appointed you, together with other Conservatives or Democrats on the Board. I trust that I may rely upon your hearty cooperation in the matter." G. P., Caldwell.

office by virtue of legislative appointment, declined 10 his offer of appointment, with thanks. The sharpest tiff

10. For examples vide ibid., W. R. McKee and L. E. Heath to Caldwell, February 23, 1872. The board of directors of the institution for the deaf, dumb, and blind had unanimously resolved to hold their present appointments until court decision could be handed down upon the legality of their position.; Kemp P. Battle (director of the insane asylum) to Caldwell, February 23, 1872. While sympathizing with Caldwell's aims, he felt that it would be inconsistent for him to occupy a position adverse to the old board of directors.

came between the governor and the old board of directors of the State Penitentiary, headed by W. A. Bledsoe. In this case, the fact that Governor Caldwell was endeavoring to remove practically the entire board and to replace it with one controlled by Republicans made the political purity of his motives doubtful. The "Bledsoe Board," refusing all compromise and protesting against the refusal of the governor to supply it with funds, stated:

"If we are not in as Directors according to law, put us out according to law. Appeal to the Courts; we will abide their decision; but do not acknowledge that you cannot put us out according to law, and then attempt to put us out by starving the convicts."
11. Ibid., Bledsoe to Caldwell, March 12, 1872; Other letters, idem to idem are dated March 13 and 23, 1872. These statements were made in the face of Clark v. Stanly.

Every case was carried to the Supreme Court, which decided each time in favor of Governor Caldwell.


In addition to rebuke and restriction of abused powers, the legislature found other vexing problems in the backwash of Repeal. Perhaps one of the most troublesome issues was that of the Ku Klux Klan and other secret political organizations. The General Assembly passed an act forbidding the secret assemblage of any two or more persons to accomplish political purposes and making violators guilty of a misdemeanor, punishable by fine or imprisonment. One conviction was secured under this act.


in Guilford County and under Judge Tourgee. Three Negroes – Thomas Lineberry, Henry Shotterly, and Alexander Thom – pleaded guilty at the fall term, 1871, of Guilford Superior Court to wearing masks and to ill treating one Benjamin Gilmer in July, 1871; they were sentenced to five years' imprisonment. It was disclosed subsequently that the Negroes
had agreed to plead guilty upon condition that the State solicitor, J. R. Bulla, would have judgment suspended upon payment of costs. However, when the case was called in court and the plea of guilty entered, Judge Tourgee refused to concur in the agreement and forced the solicitor to pray judgment; whereupon sentence was rendered. Afterward, when Judge Tourgee requested a pardon for Thom, upon grounds of youth and poor health, the governor learned of the proceedings. A heated correspondence, revealing a mutual dislike of long standing, then ensued between the two. The prisoners were not pardoned.

14. G. P., Caldwell, W. R. Scott to Caldwell, May 25, 1872 (petition and court transcript); Tourgee to Caldwell, August 31, 1872, August 7 and September 22, 1873; Caldwell to Tourgee, September 18, 1873; L. M. Scott to Caldwell, November 7, 1873.

In 1873, an act was passed by the General Assembly extending full and complete amnesty for all crimes excepting rape, murder, arson, or burglary, committed by all persons while they were members, officers, or pretended officers of several specifically named secret organizations or "any other organization, association, or assembly, secret or otherwise, political or otherwise, by whatever name known or called, in obedience to commands, decrees, or determinations, by whatever named called, of such organizations, associations or assemblies, or in obedience to the commands,
orders or requests of any one exercising or pretending to exercise any authority or pretended authority by reason of his connection or attachment to any such organization, association, or assembly. . ." It would


have been difficult indeed to frame a more all-inclusive amnesty! Later, all the exceptions to this act save rape alone were withdrawn.

16. Ibid., 1874-1875, ch. 20:17.

To the Supreme Court, however, fell the task of settling terms of office left vague by the Constitution of 1868, either inadvertently or intentionally. One group of cases, known as the "sheriff cases," involved the question of whether the terms of sheriffs elected in 1868 terminated in 1870 or in 1872. The Constitution provided that sheriffs were to be elected biennially, but, for some reason, (undoubtedly political), it extended to 1872 the term of those elected in 1868. There could be no doubt of the decision; the Court held that the terms did not expire until 1872. However, the decisions of the

17. There were five such cases, the leading one being Lofton v. Bowers, 65 N. C., 251. The constitutional provision in question is found in Art. II, sec. 29.
Supreme Court in cases involving the terms of superior judges and the superintendent of public instruction were open to question, for the Court's decisions smacked of political favoritism. In the latter case, Alexander McIver had been appointed to succeed S. S. Ashley, who was elected in 1870 but resigned in 1871. In the election of 1872, James Reid was successful, but he died before he could legally qualify, and, in 1873, Governor Caldwell appointed Kemp P. Battle, a well-known Conservative, to succeed McIver. The latter, however, refused to surrender the office; Judge Watts decided in his favor in Wake Superior Court, and the case came up to the Supreme Court on appeal. The Supreme Court held that, according to Article III, secs. 1 and 13, of the constitution, an officer elected in a previous general election would, if his successor failed to qualify, hold over to the next general election. It held further that a person appointed to succeed an officer so elected held that office just as though he had been elected. Consequently, McIver was entitled to continue in his official capacity as superintendent of public instruction until the next general election, which would be held in 1874. In the cases involving the


term of office of superior judges, the decisions involved
Article IV, sec. 3 of the constitution, which provided that all vacancies should be filled by appointment, and the appointees would hold their places until the next "regular" election. However, this was complicated by another constitutional provision which stipulated the quadrennial election of half the superior bench. According to this provision, the first judges-elect would be divided into two classes, one to hold office four years, the other to continue for eight years — the division to be effected in 1870. In 1871, W. A. Moore was appointed to succeed E. W. Jones; in 1868, John W. Cloud was appointed to succeed Darius H. Starbuck, judge-elect who failed to qualify; both Judges Jones and Cloud had been assigned to eight year terms in 1870. Now, it was quite possible to interpret the constitutional provision to mean that the next "regular" election should read next "general" election, which in this case would be 1874. Had the Court so held, Judges Moore and Cloud would have been required to yield their offices to T. J. Wilson and Louis Hilliard, who were elected in 1874 under a law of the General Assembly which was passed upon the assumption that this was the correct interpretation. But the Court chose to interpret "regular" election as meaning the next regular election for office in which the vacancy occurred, which, according to the division of 1870, would be held in 1878. To this opinion,
Justice Reade entered a vigorous dissent, based upon strong democratic grounds. He held that the constitution permitted the governor to fill vacancies in this office only as a convenience to the public, inasmuch as it would be too costly to hold special general elections for that purpose; however, the people had, by such provision, parted with their power to elect judges only temporarily and resumed it at their convenience: the first general election following such vacancy. That being the case,

"Why should the accidental vacancy and the appointment by the Governor have any other effect than to fill the office until the legitimate electors can fill it when they come together at the usual or regular time and places of electing Judges, and without the inconvenience of being called together in a special election?"13

An abler defense for the election could not have been framed by the Conservatives who were contesting the offices held by Judges Cloud and Moore. In these decisions, the Supreme Court definitely favored members of the Republican party; consequently, its course was open to criticism. Oddly, it decided that clerks of court whom the defeated contestants for judgeships had appointed to vacancies could not be ousted by the judges de jure.
14. *Norfleet v. Staton*, 73 N. C., 546. Judge-elect Hilliard had appointed Staton as clerk of Edgecombe Superior Court, since the man elected to office could not qualify. Afterwards Judge Moore, the rightful judge, appointed Norfleet. The Court decided in favor of Staton.

By far the most expensive and vital problem bequeathed by the corrupt Republican regime was that of railroads left unfinished or bankrupt, sometimes both. Numerous railroad cases found their place on the dockets of State and Federal courts. It is beyond the scope of this work to deal with the intricate problem of railroad development in North Carolina during Reconstruction. Suffice it to say that, as in the case of the transcontinental railroads at the time, there were many unsavory practices, peculation, and fraud, most of which seem to have occurred before 1870.

15. The subject is discussed at length in *Hamilton*, *op. cit.*, 426-451.

However, it will be worth while to note some of the cases which came before the courts, two of which were decided before 1870.

Certain decisions restrained the lending of State aid to the railroads. Two of these decisions were given by the State Supreme Court in 1869, both being based upon Article V, sec. 5 of the Constitution of 1868, which forbade
the General Assembly to give or lend the credit of the State to any new railroads unless such aid were approved by a referendum. The Supreme Court ruled that, under the terms of this constitutional provision, legislative acts of 1868 and 1869 extending State aid to the Chatham Railroad Company and the University Railroad Company were unconstitutional. Chief Justice Pearson, true to his conservative leanings, availed himself of the opportunity to rebuke the hasty legislation of the day for the aid of railroads, which was increasing the public debt. He, Justice


Rodman, and Justice Dick went so far as to hold that the State itself could not, without the sanction of the people, build a railroad. Justice Reade, following his customary


train of liberal economic thought, claimed, in a dissenting opinion, that the acts in question were constitutional and that no "giving" or "lending" of State credit was incurred by authorizing the State to take stock in a railroad and pay for it in State bonds; such an act was merely a plain business transaction. He further claimed wide discretionary authority for the legislature in matters of public policy.

18. Galloway v. Jenkins, 63 N. C., 147. The State aid to the Chatham Road was $2,000,000; to the University Road, $300,000.
These decisions prevented a considerable addition to the State debt and placed a restraining influence upon further railroad legislation. A case bringing a similar result

19. Two other railroads were chartered in the session of 1868-1869: the Eastern and Western Railroad, and the Edenton and Suffolk line. The Attorney General of the State pronounced them unconstitutional, and they were never organized. Hamilton, op. cit., 447; the Supreme Court's decision cut the State debt by approximately $10,000,000 and saved the State considerable taxes. Ku Klux Conspiracy. Minority Report, 383.

came before the Federal Circuit Court in 1874. In 1858-1860, the State loaned the Wilmington, Charlotte, and Rutherford Railroad (incorporated in 1855) $2,000,000, taking a lien upon its property. In 1866, the General Assembly authorized the company to issue bonds to $4,000,000, the State exchanging its lien for a second mortgage. State aid was further extended to the road in 1869 by an act authorizing an increase in the capital stock of the road to $7,000,000, of which the State was to subscribe $4,000,000 in thirty year State bonds bearing six per cent interest, $3,000,000 of which subscription was actually made. At the same time, a tax of one-eighth of one per cent upon taxable property was laid to provide for payment of interest and principal. This law was, however, repealed by the Conservative "reform" legislature of 1870-1871, which directed that the bonds subscribed be returned to the State treasury
and which virtually stopped payment out of the special tax funds. Acts of 1872, 1873, and 1874 continued to estop payment. In 1874, suit was brought before Justice Waite in Circuit Court to require the State treasurer to pay the funds collected, but the bill was dismissed by the court upon the ground that the suit had been commenced too late to do any good, inasmuch as the special tax funds had already been diverted—a decision which upheld the course of the legislature.

20. Self v. Jenkins, 21 Fed. Cas. (Case no. 12,640) 1033-1035, June, 1874. The decision involved technicalities. A sum of $151,481.13 had been collected by the special tax laid in 1869. The General Assembly, in 1870, estopped payment out of this fund by directing the treasurer to use $150,000 out of it to pay ordinary governmental expenses and to replace the same from other incoming funds. In December, 1870, the General Assembly ordered him to borrow $200,000 out of the special tax funds and to replace it with funds obtained from general taxes, but forbade him to apply any of these monies to repay the sums borrowed! The acts of 1873 and 1874 provided that the monies raised under the special tax were to be used for ordinary expenses. The plaintiff was seeking to restrain the State treasurer from further payment of money out of the State treasury until he had replaced the sum borrowed. But the court ruled that it could not act; he should have instituted his action earlier to prevent the transfer of the monies borrowed from the special funds. In short, it was too late to restrain the treasurer at that date.

Some most important suits were instituted in Federal and State courts by the Northern mortgagees of the Wilmington, Charlotte, and Rutherford Railroad Company; the Western North Carolina Railroad Company; and the North Carolina Railroad Company. As has been noted, the State
had obtained a second mortgage upon the former company to secure monies lent it before the Civil War. In 1868, an ordinance was passed whereby the company agreed to surrender $1,500,000 of its first mortgage bonds, the State agreeing to endorse $1,000,000 of the remainder. The year following came the act authorizing the State to subscribe $4,000,000 to the capital of the railroad company, but this act was, in turn, repealed, and the stockholders of the road assented to the act. Finally, in 1873, suit was instituted in New Hanover Superior Court by the mortgagees, and the road was sold, with the consent of the State, upon the consideration that the State be released as endorser for the $1,000,000 of first mortgage bonds under the ordinance of 1868 and that it surrender its second mortgage. Governor Caldwell and W. M. Shipp considered this a "good bargain." Of course, the State lost money in the process.

22. This summary is drawn from the Report of the Internal Revenue Commission of the General Assembly in Legislative Documents, North Carolina, 1874-1875, no. 20, pp. 4-11.; The history of the road is also summarized in Salf v. Jenkins, 31 Fed. Cas. (case no. 12, 640), 1033-1035.

In 1868, the Western North Carolina Railroad had been divided into two parts, and its capital stock greatly increased,
the State being pledged to subscribe two-thirds of the
stock. As the unfinished road scarcely met running ex-

of the eastern division was increased to $8,500,000; of
the western division $10,000,000.

penses and became heavily in debt, partly because of the
corruption of its presidents, George Swepson and Milton
S. Littlefield, Hiram Sibley and other New York bondholders,
creditors of the road, secured in 1872 a decree of fore-
closure in the United States Western District Court. How-
ever, the State carried the case to the United States
Supreme Court. Meantime, arrangements were made whereby
the North Carolina Railroad, which, pending the appeal,
purchased the bonds held by Sibley et al., would bid in
the property when sold under the Sibley decree, act as
trustee for the bankrupt road, and pay off its indebtedness.
This arrangement was proposed to clear the question of
title to the road. But, just as it was about to be car-
rried through, some parties to the arrangement secured an in-
junction from Judge Watts enjoining the North Carolina
Railroad from bidding at the sale; whereupon the sale was
postponed and other arrangements had to be made. Finally,
it was agreed that the State should purchase the road at
the sale for a sum not to exceed $850,000, a sum sufficient
to pay the mortgage bonds. The sale was made at Salisbury,
June 22, 1875, and this settled the issue. In the case of

24. The summary is from *Laws of North Carolina, 1872–1873*, pp. 343–344; *1873–1874*, p. 498; *Legislative Papers, 1874–
1875*, Box 964; W. A. Smith (president of North Carolina R.
R.) to President of the Senate, January 12, 1875; *Public
Documents, North Carolina, 1876–1877*, Doc. no. 1.

the North Carolina Company, a corporation chartered in
1849, the State had subscribed $3,000,000 of stock in the
road before the war, and had pledged the dividends upon
this stock to the payment of interest upon the construction
bonds issued by the company and held by Northern investors.
Beginning in 1869, the State applied these dividends to
purposes other than the payment of this interest. Conse-
sequently, holders of the construction bonds instituted suit
in the Federal Courts in 1871 to restrain the railroad
company from paying future dividends to the State treasury.
The suit was successful; nevertheless, the arrears of
interest could not be met, and, to secure this, a decree
was obtained whereby the stock of the State in the railroad
25
would be sold to satisfy the creditors. Thus the decisions


of the courts secured the interests of Northern investors.

It will be remembered that one of the charges
against Governor Holden was alleged abuse of the pardoning
power. In the "post-Holden" period of Reconstruction in

North Carolina, the annual average of pardons issued was fifty-two, a number closely approximating those granted 27 by Governor Holden. On the whole, it appears that the

27. Supra, 248; Governor Holden's record was as follows: thirty-six in 1868, seventy-three in 1869, forty-nine in 1870; After 1870, the number of pardons was nineteen in 1871, seventy-three in 1872, forty-eight in 1873, fifty in 1874, and one hundred twenty-three in 1875 and 1876. pardoning power was not misused in the 1870-1876 period; most of those pardoned had served a good share of their term, several from three to five years. Pardons were issued only for good reason or upon representation that the ends of justice had been met by the length of time already served. It is interesting, however, to note that up to 1874 a great many more Negroses than whites were the objects 28 of executive clemency. This, of course, could be explained

28. The figures are:

<table>
<thead>
<tr>
<th>Year</th>
<th>Whites</th>
<th>Blacks</th>
<th>Indians</th>
</tr>
</thead>
<tbody>
<tr>
<td>1871</td>
<td>12</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>1872</td>
<td>25</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>1873</td>
<td>19</td>
<td>34</td>
<td></td>
</tr>
</tbody>
</table>

upon grounds that crime was more prevalent among the Negroes. Yet, beginning in 1874, this trend was checked sharply and, from 1874 to 1876, the ratio between the races was fifty-five, with a slight inclination in favor of the
29 white. Whether this was due to a definite change in policy, or whether it was accidental cannot be said.

30. The figures have been summarized from the annual list of pardons, commutations, and respites, to be found in the appendix attached to the annual message of the governor to the General Assembly. These reports are always found, from 1870-1877, in document no. 1 of the Public or Legislative Documents of North Carolina for each year. The statements made by the writer are not based upon the same careful check as was employed in the case of the pardons issued by Governor Holden. There is a marked absence of charges of abuse after 1870, perhaps because Governor Caldwell issued only nineteen pardons in 1871. It is beyond the scope of this work to check the many pardons accurately. However, the reports sent to the General Assembly furnish sufficient data to warrant the general conclusions given.

As in the period of 1868-1870, a good many technical difficulties in the administration of justice under the new Code of Civil Procedure persisted. As has been noted, the General Assembly in 1871 validated all improperly-instituted actions relating to the administration of estates. However, this did not remedy the legal embarrass-


ments incurred by many parties who, for one reason or another, found that judicial irregularities, owing to mis-
understanding of the procedure under the changes of 1868
and the new code, had invalidated the proceedings in their cases. To remedy the confused situation, the General Assembly passed a blanket act in 1873 which, after reciting the confusion and uncertainty respecting the extent and limits of jurisdiction of the courts, validated virtually all cases wherein irregularities of procedure were found.

32. Laws of North Carolina, 1872-1873, ch. 175; 294-295. Act of March 3, 1873. It stated that: 1) Errors, if made in good faith or if both parties consented, were of no force to invalidate; 2) Orders and judgments made out of term by the judge were valid, provided they were lawful if made during regular term; 3) Judgments rendered according to the practice in vogue before the adoption of the Code of Civil Procedure and not yet signed by the judges were valid.

Finally, at the close of the period of Reconstruction, in 1876, a new constitution was adopted. In all essential matters pertaining to the administration of justice, this constitution did not alter the one adopted in 1868. The same hierarchy of officials was preserved, with the same powers. In certain minor points, however, alterations were made. The number of Supreme Court justices was reduced from five to three, of superior judges from twelve to nine. Both of these offices remained elective, but it was specified that the superior judges were to be elected from their respective districts instead of from the State at large. Some years later, the number of these judges was
33. The changes are found in Article IV, sec. 6, 10, 21 of the Constitution of 1876.

restored to twelve. To-day, the Supreme Court numbers seven justices, and the superior court judges number twenty-one.

Thus, the years 1870-1876 saw North Carolina clearing up some of the confusion in procedure occasioned by misunderstanding of the changes of 1868; attempting to settle the vexed animosities occasioned by secret political societies; struggling under the burden of corruption and default due to the railroad frauds — successfully reducing the debt and saving the roads in some cases; succeeding in checking misconduct on the part of the judiciary in some cases but failing to throttle its power to render "political" decisions in others. But, although the Conservatives achieved success in many of their aims, they failed to make any marked alterations in the judicial set-up and changes in the administration of justice which the Republicans accomplished in 1868 — those changes had come to stay.
V

ECONOMIC AND SOCIAL PROBLEMS
OF THE RECONSTRUCTION
PERIOD

Thus far, attention has been centered upon those features of the administration of justice which possessed constitutional or political significance primarily. Studies of this nature have been unduly favored over economic and social problems in the literature of Reconstruction; on the other hand, historians of to-day, with attention definitely turned to the "bread and butter" aspects of the period, may never appreciate fully the value of having the political background clarified for them. There is no better means of studying these problems and their solutions than in the decisions of the courts and in correspondence and other materials concerning the administration of laws bearing social and economic import.

It would be a work of supererogation to describe the prostrate condition of society in North Carolina at the conclusion of the Civil War; the effect of the ravages of war upon every Southern state is well known. Likewise, the huge economic losses resulting from emancipation without compensation are appreciated. Finally,
the emancipation of the slaves created tremendous social problems. What was the status of the newly-freed Negro; what position did he occupy before the courts? Could he secure justice from the courts in the new order of things? These and kindred difficulties, together with many solutions proposed to overcome the economic prostration of post-war society, occupied much of the time of legislators and judges. A study of these aspects casts revealing light upon the life of this society.

One of the first solutions proposed to cure the economic ills of a people left prostrate by the Civil War was the passage of laws staying the execution of judgments and the institution of suits for debts contracted during the War. That this idea was not a new one in 1865 is indicated by the fact that a "stay law", by virtue of which defendants in actions upon debt could not be compelled to plead for twelve months after institution of such actions, was passed as early as 1861. However, it was felt that


this stay was not sufficient to meet the needs of the public after the conclusion of the war, and, as a result, new "stay laws" were enacted in 1866-1868, each of which progressively extended the stay of actions on debts con-
tracted prior to May 1, 1865. It will be well to survey the general course of these acts, in order to appreciate their extent and to secure the background necessary to appreciate the decisions rendered thereon by the courts.

On March 10, 1866, the General Assembly of the civil provisional government under Governor Worth enacted a law whereby the superior courts were to have exclusive jurisdiction over cases relating to contracts entered into prior to May 1, 1865. It further provided that all writs in actions of debt, covenant, assumpsit, or account issued to the spring term, 1866, of these courts were returnable to the fall term of the same year. Finally, defendants in all suits brought to recover ordinary debts (i.e. actions ex-contractu) were allowed a period of six months from this return term before being required to plead, and, in cases wherein suits had already been brought and were in pleading before the superior courts, trial would not be held until the fall term of 1866. This act, however, proved to be but a stop-gap, to be replaced by a Convention ordinance of June 3, 1866, which was much more definitive and far wider in its scope.

2. Ibid., 1866, ch. 16: 22-23.
By the ordinance of June 3, 1866, superior courts were to have exclusive jurisdiction over actions of debt, covenant, assumpsit, and account, wherein the sums due were sixty dollars or over. Similar actions involving sums less than sixty dollars could be handled by justices of the peace. Moreover, actions of this type could be taken only at the spring terms of superior courts. Writs issued to the fall terms of 1866 (as provided by the act of March 10, 1866) were returnable to spring terms of 1867, and all actions pending were continued to that date. Dormant judgments could be revived only by actions of debt (i.e., according to common law remedy), and every scire facias to revive a dormant judgment was to be dismissed on motion, at the cost of the debtor. Finally, the ordinance provided for a complicated scheme which virtually enabled persons owing debts of sixty dollars and over to pay their obligations on a staggered installment basis covering four years. Indebtedness to the extent of twenty-five to sixty dollars was payable on a similar basis covering a three-year period; while debtors owing twenty-five dollars or less were required to pay within a year and a half. All suits

3. Ibid., Ordinances of 1865-1866, ch. 19: 31-37. The "installment scheme" is most interesting. In cases of debt involving sums of sixty dollars or over, if a defendant paid one-tenth of the sum (including principal, interest, and costs) within the first three days of the return term,
he was allowed a year to plead; if, at the conclusion of the year, he paid one-fifth of the remainder due, he was allowed another year to plead; if, at the conclusion of that year, he paid one-half of the residue, he was entitled to still another year, after which the plaintiff might have full judgment. In cases wherein judgments had already been rendered, no writs of fi. fa. or ven. ex. were to be issued at spring term, 1867, without the permission of the court. In such cases, if the defendant paid one-tenth of the judgment within the first three days of the term, he was "indulged" a year, and so on as above. In cases of debt before justices of the peace in which the sums involved were twenty-five to sixty dollars, if the defendant paid one-fifth of the debt, he was allowed twelve months to plead; if, at the conclusion of that period, he paid one-half of the residue, he was entitled to another year, at the conclusion of which the plaintiff was entitled to judgment. In cases of debt covering sums of twenty-five dollars or less, if the defendant paid one-fifth of the sum, he was permitted six months to plead; another six months if he then paid one-half, after which the plaintiff was entitled to judgment.

or actions upon debts involving sums over sixty dollars, pending in magistrates' or county courts, were transferred to superior courts. Relief for fraud might, of course, be had in equity. This ordinance applied only to debts incurred before May 1, 1865.

These laws were far-reaching in their scope and, to the minds of some, may have been pernicious in their influence, but it is interesting to note that they were mild in comparison with some of the proposals of the time. Thus, a bill to deprive creditors of all remedy was introduced in the House of Commons in January, 1868; and so great was the general interest of people in the subject of debts incurred during the War that the Judiciary Committee
of the House felt it advisable to submit a long report pointing out the danger of such a move. The committee showed that it was plainly unconstitutional as it impaired the obligation of contract and that it would be disastrous to the interests of the State — to industry, commerce, and agriculture —, for such "repudiation" would destroy the faith of future relations and would strike a death blow to the financial credit of the State. That the committee should feel impelled to make such a report in view of the general interest upon the subject is most significant.

4. Legislative Papers, 1866-1867, Box 816.

On February 12, 1867, the General Assembly passed an act making all writs in actions of debt incurred before May 1, 1865, returnable to the superior courts at their spring terms of 1866 instead of 1867, thereby giving debtors still another year of grace, as if the act of 1866 were not sufficient! It also enabled debts coming under the jurisdiction of justices of the peace to be paid on a four-year staggered installment basis, regardless of the amount involved; and it extended the jurisdiction of the justices of the peace. Still another act stayed executions

peace was extended to cover sums amounting to one hundred dollars principal upon bonds, bills, promissory notes, or accounts; however, justices could handle accounts up to sixty dollars value only wherein the debt in question concerned accounts for goods, merchandise, work or labor done, or specified articles.

on judgments rendered in actions ex contracts prior to May 1, 1865, until spring term, 1866, of the courts in which they were given. Finally, the Convention of 1868 passed an ordinance suspending proceedings upon debts contracted prior to May 1, 1865, until the Constitution of 1868 should go into effect.

Such were the laws enacted by the legislative department of the State from 1866 to 1868 -- laws which progressively extended the time for payment of war-time debts and which were of great economic significance. These acts were enforced in the courts of the State; apparently, no question of their unconstitutionality was raised until late 1868 and early 1869.

of 1866, in requiring that every scire facias to revive a dormant judgment should be dismissed, did not impair the obligation of contract, but merely left to the creditor remedy at common law; *Israel v. Ivey*, 61 N. C., 551 and *McCubbins v. Barringer*, 61 N. C., 552-556. The acts and ordinances removing to superior courts jurisdiction over contracts entered into before May 1, 1865, were not unconstitutional because of such removal. The legislature had long had power to control the jurisdiction of county courts. But no question of the constitutionality of the stay laws was involved; *Madre v. Felton*, 61 N. C., 281. A *ven. ex.* could be issued if a *fl. fa.* had been issued already. (Vide footnote 3, p. 291-292).

Meantime, on April 11, 1867, General Sickles, then in command of the Second Military District under the Reconstruction Acts, issued a general order famous in North Carolina history -- General Order no. 10, to which attention has already been called -- which complicated


the situation, if the laws passed by the State could be regarded as "simple"! After reciting the general destitution, accentuated by the failure of crops, among the population of the Second Military District and declaring that it was the disposition of creditors to enforce the immediate collection of all claims, this order stated:

"To suffer all this to go on without restraint or remedy is to sacrifice the general good. The rights of creditors shall be respected; but the appeal of want and suffering must be heeded. Moved by these considerations, the following regulations are announced: They will continue in force, with such modifications as the occasion may require, until the civil government of the respective States shall be established, in accordance with the requirements of the Government of the United States."
Accordingly, judgments or decrees, for the payment of money, on causes of action arising between December 19, 1860, and May 15, 1865, could not be enforced; proceedings in such causes then pending were stayed; and no suits for such causes could be thereafter instituted. The sale of all property, following execution or process upon liabilities contracted prior to December 19, 1860, was ordered suspended for twelve calendar months, except in cases in which defendants intended to remove their property fraudulently beyond the territorial jurisdiction of the courts; and the sale of real and personal property by foreclosure of mortgage was similarly suspended, except where the payment of interest accrued since May 15, 1865, had not been made. However, the order did not affect causes of action arising after May 15, 1865; in such cases, the courts were free to apply the regular procedure under State laws. But it did provide for a considerable homestead exemption, which will be considered presently. It

10. *Infra*, 312.

also ordered suspended all State laws or ordinances inconsistent with its provisions. This order was issued to meet the needs of South Carolina primarily.

11. G. O. no. 10, *General Orders, Second Military District*, 1867; For the circumstances occasioning the order vide
Immediately, a number of questions arose as to just what effect this order had upon North Carolina laws and their administration, especially since the State seceded May 20, 1861, and not in December, 1860. Lawyers were at a loss to understand the meaning of "causes of action" arising between December 19, 1860, and May 15, 1865. For example:

"1. Suppose the Contract to have been entered into previously to the 19th day of December, 1860; but the debt to have become due, and the cause of action to have arisen subsequently to that date and before the 15th of May, 1865. -- Does this section apply so as to forbid the enforcement of execution, or to stay proceedings already begun, &c.?

"2. Suppose the Contract to have been entered into between the 19th day of December 1860, and the 15th day of May 1865, but the debt to have become due, and the cause of action to have arisen subsequently to the 15th day of May 1865. -- Does this section apply &c.?

"3. Suppose the Contract to have been originally entered into previously to the 19th day of December 1860, and the debt having become due either before or after the 19th day of December 1860, to have been renewed between the 19th day of December 1860, and the 15th day of May 1865, by taking up the old evidence of debt and substituting a new one -- Does this section apply to this case to forbid the enforcement &c.?

"4. Does this section forbid the enforcement of judgments and decrees, and stay proceedings which are now pending, and forbid the institution of new suits, when the cause of action is a tort, and the form of action ex delicto and when such tort was committed between the 19th day of December 1860, and the 15th day of May 1865. -- as for example in suits for trespass, libel, wrongful conversion of property and the like?

"5. Does this section apply to the actions of replevin and detinue, instituted for the recovery of specific
articles, where the judgment is in the alternative —
either for the return of the articles or for damages?
"6. Does this section apply to the action of
ejection?"

12. G. P., Worth, Worth to Canby, April 22, 1867. The
questions were propounded originally to Governor Worth by
R. C. Badger and E. G. Haywood, well-known Raleigh lawyers.

When these questions were put to General Sickle's for defini-
tion, he refused to give an answer, replying that "the
provisions of this order will be interpreted and enforced
by the courts." This, of course, was a most difficult

13. Senate Executive Documents, no. 14, 40 Cong. 1 Sess.,
Circular of April 27, 1867. "The order is to be deemed
and taken as an ordinance having the sanction and the
authority of the United States for the regulation of certain
civil affairs therein specified."

task to impose upon the State courts, for it was one
thing to interpret the meaning of an act passed by the
General Assembly and quite another to interpret an order
issued by a military commander. However, the order did
not remain in force long enough to enable the courts to
formulate interpretations of lasting effect, for its exis-
tence terminated on April 2, 1868, on which date General
Canby approved and put into effect the ordinance of the
14
Convention of 1868. In 1868 and 1870, however, the State

14. Supra, 294; G. O. no. 57, April 2, 1868, General Orders,
Second Military District, 1868.
Supreme Court held that bonds or promissory notes executed after May 15, 1865, even though given in satisfaction for bonds or promissory notes executed previous to that date, constituted causes of action subsequent to May 15, and, therefore, were not within the purview of the order. Also,

15. Hood v. Proneberger, 63 N. C., 35-36 (June term, 1868); Isler v. Kennedy, 64 N. C., 530.

The order was modified by General Canby on December 31, 1867, by substituting the date of May 20, 1861, for December 19, 1860.


In addition to the difficulty over interpretation, the civil authorities of the State objected to the promulgation of General Order no. 10 upon the ground that the evils it intended to cure had already been remedied by State legislation and that it was unconstitutional because it impaired the obligation of contract. Reference has been made to the fact that objections to the order had been made to President Johnson by Governor Worth and that, as a result, General Sickles' interference with State laws had drawn a severe rebuke from Attorney General Stanbery, whose opinion was soon nullified by the Third Reconstruction Act.
17. Supra, 120-122.

Nonetheless, protests continued to be made by the State authorities, who insisted that the State legislation of 1865-1867 quite effectively remedied the evils which General Sickles cited as basic reasons for issuing the order. His successor, General Canby, met these assertions with the counter-statement that, in many of its provisions, it embodied the same principles that the State legislation did and that, as regards the length of the stay and complications of operation, the military legislation was less comprehensive and stringent; therefore, if the military order was unconstitutional because it impaired the obligation of contract, was not the State legislation equally so? And, granting that the laws enacted by the General Assembly effected the same ends as those aimed at by the military order, it was equally true that "the validity of these laws — as a question of fact and as a statement of the issues involved was seriously questioned; and the determination of these questions invited and threatened a flood of litigation that would have been fruitless of any permanent result except a grievous addition to the burdens already weighing upon your people."

18. G. E., Worth, Canby to Worth, October 12, 1867.
The first of these counter-arguments was sound, but the second one was faulty in its reasoning; for, if the State legislation was of questionable validity, was not the military order equally questionable, since both embraced the same general means to the same end? Moreover, if the military order did hold back a flood of litigation, it could but put off the evil day. As a matter of fact, General Canby, in his replies to the civil authorities, completely misconstrued or perverted the original purpose of General Order no. 10; for he asserted that one of its fundamental purposes was to stay proceedings upon debts and contracts entered into during the period of the War until such issues as the validity of private contracts made during and under the existence of the Confederate government and related matters were settled, an object

19. Ibid.

which the closest inspection of every phrase of the order will not reveal. If the language used by General Sickles be indicative of his purpose, its object was purely economic, and its intent was merely to relieve pressure upon debtors by giving them temporary relief. Furthermore, General Canby's introduction of this extraneous issue was matched by his utter misconstruction of the purposes of the Reconstruction Acts: he conceived that authoritative state-
ments (presumably by decisions in United States Courts) upon the validity of private contracts made during and under the existence of the Confederate Government were essential to the establishment of a State civil government in conformity with the requirements of the Government of the United States! Either General Canby was

20. Ibid., His language is indefinite, but the meaning is clear. "The next question relates to the effect of the order upon issues that may eventually be carried beyond the jurisdiction of your Courts. The order itself is... intended... to stay preliminary proceedings until the principles of justice and equity that should control their adjudication have been settled or, in the language of the order 'until the civil government of the respective States shall be established in conformity with the requirements of the Government of the United States.'... These are not abstract issues. They are questions of practical and daily application. The decisions of the Courts of the States lately in Rebellion, have been conflicting and so far as I am advised but one of the points in question has been adjudicated and settled by the Courts of the United States. This decision does not warrant the assumption that contracts, that were in violation of the laws of the United States, that were aimed at the subversion of that Government -- or were against its declared public policy -- can be enforced in its Courts; and yet, I am justified from the facts before me, in assuming that much of the pressure for the abrogation of General Orders no. 10, and, by necessary implication -- or your own relief-laws is for the purpose of pressing doubtful contracts to a premature conclusion & obtaining settlements before the principles upon which they should be settled -- have been determined by the Courts of ultimate resort."

The whole subject of Confederate contracts is discussed in infra, 333-349.

fearfully befuddled in his legal and constitutional thinking, or he was quibbling. However, the order stood until April 2, 1868.
However muddled the thinking concerning the intent of General Order no. 10 might be or whatever interpretations might be offered upon the definition of "causes of action" arising between December 19, 1860, or May 20, 1861, and May 15, 1865, there is no doubt as to the general effect of the order. It had the legal effect of an injunction. Associate Justice Reade stated this clearly in a case decided at June term of 1867:

"We do not consider that order as forbidding the several courts in the State from proceeding with the trial of cases at law or the hearing of cases in equity and rendering judgments and decrees thereon; but that it forbids execution to issue—in analogy to injunction cases when the court proceeds in judgment and the execution is enjoined." 21


Two years later, in a bill of equity involving an injunction which had been dissolved by military order in the spring of 1868, Associate Justice Dick rendered a more severe opinion:

"His Honor in the Court below, properly yielded obedience to the military orders, as silent leges inter arma, but that temporary government, with its general orders, has passed away, and the municipal law of the State has again assumed its wise and beneficial supremacy." 22


It is impossible to say just how far this order interfered with activities of the civil courts. Probably it did not
interfere greatly, inasmuch as State laws had postponed actions upon most cases the order could cover until the new civil government went into effect in 1868.

It is interesting to note, in passing, that General Sickles attempted to apply General Order no. 10 to processes of the Federal Courts. It is quite possible that he did so in order to prevent non-resident creditors from obtaining relief in actions of debt, while debtors were protected from creditors who lived within the State.

23. G. P., Worth, Worth to Sickles, June 17, 1867. "The action of the district court of the United States, now sitting at Raleigh, by which the non-resident creditor, may enforce collection, while the defendant, under your order No. 10 is restrained from collecting from his debtor, occasions much alarm." Endorsed by Sickles, June 21, 1867, that he had heard of no such case. The fact that this correspondence occurred before the action taken by General Sickles in forbidding enforcement of an execution by the United States Circuit Court suggests that he may have been motivated by a desire to equalize conditions for all.

On July 30, 1867, United States Marshal Daniel R. Goodloe reported to the general that Colonel Frank, post commander at Wilmington, had forbidden the enforcement of an execution issued at the June term of the United States Court—an action based upon the much-debated order. Professing to believe that Colonel Frank was mistaken, since he could not suppose that General Sickles would set aside any law of the government to which he owed allegiance, the marshal stated that, to avoid collision between the civil
and military authorities, he had directed his deputy to suspend execution of the writ until the General could be informed of the facts. The latter referred the matter

24. Ms. official copy of Goodloe to Sickles, July 30, 1867. Department of Justice Archives, National Archives.

to Colonel Frank, with instructions to report the material facts upon all cases suspended, the information upon which could be had from the United States marshal. However, Marshal Goodloe declined to give the information requested, refusing to recognize the right of the military "to obstruct or inquire into the nature of the process of the United States Courts..." Colonel Frank informed the marshal

25. Endorsements upon ibid.

that his suspension of the court action had the approval of General Sickles, that he would not permit judgment or decree of any court to be enforced in violation of military orders, and that he would use force to prevent any such execution. Marshal Goodloe could do no more than report these developments to Washington; his course met with full approval from the Attorney General's office. The matter was then

referred to President Johnson, who sustained the conduct of the marshal and also the opinion of the Attorney General's office that there was no power competent to suspend the process of a United States Court save the court itself or a superior one. General Sickles was removed from command on August 26, 1867, and General E. R. S. Canby appointed in his stead.

27. Hamilton, op. cit., 231-233; The order is given in Richardson, op. cit., VI, 557.

Strange to say, this drastic action did not prevent a recurrence of military interference; in May, 1868, Marshal Goodloe reported that the military officer commanding at the post of Goldsboro had forbidden the sale of certain property under execution of the Circuit Court of the United States. As in the former case, the authority cited was General Order no. 10. However, the military


29. Register of Letters Received, Attorney General's Office, II (Department of Justice Archives, National Archives). Remarks made with reference to Goodloe's letter of May 15, 1868: "July 10 Marshall Goodloe states orally that the military have retracted."

of this nature occurred. The military authorities proved
unable to regulate the activities of the United States Courts. This civil victory meant, of course, that non-resident creditors could obtain judgments in Federal Courts and thus gain an advantage over resident creditors. However, this situation would have obtained had the State laws remained in effect.

Reference has been made to the fact that the military order terminated on April 2, 1868, at which date, with military permission, the stay ordinance passed by the Convention of 1868 became effective. After the inauguration of the new civil government, public sentiment in the State apparently deprecated the stay laws, for Governor Holden, in his first message to the General Assembly, earnestly recommended the repeal of all such laws:

"Our State government will not be in complete operation until every impediment to the collection of debts is removed. Stay laws which give indulgence beyond the usual dilatory plea, or beyond the ordinary stay of execution on sufficient security are, under any circumstances, of doubtful validity. The 'evil day' of payment, as it is termed, is postponed in most cases to be felt with added force by the debtor. A sound and judicious credit system...is impaired, if not destroyed, by general laws which may be said to place the creditor for years in the hands of the debtor, with the certainty in many cases of the loss of the debt...The losses incurred by the rebellion are not confined to particular cases. They were general, affecting the whole people of the State in every walk of society. If a debtor cannot pay in the last resort...he is bankrupt...We may lament his misfortunes and sympathize with him, but still the fact remains that he is still in possession of property which justly belongs to his creditors, some of whom have been reduced to his condition by his failure to meet his obligations."
Finally, in January term, 1869, the State Supreme Court, in a most interesting decision, declared the stay laws unconstitutional and branded them as a detriment to the general welfare of the State. The opinion of the Court, delivered by Associate Justice Reade, emphasized the need of protecting the interests of all classes of society: capitalists, laborers, and farmers. The welfare of all depended upon the obligation of contract.

"As it is, we find that eight years of stay laws have left a considerable indebtedness, with interest and cost accumulated and creditors and sureties impoverished, without any corresponding benefit to the principal debtors, some of whom cannot pay and have sought relief from the bankrupt law; and some have delayed and have now lost the opportunity for that relief by reason of the false hopes held out by the stay law; and some of whom will not pay, although their means are abundant and are used in speculation and extravagance."


Though such was the gloomy picture of actual conditions, every man's bond—that is to say, his word—should be inviolable, a fact which the framers of the Constitution of the United States recognized as of vital importance, a principle which "was a guaranty of justice to all, and is expressly so against him who would obtain the profits of industry and withhold the reward."
To this decision, Justice Rodman entered an able dissent, in which he claimed that the stay laws were intended primarily to change the jurisdictions of the courts and that the Court was not entitled to declare this intent, as expressed by the legislature, false. Pointing out that the General Assembly had interfered greatly with the obligation of contract before, the most notable example being the ordinance of emancipation, he declared:

"If in these instances the legislative acts did not so materially alter the remedy of the creditor as to impair the obligation of the contract, it is difficult to see on what principle that effect can be attributed to an act which leaves to the creditor every remedy he had before; their operation being retarded on considerations of public policy."

He could "conceive of no standard by which the degree of the materiality of the change can be judicially measured any more definite than that heretofore declared, which is obviously insufficient to solve this case." And so, after

many years of lawmaking and earnest discussion, in the midst of which the most famous of the military orders became a burning issue, the stay laws, once considered the hope of a State prostrated economically by the ravages of
war and its aftermath, were ignominiously relegated to
that class of laws denominated detrimental and unconstitu-

tional — a delusion and a snare.

34. It is interesting to note that the number of bankruptcy
cases in United States Courts was unusually large in 1868.
There were thirty petitions in 1867, five hundred one in
1868, sixty-four in 1869, thirty-two in 1870. Whether this
unusually large number of petitions in 1868, which seem-
ingly persisted to some extent in 1869, had any connection
with the move to repeal the stay law is not certain. It
may have. Senate Executive Documents, no. 19, 43 Cong. 1
Sess., I. Figures for North Carolina are on pp. 3, 5, 8,
9, 11, 14.

Another solution suggested for the economic ills
of post-Civil War society in North Carolina was the grant
of security, through legislative action, of a certain amount
of real property, to every freeholder, and of a designa-
ted amount of personal property to all persons. These
specified amounts of property would be exempt from all
actions of debt, except, of course, cases involving fraud
or cases wherein the debt had been incurred to secure the
property itself; and the entire amount to be thus exempted
came to be known as the "homestead exemption" — to most
people, just "homestead." Thus, every man would be pro-

35. The term "homestead," used accurately, meant only real
estate, generally the home and a designated amount of house-
hold furniture, etc., up to a certain value; personal
property could not be, in strict accuracy, a "homestead,"
but in common usage people used the term to cover all the
exemptions.
ected economically to a degree sufficient to enable him to keep his head above water no matter how fiercely the winds of adversity might blow in a post-war period of insecurity; in such fashion, all men, their wives, and their children would be secure in their homes and their means of earning a living — provided they once possessed the means.

The first law dealing with this subject was passed by the General Assembly on February 25, 1867. It exempted from actions of debt all mechanics' tools; the agricultural implements of a farmer necessary for two male laborers; the libraries of attorneys-at-law, doctors and physicians; and ministers of the Gospel; and surgeons' and dentists' instruments. Furthermore, real estate of heads of families or housekeepers, if freeholders, was similarly exempted to the extent of one hundred acres, if located in the country, or one acre, if located within a city. Finally, the following personal property of said heads of families or housekeepers was made free from actions of debt: one work horse, one milk cow and a calf, fifteen hogs, fifty bushels of corn, twenty bushels of wheat or rice, five hundred pounds of pork or bacon, one yoke of oxen, one cart or wagon, and household furniture to the value of two hundred dollars, to be selected by the debtor. This act was very far reaching. It did not, however, apply
in *ex post facto* fashion.


Shortly after the passage of this act, General Sickles promulgated a homestead order of his own — none other than General Order no. 10!

"In all sales of property under execution or by order of any court, there shall be reserved out of the property of any defendant who has a family dependent upon his or her labor, a dwelling house and appurtenances and twenty acres of land, for the use and occupation of the family of the defendant, and necessary articles of furniture, apparel, subsistence, implements of trade, husbandry or other employment, of the value of five hundred dollars. The homestead exemption shall inure only to the benefit of families — that is to say, to parent or parents and child or children. In other cases the exemption shall extend only to clothing, implements of trade or other employment usually followed by the defendant, of the value of one hundred dollars. The exemption hereby made shall not be waived or defeated by the act of the defendant."37


This order, while it suspended all civil laws or ordinances inconsistent with its provisions, obviously did not defeat the purpose or provisions of the State homestead law. In applying the exemption to all sales of property, it is clear that it had an *ex post facto* effect. However, it was not an object of controversy between the civil and military authorities.

This trend of economic thought, expressed by both
the civil and military authorities, received its final endorsement in Article X of the Constitution of 1868:

"Section 1. The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt.

"Section 2. Every homestead and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

"Section 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt, during the minority of his children, or any one of them."

These provisions were seconded by legislation enacted shortly after the new civil government went into effect in 1868.


The outstanding question faced in the application of these constitutional provisions and the laws pursuant thereto was whether or not the homestead exemption applied to debts contracted prior to the ratification of the Constitution of 1868. A number of Republicans wrote to Governor Holden asking for an opinion upon this matter:
they felt that the exemption was valueless if it did not apply to pre-existing debts; however, their lawyers, who were Conservative in politics and so not to be trusted, told them it did not so apply. The governor endorsed one of

39. G. F., Holden, W. J. Laird to Holden, November 9, 1868:

"Sir, by request of the Commissioners of this county Anson I submit the following question to your honor [sic]

"that [sic] is whether or not the Homestead [sic] laid down in the Constitution has any barring [sic] on debts made [sic] prior to its ratification or not [sic]

"there [sic] has become to be some dissatisfaction among the Republican party with regard to that one thing [sic] they [sic] or [sic] told by the democrats and Lawyers of that party that the Homestead [sic] has a Nothing [sic] to do with any debts only new and that has bin [sic] made since its ratification [sic]"

Frank D. Irwin (Clerk of Burke Superior Court) to Holden, January 20, 1869. Was the law retrospective or prospective? If it were only prospective, but little good could be derived from it; for "the people of this County are sorely oppressed, especially the farmers --- who were so unfortunate as to get into debt. they [sic] are sued, their little property & effects, advertised and soon under the sheriff's hammer to be sacrificed at less than 1/3 its value. . . . "I have heard of but one as yet, who have [sic] taken the benefit of the Homestead. The lawyers say it is null [sic] & void, his creditors tell the Officers to go a head [sic] & execute & sell."

John C. Whitsett to Holden, November 11, 1868. Whitsett desired an explanation upon this question as nobody seemed to know anything about it. Whitsett claimed he was being pressed by a "Rebel Conservative" who had a judgment and execution on all of his property, including the home.

These requests: "Answered that Homestead ought to be considered retrospective until decided different [sic] by
the Supreme [Court]." So important did the question become that the General Assembly requested the Supreme Court to render an opinion upon the validity of the retrospective action of the constitutional provisions. This the Court refused to do, reserving its opinion until an actual case was decided. However, in the decision holding  

41. Legislative Documents, North Carolina, 1868-1869, no. 23. Chief Justice Pearson to T. R. Caldwell (President of the Senate) and J. W. Holden (Speaker of the House), February 9, 1869.

the stay laws unconstitutional, the Court for all practical purposes announced that it would receive the homestead exemption favorably.


The authoritative decision upon this very important question was handed down in the case of Hill v. Keeler, in the January term, 1869, of the Supreme Court. Associate Justice Reade, whose opinions were at all times flavored with the spice of democratic principles (even when declaring the stay laws unconstitutional), delivered the opinion of the Court: the homestead exemption did apply to pre-existing contracts; in so doing, it did not impair the obligation of contract.
"The great error is in supposing that the homestead law is to defeat debts. That is no part of the object of the law. The laying off of a homestead is the sole object, and is prospective altogether. If any debt is affected by it, it is merely incidental. It declares its object upon its face to be not to defeat debts, but to allow to every resident of the State and his children and his widow a home and the means of living, if they have them. It is a question not of defeating debts, but in the language of Chief Justice Taney, 'it is a question of policy and humanity, which every civilized community regulates for itself.' 43


The object, then, of the homestead law was to further the welfare of society, and it was for the legislature to determine public policy — not the courts. But the Court was not unanimous in its decision; indeed, Hill v. Kessler revealed that the two justices whom both Conservatives and Republicans had supported in the election of 1868 differed sharply in economic and social outlook. Chief Justice Pearson, in his dissent, argued that, in nine out of ten cases, the only property a debtor possessed would be covered by the exemption, as happened to be the case in this particular instance. The Chief Justice disliked all forms of homestead exemptions, prospective as well as retrospective:

"I am aware that in several of the States decisions have been made sustaining homestead laws. These cases all rest on the fallacy of assuming the power to make exemptions to some extent, and then, on the idea of legislative discretion, the amount is swelled up to thousands; and it is justified on the ground of 'keeping pace with the progress of the age' — a progress in this particular, I fear, of dis-
honesty and fraud."

44. Ibid., 451.

After this basic decision had been made, the Court proceeded to the interpretation of secondary, though important, matters. Thus, although the homestead act was retrospective, it was held that the exemption did not apply if a levy had been made upon property before the adoption of the Constitution of 1868. In such case, there was a vested right, which it was not the purpose of the Constitution to destroy. However, if judgment had been obtained against a

45. McKeithan v. Terry, 64 N. C., 25-26. This decision, of course, could be questioned; for, if the assertion in Hill v. Kessler that the purpose of the Constitution and the laws was solely to lay off homesteads be true, what had vested rights to do with the issue?

debtor before the adoption of the Constitution but levy on the same was not made until afterward, the homestead exemption applied.


Much discussion was aroused by the question of whether or not the homestead exemption applied to persons who became debtors as a result of judgments arising out of tort or conviction of crime. The matter was referred to Attorney General L. P. Olds, who replied convincingly that
the public welfare requires that injuries to both State
and individuals be punished for wrong done them, and
therefore "any law whereby these remedies are weakened is
a public and a private evil, and not to be tolerated."

Yet, in the face of so strong a construction, the Supreme
Court held, in 1872, that the personal property and homestead
of an individual guilty of defamation of character
could not be sold under an execution issued upon judgment
rendered in such action. Justice Reade, in delivering the
opinion of the Court, argued that execution never issued
upon debt, contract, tort, or damages, but upon judgment;
therefore, since the paramount aim of the Constitution of
1868 was to secure homesteads, the homestead and personal
property of individuals which were exempted under the
constitution could not be sold under an execution issued
upon a judgment rendered in an action ex delicto. Chief

Justice Pearson replied vigorously that such a construc-
tion would protect slanderers, seducers, and malicious
prosecutors — that it was not the intention of the Cons-
titution to put people "at the mercy of the vicious and
ill-disposed." One cannot help feeling that the Chief
Justice had by far the stronger interpretation.

This last case was illustrative of the difficulties involved in holding that the homestead exemption was retrospective and yet did not impair the obligation of contract. Had the Court conceded that the exemption was intended to protect debtors, then obviously a retrospective action impaired the obligation of contract, for a contract, when made, involves the remedy obtainable at the time. On the other hand, the decision that the Constitution intended to secure homesteads almost necessarily led, upon strict construction, to such a ruling as Dellingner v. Tweed. But the Court was not consistent in its application of the homestead principle. Justice Reade himself held in one case that vested rights held priority over homesteads. And, in 1873, Justice Rodman declared: "The purpose of the homestead law is to legislate between a debtor and his creditors, and to affect other interests incidentally only." Justice

50. McKeithan v. Terry, supra, 317.

Rodman was only speaking the truth, but his admission invalidated completely the original thesis so ingeniously presented by Justice Reade.

Three years after the authoritative State decision of Hill v. Kessler and shortly after the State Supreme Court had settled most of the secondary homestead issues, the United States Supreme Court announced, in 1872, in the case of Gunn v. Barry, that a homestead act of the State of Georgia, by allowing far greater exemptions than were permitted under former laws of the State, was unconstitutional in its retrospective aspects: it affected and impaired contracts formed under previous laws, inasmuch as the remedy at law is a part of the obligation of contract. This decision visibly upset the North


Carolina Supreme Court, especially Justice Reade, although the Court refused at first to concede that the action of the highest court in the land affected the North Carolina cases. Justice Reade pointed out that the Georgia law permitted exemptions to the extent of real estate in fee simple plus improvements to the sum of two thousand dollars and personal property to the sum of one thousand dollars, precisely double the amounts granted in North Carolina. Furthermore, the North Carolina law of
1867 provided for much larger exemptions than the laws of Georgia passed previous to the one in question before the United States Supreme Court. These points were presented cogently by Justice Reade in defense of the view that the retrospective effect of the North Carolina homestead was not affected by Gunn v. Barry. The associate justice even urged that the provisions of the Constitution of 1868 and the laws pursuant thereto really placed restrictions upon the exemptions granted in the act of 1867; hence, the 1868 laws were made primarily to secure necessaries and comforts to people, not to defeat debts. However, his fear of the effect of Gunn v. Barry, together with his liberal economic thought, was exhibited in his reply to the action of the highest court:

"It would be verging on the ridiculous to say that the Supreme Court of the United States, or any other court, better knows the details of what is necessary for the 'comfort and support' of the citizens of North Carolina than the Legislature of the State... And it would be inhumanity to say that because the Legislature repealed one exemption law and substituted another and a lesser one, therefore the debtor should not have any exemption at all. And this, too, at a time when, owing to peculiar circumstances, probably one-half of the debtor class are owing more old debts than they can pay... If under our circumstances our people are to be left without any exemptions, the policy of Christian civilization is lost sight of, and we might almost as well return to the inhumanity of the Twelve Tables of the Roman law: 'If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber.' Cooper's Justinian, 855, App."

For the next four years the North Carolina Supreme Court continued to assert the validity and constitutionality of the decision of Hill v. Kessler; but, in 1877, its


... course was directly overruled by the highest court in the land, nine years after the passage of the homestead law of 1868.


It is most interesting to note that the course of State laws and decisions upon the homestead issue was closely paralleled by decisions in bankruptcy in the Federal Courts in North Carolina during the same period. On March 2, 1867, Congress passed a law providing that there should be exempted from the possessions of a bankrupt before the United States Courts all such property as was exempt by State laws as of 1864. This law was

56. U. S. Stat. at Large, XIV, 517.

... amended in 1872 and 1873, so that bankrupts would be
allowed exemptions accorded debtors as per State laws existent in 1870. By these acts, Congress applied, in North Carolina, the homestead exemption to proceedings in bankruptcy.


Before the acts of 1872 and 1873 were passed, an attempt had been made to apply, by means of a Federal District Court decision, the homestead exemption of North Carolina to proceedings in bankruptcy. In 1869, a bankrupt pleaded that Congress, in accepting the North Carolina Constitution of 1868 and permitting the State to return to its normal political relations with the Federal Government, had, in effect, amended the bankrupt law of 1867 to embrace a homestead exemption as of the North Carolina Constitution. It was an ingenious plea, but Judge G. W. Brooks rightly denied it; clearly, Congress contemplated no such action. However, when


the acts of 1872-1873 were passed, they were promptly enforced in the District Courts in North Carolina, and

59. E. g., In re Hall, 11 Fed. Cas., 199-201. (no. 5,921).
the State Supreme Court cited the laws to show that the
decision in Hill v. Kessler had received general acquies-
cence. When the decision of the United States Supreme

60. Martin v. Hughes, 67 N. C., 297.

declaring the homestead exemption of Georgia unconstitu-
tional was announced, it was apparent that this threatened
the North Carolina homestead act also, and, if the latter
suffered a like fate, the bankruptcy laws of the United
States were bound to be affected. Judge R. P. Dick,
the newly-appointed judge for the Western District of
North Carolina, created in 1872, met this threat by
pointing out that, although the States were prohibited
from impairing the obligation of contract, there was no
such inhibition upon the National Government; Congress,
by virtue of the authority granted by the Constitution to
pass a bankrupt law, had the power not only to impair but
61 to destroy the obligation of contract. He admitted that


Congress could not, by legislation, give effect to a
State law or constitution that violated the United States
Constitution; yet, there were certain things which a
State could not do, but which Congress could, among them
being coining money, emitting bills of credit, and making
bankruptcy legislation. In the last-named matter, the National legislature might adopt the very language and principles employed by State legislation. In his opinion, the acts of 1872 and 1873 did not profess to validate State laws that were unconstitutional, but they did adopt those principles and make them part of the bankruptcy legislation of the United States. Judge Dick

62. Ibid., 1082.

exhibited, in his opinions, a line of economic thought similar to that of Justice Reade in the State Supreme Court.

"Until within a recent period the statute law of this State subjected to execution the lands, person, and chattels of a debtor, and only a few articles of small value were allowed as exemptions to keep the debtor and his family from absolute starvation or dependence upon the charity of neighbors. This legislation and the natural greed of creditors necessarily had the effect of filling the country with families of paupers who were a burden instead of a benefit to the State. The constitution of this state, adopted in 1868, was the commencement of a new, more humane, and enlightened policy upon this subject. The results of the Rebellion had rendered a large number of our people bankrupt in fortune; and the convention of 1868 determined to insert a provision in our organic law, to preserve the liberty of an honest and unfortunate debtor, and secure a home for his family, and encourage him and enable him by honest industry to assist in restoring wealth and property to the state."


It will be remembered that Judge Dick had been a State
Supreme Court justice until 1872; he had concurred in 64
the Hill v. Kessler decision. In spite of his strong

64. Ibid., 1250.

defense of the homestead exemption, however, his views
were overruled by his immediate superior, United States
Circuit Judge Bond. The latter, following the decision of
Gunn v. Barry, ruled in 1875 that, in cases of debts in-
curred before the adoption of the Constitution of 1868,
the homestead exemption could not be applied. Thus,


the decisions in the Federal Courts had run a close
parallel to those for the State legislation.

A third suggestion for the economic betterment
of post-war society in North Carolina was the abolition
of imprisonment for debt. This was accomplished by
legislative act in 1867, a law which was re-enforced by
66 General Order no. 10. Of the three solutions pro-


posed for the economic welfare of North Carolina this
was the only one not declared unconstitutional, and it
was enforced by the courts of the State immediately.

One of the interesting developments in the administration of this law was that, according to the interpretation of the Supreme Court, bail could not be required, inasmuch as abolition of imprisonment for debt meant that a judge could not render judgment upon a bail bond. This interpretation followed the doctrine of "qui bono?" — why require a useless act? At first, this decision of the

68. Ibid.

Supreme Court operated in favor of non-resident debtors; for, while the law made provision whereby bail could be required upon oath of the plaintiff that the defendant was about to remove himself or his property beyond the limits of the state, it left resident creditors of out-of-state debtors no remedies equal to ones which could be used against resident debtors. For example: a creditor might make oath that a debtor was about to remove himself or his property beyond the limits of the State; in such case, the plaintiff might have a capias ad respondendum (a writ under which the sheriff took bail to compel appearance). But this procedure could not be applied to a non-resident debtor, since he was already living beyond the limits of the State and, therefore, was not about to remove; a non-resident debtor, thus, could not be required to give bail. Failing to secure this remedy,

resident creditors endeavored to secure an attachment upon the property of non-resident debtors, only to meet another rebuff from the Court. The aim of the creditors was plain: by securing a writ of attachment, which had the effect of seizing the property of the debtor, the creditor could force the latter to appear or suffer the loss of his property; whereupon the creditor could enter a nonsuit, make affidavit that the defendant was about to remove, &c., and thus force him to give bail. By this means the defendant would be forced into the State, and the plaintiff would have a chance to secure a better hold on him. However, the object was defeated by the decision of Chief Justice Pearson, who held that, under the doctrine of *qui modo*, since bail could not be required of said debtor, it was impossible to issue the requested writ of attachment. And so, the creditor was left without a remedy. To use the words of the Chief Justice:

"It is asked: What is a creditor to do? A non-resident debtor, if not required to give bail, may enter his pleas and contest the cause of action and then remove his property while the action is pending! We can only say, it is the province of the courts to expound the laws, not to make them." 70


This decision was rendered in 1868. When it is remembered that, by virtue of the fact that General Order no. 10 did
not apply to United States Courts, it was possible for non-resident creditors to collect from resident debtors.


the exasperation aroused by this opinion may well be imagined. The only remedy, of course, lay in new legislation, which cured the difficulty. Except for this embarrassment,


ment, no trouble was encountered in the application of the abolition of imprisonment for debt — a move which was in accordance with the best thought of the time.

In times past so much emphasis has been laid upon the political history of Reconstruction (in accordance with the dictum that "history is past politics") that these laws and their administration in the courts have, for the most part, been overlooked or disregarded. These were significant laws, involving principles of fundamental economic importance, the administration of which touched the daily life of people and which were probably more influential than the fanfare of politics, with its speeches and elections, its Union Leagues and its Klans. Here was a set of proposals intended to solve the economic ills of the time. It was first conceived — or at least put into operation — by the party known as Conservatives, the
followers of Governor Worth. Although the laws passed by
that body of men were superseded by General Order no. 10,
they were even more comprehensive in many instances than
were the provisions of that order. Finally, every plank in
this program for recovery was taken over by the Republi-
cans, often known as Radicals, in 1868. It is of great
importance to note that, however much the civil and mili-
tary authorities might clash over the application of the
general order or however much Conservatives and Republi-
cans might hurl the thunderbolts of political invective
at each other's heads, the fundamental economic program
of all was the same.

It is true that, after the Republicans came
into control in 1868, changes were made in this program
begun by the Conservatives and fostered by the military
authorities. The stay law was declared unconstitutional,
although such a decision must have hurt some Republi-
cans. On the other hand, there is some evidence that the

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73. C. P., Holden. L. J. Horner to Holden, January 15,
1869. Horner was perturbed at the rumor of possible re-
peal of the stay laws. The market would be glutted with
forced sales. Most old debts were contracted on the
understanding that the debt was to be paid in the same
currency. He suggested the passage of a law to legalize
the payment of debt in currency. Governor Holden en-
dorsed this letter, thanking Horner for his suggestions
and adding that the stay laws would probably not be re-
pealed soon, "though I think all such laws are wrong in
principle."
stay law operated more for the benefit of Conservatives than of Republicans. Governor Holden recommended its repeal upon the grounds of justice to all and the necessity of fostering a sound credit system. Finally, it was declared unconstitutional in an opinion rendered by a man of liberal economic thought, whose main economic interest lay in the field of banking, yet whose decisions were always marked by strong democratic leanings. The medley of opinion defies an economic interpretation.

As for the homestead exemption, there can be no question that many Republicans earnestly desired it to apply to debts incurred prior to the adoption of the Constitution of 1869. Probably the majority of these men owned but little property — certainly less than the homestead exemption. The same evidence indicates that...
76. Supra, 313-4; G. P. Holden, Thomas Paschall to Holden, December 2, 1866. Did the law allow to each head of a family $500 worth of personal property? "The reason I want the particulars from you, there is a passel of 'lia-
obolical Democrats' preparing to sell my little possessions not over $500 worth in all. The lawyers are all of the afore named politics & are so closely united together they will not tell a man anything unless he, is what they call
of 'right stripe.'"
"P. S. I own no land."

Conservatives, mainly lawyers, opposed this idea. Allowance
must, of course, be made for the fact that the writers of
the letters upon which these statements are based were
persons in debt and were pleading their cause strongly.
On the other hand, the legal profession would naturally be
inclined to oppose a retrospective interpretation of the
homestead exemption — especially the older lawyers like
Chief Justice Pearson. Moreover, though the homestead law
of 1867, framed by the Conservatives, expressly stated that
it had no retrospective effect, it is clearly evident that
the Conservatives favored a prospective homestead exemption.
They had formed a comprehensive one in 1867, refused to
alter that provision of the constitution when a move for
77
a convention was under way in 1870-1871, and kept the ex-

77. Hamilton, op. cit., 564; Moore-Gatling Papers, Southern
Historical Collection. Thomas R. Jernigan (attorney at
Harnettsville) to John Gatling, September 6, 1871, "It
must be admitted that the convention was defeated by our
own party — some voting against it through fear of losing
their homesteads, & others not voting at all."
emptions unchanged when the Constitution of 1876 was framed. Moreover, a General Assembly, controlled by Conservatives, in 1873, instructed the North Carolina Representatives in Congress to use their influence to prevent the repeal of the bankrupt law of the United States, a law which embodied the North Carolina homestead exemption.


Finally, the stay law was declared unconstitutional and the retrospective feature of the homestead law was held to be constitutional by a court composed of men of diverse economic thought: the very conservative Chief Justice Pearson and the ultra-liberal Associate Justice Rodman, who, despite his unorthodox views, was one of the commissioners to adopt the code of New York State because of its commercial features. Between these two stood men of moderate, but democratic views -- men like Justices Reade and Dick -- who voted with the Chief Justice to defeat the radical stay law, but with Rodman to uphold the less extreme homestead law.

After the stay law was declared unconstitutional, a large number of cases, hitherto dormant under the stay laws, which involved contracts made during and under the existence of the Confederacy and the government of the seceded State of North Carolina, came up for decision. Their
appearance added further complications for the courts, inasmuch as it became necessary to establish rules upon the validity of such contracts and upon the manner of estimating their value. No simple matters were these to solve; they involved constitutional issues of the gravest import as well as the question of pecuniary value of such contracts at the time of their making. Nor was this all; for, having estimated the value of such contracts in Confederate money, the court must translate the sum arrived at into United States currency. In addition, minor questions arose that required settlement upon their merits.

The chief constitutional issue involved in these cases of "Confederate contracts" was: did the Civil War constitute a war or a rebellion? The State Supreme Court's opinions upon this delicate subject varied. At one time, it held that "the persons exercising the power of the State, and the persons exercising the power of the county, had disavowed their allegiance, and put themselves in open hostility to the rightful State government, and to the government of the United States. In other words, there was rebellion." Throughout the years 1870-

79. Leak v. Commissioners, 64 N. C., 135.

1873, the Supreme Court held to this conception of the
War, but, in 1874, Justice Rodman was permitted to deliver

80. E. g., Kingsbury v. Coosh, 66 N. C., 524; Werth v. Wilmington, 68 N. C., 24., to cite but two of several opinions bearing upon the same point.

an opinion which changed the effect of those previously handed down.

"1. The Confederate States were a belligerent power.

"2. The rights of belligerents are reciprocal and equal during war, and it is indifferent whether the war be between sovereign and independent nations, or between powers, one of which claims sovereignty over the other, as is the case in a civil war. If the conflict is recognized as war and the rebellious power as a belligerent, it is quaad hoc, and, as regards its belligerent rights on the same footing as an independent nation."81


In the light of the actual facts; the recognition of the belligerent rights of the Confederacy by England and France, the treatment of Confederate prisoners as prisoners of war, the issuance of the Emancipation Proclamation upon the basis of war powers pure and simple, and the length and extent of the War, Justice Rodman accurately described the reality of things; however, his opinion was not in accord with the decisions of the Federal Courts.

Taking the decisions of the Federal Courts as the guide (and, of course, their decisions, especially those of the Supreme Court, are final upon the meaning of the law of the land), it is settled that the United States
sustained the double character of a belligerent and a sovereign and exercised the rights of both. It upheld its claim to the allegiance of the people of the Southern states; while, for practical purposes in conducting the war, the Confederate States were accorded belligerent standing. As the Supreme Court ruled in

82. This matter is ably summarized in James Garfield Randall's excellent study entitled Constitutional Problems Under Lincoln, (N. Y., 1926), 65-67, 71-72.

1869, there was no Confederate Government de facto, in such sense as to give legal effect to its acts; but, for the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. This recognition, however, did not extend to the pretended Confederate Government, which was simply armed resistance to rightful authority. Chief Justice Chase, in his decisions ren-


dered upon circuit duty in the Southern states in 1867-1869, handed down similar opinions, the most noted one, as far as North Carolina was concerned, being Shortridge v. Macon, decided in June, 1867. Thus, whatever the

84. Printed in 61 N. C., 393-399. Chief Justice Chase held that such belligerent rights as were granted the South were concessions made "in the interests of humanity to mitigate vindictive passions inflamed by civil conflicts and to prevent the frightful evils of mutual reprisals and retaliations. They establish no rights except during the war." Had the rebellion been successful, it would have
been revolution; but it was not successful, and therefore was a violation of law. "Those who engage in rebellion must consider the consequences."


historical reality, the first decisions of the State Supreme Court upon this grave constitutional issue were the correct ones. As a matter of fact, all the vital problems concerning private contracts made during the existence and under the authority of the Confederacy were settled in accordance with the early decisions.

Resistance to the National authority, then, was rebellion. Following out this principle strictly, all contracts entered into under and during the existence of the "rebellious" government of the Confederacy or of the pretended State Government of North Carolina cooperating with the Confederate States were illegal and void. However, decisions of this nature would certainly have been most disastrous to the economic welfare of all. Therefore, it was held by the Federal Courts that business transactions involving the use of Confederate currency could not be regarded as void. Realizing that it would be "cruel and oppressive" to declare such transactions void, the Supreme Court chose to hold that this currency was imposed "by irresistible force upon the community"; conse-
quently, such engagements were legal and enforceable at law. It was likewise held that transactions involving

85. *Hansauer v. Woodruff*, 82 U. S., 237; Chief Justice Chase rendered a leading Circuit Court decision in which the opinion was the same as the above. (May, 1863).

Confederate notes were enforceable, and a party entitled to payment in Confederate dollars might recover, in lawful United States money, the actual value of a note.


These decisions, made in 1863 and 1872, were not handed down in North Carolina cases, but it is obvious that their effect was general in scope. In North Carolina, they could only have strengthened a Convention ordinance of October 18, 1865, which declared all laws compatible with State and Federal constitutions to be in full force, and which validated judicial proceedings and contracts made during the Civil War.


Not all contracts made during the Civil War could be held valid; those which gave aid to the Confederacy were declared illegal, against public policy, and void. It is most interesting to follow the course of the State Supreme
Court in its decisions upon this point. The Court refused to lay down any general rules upon the meaning of giving aid to the Confederacy. Instead, each case was decided upon its merits. However, certain types of contracts were so obviously illegal that they were quickly ruled invalid by the Court. Thus, bonds or notes given in consideration of loans of money for the purpose of hiring substitutes in the Confederate army were declared void and unenforceable. Even if a person borrowed money for such purpose, the lender being aware of the object, and then failed to use the money for the original intent, the contract was declared illegal and the lender could not recover. Money lent to counties to be used in equipping Confederate military companies likewise came in this class.

as did the sale of coaches and horses used in carrying the mail for the Confederate Government. Money lent to

the city of Wilmington to obstruct the river could not
be recovered even though the bond was later sold and
bought with no knowledge of the original illegality.

92. Worth v. Wilmington, 68 N. C., 34.

All these decisions were clearly correct; they were based
upon the opinion that the resistance of North Carolina to
the Federal Government during the Civil War was rebellion.
One decision, however, was peculiar and perhaps open to
question. In 1862, James P. Leak lent the County of
Richmond the sum of two thousand dollars to pay for salt
to be made at the State-works at Saltville, Virginia.
When, after the War, he endeavored to recover his money,
the Supreme Court denied his plea for a writ of mandamus.
After reciting that the county and State officials were
in rebellion against the United States, the Court
declared:

"It follows that the courts of the rightful
State government, which has regained its supremacy, can-
not treat the acts of persons so unlawfully exercising the
powers of the State and county authority as valid, unless
the Court is satisfied that the acts were innocent and
such as the lawful government would have done. So. . .
the onus of showing that the contract was for innocent
purpose, and not made in aid of the rebellion, is upon the
plaintiff. . .

That the act of providing salt for the use of
the people was calculated to counteract the blockade and
other measures of the United States to suppress the re-
bellion, and to enable the people of the insurgent States
to protract the struggle, is a matter too plain for dis-
cussion; any one who attempts to the contrary must confess to the soft impeachment of allowing his reasoning faculties to be obscured by prejudices and sympathy for 'the cause of the South', as it was called on the argument.

"Grant seizes a man in the act of carrying corn and salt into Vicksburg, who says: 'The women and children are in a state of actual starvation, and my motive was to do an act of charity and humanity, and mitigate the rigors of war'; the reply is obvious: 'The laws of war are paramount to the motives of charity and humanity. Starving the citizens was resorted to in order to compel the authorities to surrender, and you attempt to counteract my measures, and aid them to protract the siege.'"

93. Leak v. Commissioners, 54 N. C., 135-137.

The manufacture of salt was, of course, an important part of the activities of the Confederate States, but such a decision might be used to debar many an engagement undertaken to supply people with the necessities of life. This hardship, apparently, was recognized by the Court, for its decision was greatly softened later. For example, a defendant in a Burke County case had contracted to make iron for the use of the Confederate Government and had rented a tract of land to raise food for the laborers employed upon the project, giving his note for said lease. The Court held that the note was enforceable, and that it could not take into consideration such indirect aid to the Confederacy as was given by feeding laborers working upon such a project.
"It is well known that during the late war every cultivated field in the South was made to pay its tithe to the support of the Confederate Army. Were all leases of fields, therefore, illegal?"54


In such fashion did the State Supreme Court decide what types of contracts made during the War were illegal. It laid down no rules; the only means of ascertaining what contracts were illegal is the study of these various decisions. One may say, however, that, if the contracts or engagements were marked by clear intent to aid the cause of the Confederacy, they were certain to be declared of no effect. It is interesting to note, moreover, that only original contracts were held to be illegal. Thus, a man borrowed money from another to hire a substitute in the Confederate army and then borrowed from a third person to pay the original lender; this second contract, even though the lender might be aware of the object (e.g. being so advised by the borrower) was not tainted with illegality; it was a new and indirect transaction. Again,


a county contracted a debt to equip a company of soldiers for the Confederate army; it then borrowed money to pay that debt. It was held by the Court that a recovery could
be had on the bond for such money. In cases of this


type, the illegality was held to be too remote.

In 1871, contrary to its normal procedure of
ruling all contracts in aid of the Confederacy void, the
North Carolina Supreme Court decided that Confederate bonds
were a valid medium for discharge of a debt, declaring
that it could detect no difference between Confederate
97
bonds and Confederate currency. This opinion was cited

between the treasury-notes and the bonds was that the latter
bore interest and the former did not. Both were payable on
the condition of the ratification of the treaty of peace
between the United States and the Confederate States; both
were issued by the Confederate government for the purpose of
aiding it to carry on the war; and they must stand on the
same footing as the same subjects of traffic."

and approved by Judge Brooks in Federal District Court.


However, these decisions were clearly invalidated by the
United States Supreme Court in rulings handed down in 1872
and 1873. This Court was of the opinion that investment
in Confederate bonds was a direct contribution to the re-
resources of the Confederate Government and therefore illegal.

It also decided that bonds issued by the secession convention of Arkansas did not constitute a valid consideration for a promissory note, although they were used as a circulating medium in common business transactions. Rather, the issuance of such bonds constituted an act of hostility against the United States. War bonds did not stand upon the same footing as currency, which was forced upon people. "The difference between the two cases is the difference between submitting to a force which could not be controlled, and voluntarily aiding to create that force."


In regard to valid and binding contracts, the ordinance of the Convention of 1865 which validated contracts made during the War provided that the next General Assembly of the State should establish a scale for the depreciation of Confederate currency to enable the courts to secure accurate estimates of the value of contracts entered into during the War. Such a scale would, for example, enable a jury to translate the value of a contract, the consideration of which was Confederate currency, into its proper value in gold, which, in turn would be used as the basis for giving the value of the contract in post-war currency. This the General Assembly reluctantly did in March, 1866; for it declared that, in its opinion, no
101. Laws of North Carolina, 1865, ch. 38: 98. The scale, using the gold dollar as the unit of value, ran as follows:

<table>
<thead>
<tr>
<th>Month</th>
<th>1861</th>
<th>1862</th>
<th>1863</th>
<th>1864</th>
<th>1865</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan.</td>
<td>----</td>
<td>1.20</td>
<td>3.00</td>
<td>21.00</td>
<td>50.00</td>
</tr>
<tr>
<td>Feb.</td>
<td>----</td>
<td>1.30</td>
<td>3.00</td>
<td>21.00</td>
<td>50.00</td>
</tr>
<tr>
<td>March</td>
<td>----</td>
<td>1.50</td>
<td>4.00</td>
<td>23.00</td>
<td>60.00</td>
</tr>
<tr>
<td>April</td>
<td>----</td>
<td>1.50</td>
<td>5.00</td>
<td>20.00</td>
<td>100.00</td>
</tr>
<tr>
<td>May</td>
<td>----</td>
<td>1.50</td>
<td>5.50</td>
<td>19.00</td>
<td>----</td>
</tr>
<tr>
<td>June</td>
<td>----</td>
<td>1.50</td>
<td>6.50</td>
<td>18.00</td>
<td>----</td>
</tr>
<tr>
<td>July</td>
<td>----</td>
<td>1.50</td>
<td>8.00</td>
<td>21.00</td>
<td>----</td>
</tr>
<tr>
<td>Aug.</td>
<td>----</td>
<td>1.50</td>
<td>14.00</td>
<td>23.00</td>
<td>----</td>
</tr>
<tr>
<td>Sept.</td>
<td>----</td>
<td>2.00</td>
<td>14.00</td>
<td>25.00</td>
<td>----</td>
</tr>
<tr>
<td>Oct.</td>
<td>----</td>
<td>2.00</td>
<td>14.00</td>
<td>26.00</td>
<td>----</td>
</tr>
<tr>
<td>Nov.</td>
<td>1.10</td>
<td>2.50</td>
<td>15.00</td>
<td>30.00</td>
<td>----</td>
</tr>
<tr>
<td>Dec.</td>
<td>1.15</td>
<td>2.30</td>
<td>23.00</td>
<td>35.00</td>
<td>----</td>
</tr>
</tbody>
</table>

" (1-10)  35.00
" (10-20) 42.00
" (20-30) 49.00

The scale could be adopted which would do justice to all sections of the State. Therefore

"... Be it enacted... That in all civil actions which may arise, in courts of justice, for debts contracted during the war, in which the nature of the obligation is not set forth, nor the value of the property, for which such debts were created, is stated, it shall be admissible for either party to show on trial, by affidavit or otherwise, what was the consideration of the contract, and the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly." 102

102. Ibid., ch. 38, sec. 1: 96. Sec. 2 of this act laid down the same general rule for justices of the peace.

These acts became the basic laws for the estimation of the value of contracts made during the Civil War.
The State Supreme Court, in interpreting these acts observed, first, that the fact that the consideration of an agreement was Confederate treasury notes did not invalidate it, and, second, that these laws ratified such contracts and, in so doing, enforced the obligation of contract. Therefore, there was no conflict between the State laws and the Constitution of the United States.


In 1869, two years after rendering this decision, it laid down the following fundamental rules of procedure in estimating the value of these contracts:

"1. Money contracts are presumed to be solvable in Confederate money, and the value thereof must be estimated by the jury in coin, according to the legislative scale, and then the depreciation of United States Treasury notes must be added to such nominal amount of coin. The legislative scale only applies to contracts where Confederate money was the consideration.

"2. In all other kinds of contracts the value of the property or other consideration may be shown in evidence, and the jury must estimate such value in United States Treasury notes." 104


This was a faithful interpretation of the laws. These fundamental rules were consolidated by application in many individual cases. True to the meaning of the acts, the Court held in these cases that, if a purchaser of an article
gave a bond or note payable in Confederate currency, notwithstanding that the bond or note expressly stated it was to be payable in currency, the jury was to estimate the value of the article. The laws of 1866, as has been seen, required juries to estimate the value of these articles (or, in the words of the law, "the consideration of the contract") in "present currency". The Court laid down the following rules as a guide to the procedure in making such estimates: the jury, in valuing the article in question, be it horse, wood, land, or a slave, was to find the value of the article in gold at the time of the purchase and add the depreciation in United States Treasury notes at the time of the verdict, thus giving a verdict in currency. The United States Supreme Court,

however, overruled the entire train of reasoning, holding that the law of 1866, in so far as it authorized the jury to estimate the value of the contract according to the value of the article, without reference to the value of the currency stipulated, was unconstitutional, because it impaired the obligation of contract. In so doing, the highest court in the land had made the most unusual decision.


that, if a contract made under and during the existence of the Confederate Government stipulated that it was payable in Confederate currency, it was unconstitutional for a state law, passed after the "rebellion" had ceased, to instruct juries to overlook that Confederate currency in favor of the gold value of the article or consideration upon which the contract was based! The North


Carolina Court had no recourse but to adjust its future policy in conformity with this unexpected opinion.


In the administration of the laws respecting "Confederate contracts," a most interesting question arose, which was to have a definite bearing upon another economic problem of the time. Suppose an officer (sheriff, constable, or clerk and master in equity) with authority to collect a debt had no definite instruction whether to collect in Confederate currency or specie? What was he to do? When faced with this question the first time, the Supreme Court decided that the officer would be justified in taking currency used at the time in payment of debts.

The following year (1867) it laid down the general rule for such cases. No precise, hard and fast rule to cover all cases could be made, but it was held, in general, that if an officer had no definite instruction he might have received Confederate currency prior to 1863 but not after, while the year 1863 was debatable ground. Of course, if

110. Emerson v. Mallett, 62 N. C., 335.

the officer had definite instructions, they were mandatory.

111. McKay v. Smithman, 64 N. C., 47-50.

Another economic problem of great interest concerned the liability of administrators of estates, guardians, and other fiduciaries who received depreciated Confederate currency in the management of estates during the war. The General Assembly enacted a law on March 3, 1867, whereby such persons were not to be held liable for having received Confederate or State currency in payment of debt or demand, or for having invested the funds of their charges in State or Confederate bonds; they were presumed to have acted in good faith. Questions of diligence or negligence were to be submitted to the jury as a question of fact. This law was annulled by military orders. So

112. Quoted in House Executive Documents, no. 342, 40 Cong. 2 Sess., XI, 92-93.
the entire problem was left for future solution.

The fundamental rule for cases of this type was laid down in *Cummings v. Mebane* in January term of the Supreme Court, 1869.

"It will not do to look back now and see how estates might have been better managed, and exact of those who had them in charge that degree of diligence which would have proved most beneficial in each particular case. The degree of diligence to which we think they should be held liable is that which a prudent man at that time would have used in the management of his own affairs." 113.


The following year, the Court took occasion to sustain this position by an analysis which is worthy of a lengthy citation:

"In the administration of justice this Court feels constrained to take judicial notice of the anomalous condition of things which existed during the late war and the transition period which preceded the adoption of our present State government.

"In 1861 the rightful government of this State was subverted by a government of paramount force. In the constant changes of revolution the well-established laws of trade, commerce and finance were so much deranged that prudence, experience and wisdom furnished no certain guide in business transactions, and afforded no safeguards against unfortunate investments. An intolerant public opinion, and the fear of military authority, often controlled the action of the most cautious and prudent men. Stay-laws prevented the enforcement of contracts in the courts, and a wild spirit of speculation and the rapid depreciation of the currency unsettled the value of property. No one could tell what a day or an hour might bring forth.

"For some time after the termination of hostilities there was no regular system of courts with certain and well-defined jurisdictions. The failure of the banks, the re-liquidation of State securities, and the emancipation of the
slave property of the country produced wide-spread individual insolvency. The various policies of reconstruction which were proposed for the settlement of existing disorders were undergoing constant change, and the civil functions of the State were subordinated to military power. It would be unjust and even oppressive to apply to the business transactions of such a period the same strict accountability for prudence and diligence which are proper in times of peace and prosperity and well-established civil government. 114

114. White v. Robinson, 64 N. C., 698-700.

In the succeeding year, it applied the rule formulated in connection with "Confederate contracts," to wit, that a person in a fiduciary capacity might receive Confederate currency before 1863 but not after and that the year 1863 itself was debatable ground. In cases in which the

115. Supra, 348-349.

guardians and administrators received Confederate money on good notes in late 1863 (even April in one case) and the spring of 1864, they were held negligent. On the other


hand, guardians who failed to collect upon notes whose obligors were solvent during the War were held to have acted prudently and could not be held responsible because the sureties became insolvent after the War. On the
whole, the administration of justice as regards guardians and kindred persons was well thought out and fair.

These decisions upon contracts made during and under the Confederate Government and upon the management of estates by persons in a fiduciary capacity during the Civil War were most important and bore upon vital economic problems. Although the War was over long before they were rendered, they were far from academic; for the existence of stay laws, promulgated by both civil and military authority, prevented most cases of this nature from coming before the courts until 1869, when the stay laws were ruled unconstitutional. That same year saw the State Supreme Court lay down the fundamental rules, but most of the important applications of the rules came in 1870. Thereafter, many cases upon these subjects came up annually. From a study of the numerous decisions, it may be concluded that, although the secession of the Southern states and the subsequent formation of the Confederate States of America were held to be a "rebellion" against the rightful authority of the United States, all private contracts not in direct aid of the Confederacy (or in which Confederate bonds constituted the consideration) were ruled valid and
binding. In estimating the value of these contracts, juries were to apply the legislative scale of depreciation of Confederate currency made in 1866 wherever the contracts stipulated payment in currency, but were to estimate the value in gold in all other cases, and, eventually, were required to translate the gold value arrived at into United States currency prevailing in the post-war period. Finally, all administrators and others in a fiduciary capacity might receive Confederate money in payment of debt and demands in the administration of estates and property of their wards and testators up to 1863, but not afterwards, as a "prudent" man would have done in the management of his own affairs.

In addition to the troubled economic conditions of the times, the State of North Carolina faced tremendous social problems arising from emancipation. It has been noted that the State courts had no jurisdiction over cases involving Negroes throughout the period of the provisional government of W. W. Holden in 1865, by virtue of the fact that State laws at that time did not admit the testimony of Negroes in cases wherein white persons were concerned; cases involving the interests of Negroes were handled by the Freedmen's Bureau and by military commissions. However, the civil courts were permitted, in January, 1866, to have jurisdiction of cases wherein Negroes
were accused of crime, inasmuch as their testimony was
admissible by State law in such instances. Finally,
after considerable negotiation between the civil and
military authorities and only after the passage of State
legislation removing all discriminations between whites
and blacks in matters of testimony and punishment for
crime, the State courts were permitted to take jurisdic-
tion in all cases involving Negroes, except claims for
wages due under contracts approved or witnessed by

118 offices of the Freedmen's Bureau.

118. These matters are discussed in detail in supra,

There is considerable scattered evidence to show
that, during the period of military control and after
the extension of jurisdiction to State courts of nearly
all cases involving Negroes, the latter received fair
treatment at the hands of the civil courts. General
Robinson, the military commander who granted the extension,
stated that he had little cause to regret his action. He
felt it his duty to interfere in certain apprenticeship
cases to protect Negro children from being bound out un-
justly — or, as he put it, to keep the State courts in
certain counties from succeeding in their attempt "to re-
establish slavery under the mild name of apprenticeship"—
but, on the whole, he was satisfied with the arrangement.

119. Supra, 93-95.

Moreover, the civil and the military authorities co-operated upon this point by referring cases of difficulty to joint commissions selected for each case, and the State Supreme Court, in its opinions upon apprenticeship cases, definitely dealt more than fairly with the Negro.

120. Supra, 94-97.

Both Government and State records reveal the effort of the courts to accord similar treatment to white and black and to give justice to the Negro as plaintiff or as defendant. General F. D. Sewall, who was sent by General C. O. Howard to inspect the work of the Freedmen's Bureau in North Carolina, reported on May 14, 1866, that there were but few acts of cruelty or violence and that the civil courts manifested willingness to do the Negro justice. An almost identical statement was made by Colonel Whittlesey to General Howard. Scattered reports from

121. House Executive Documents, no. 120, 39 Cong. 1 Sess., 30, 35. Both reports were made the same day. Both men were sympathetic toward the work of the bureau.

several counties indicated that the blacks and whites were actually receiving the same punishment for the same types
122. On August 17, 1867, a form letter was issued from the board convened by General Sickles to study the problem of erecting a penitentiary to the clerks of the superior courts, requesting information upon the number of felonies for the past two years and the punishment inflicted. The returns are to be found scattered through G. P. W., North for the latter months of 1867. Some of these returns indicated the punishments given to Negroes and to whites, respectively. These show that the punishments were similar. E. g. The larceny cases, by far the most numerous, are given with this classification for several counties. In Montgomery County, thirteen colored men and one white man were convicted. Ten of the colored men were released upon payment of costs; three were whipped. The white man was whipped — thirty lashes. In Forsyth County, six colored men were punished in the spring of 1866 for larceny with from fifteen to thirty lashes. Of seven white men convicted for the same offense, two escaped and fled, one was released upon payment of costs, the rest received ten to thirty lashes. In Cabarrus County, whites and colored received the same punishment. In Columbus County, three Negroes out of eleven convicted were punished, while twenty white men all received punishment. In one county, which cannot be identified, seven freedmen received fifteen to thirty lashes, while one white received fifteen lashes and another twenty lashes. Other reports simply lumped all cases without differentiating, but it is evident that the common punishment for larceny was whipping, and one is left with the impression that the lash was meted out to all comers, black and white alike.

123. G. P., North. Petition from Sampson County, December 8, 1866.
legislation of March 10, 1866, the testimony of a
Negress could be received against a white man alleged
to be the father of her bastard child. The Court
declared:

"It is not intended by nature, nor is it
tolerated by the law, that men should cast their off-
springs upon the world, with all the disadvantages of
caste and color, and leave them to perish, or else be
supported by the public." 124


The same court also held that, when two Negroes were ar-
rested for stealing and one confessed after seeing the
other whipped and threatened, conviction upon such
testimony was invalid. In another case, a party of men

125. State v. Lawson, Ibid., 49. "Everything that the
prisoner said and did, after he had witnessed the torture
inflicted upon George, was "with fear of the lash before
his eyes!" The party had assembled with a determination
to find out the truth by means of the lash, forgetful
of the rule — 'The end does not justify the means.'"

had tortured a Negro until he confessed stealing; the
leader was sentenced by Superior Judge Barnes to sixty
days in jail and a fine of fifty dollars, the rest of
the party receiving thirty days and a twenty-five dollar
fine each. Judge Barnes was glad that Governor Worth re-
fused to interfere. He added:
"In the present disordered state of society here it is absolutely necessary to make striking examples and it is especially due to the character of our State that we shall show to the world that we can and will do ample and full justice to every race and color in the administration of the criminal law.

"The case was I understand immediately reported to the authorities at Washington. . . Had I failed to have adequately punished these parties. . . that fact would have heralded forth and would have furnished another pretext to those who desire the restoration of military rule. But independent of these circumstances, my sense of justice and right compelled me to pronounce the judgment I did, and mature and calm reflection strengthens the position."

Judge Barnes stated he had endeavored to impress upon the people the absolute need of a rigid and impartial administration of the law, as the only means of retaining it in our own hands and preventing the restoration of military courts."

126. G. P.'s Worth, David A. Barnes to Worth, November 10, 1866.

The emphasis laid by the judge upon the necessity of impartial justice to prevent the restoration of military courts may explain more of the fundamental reason for fair treatment to Negroes than Conservative whites of the time would admit. It must be remembered also that the Civil Rights Act of 1866 and the presence of military and Freedmen's Bureau authorities ensured Federal control if the State authorities failed to produce justice. But it is difficult to weigh such factors — just as difficult as it is to weigh objectively the amount of real desire to give
the Negro justice per se. The fact remains that there is much evidence of fairness to the black man in the courts.

For the most part, Governor Worth showed impartiality and fairness in his use of the pardoning power. In 1867-1868, several cases were tried in which whites were sentenced for offenses committed against Negroes and in which appeals were carried to Governor Worth, only to be refused. In two of them the convictions were represented to him as being "negro triumphs." On the other hand, 127

127. E. A. In 1863 or 1864, Blount King, while acting as chief of police for Goldsboro, made a severe assault upon a free woman of color. Tried in 1867, he was convicted and sentenced to three months in jail. Worth refused to pardon, following his usual practice of taking the advice of the judge, in this case, W. M. Shipp. Ibid. William R. Lane to Worth, October 9, 1867; Worth to W. M. Shipp and to Messrs. Dortch et al, October 10, 1867; Shipp to Worth, October 13, 1867; Governor's Letter Book, LVIII, 159-160.

James Martin, sentenced to three months in prison and a fifty dollar fine for an assault and battery in the spring of 1867 in Anson County, was refused any executive clemency. G. P., Worth, Petition of May 9, 1868. Endorsed "declined."

David Glisson and Needham Cobb were convicted in Sampson County Court in the spring of 1866 of stealing a Negro's horse. From a sentence of thirty-nine lashes, one month in prison, and thirty-nine more lashes, the judgment was changed to twelve months in prison, probably because of the military order forbidding whipping. Glisson was pardoned August 1, 1867, on grounds of youth. Ibid., petitions of May 25 and July 27, 1867; Judge Buxton's letter of July 29 recommending clemency.

Several Negroes received pardons, mostly for sound reasons,
but in one or two instances apparently for the economic benefit of their families. In one case, which aroused considerable comment, partly because of the obnoxious conduct of a Freedmen's Bureau agent, Governor Worth and General Sickles cooperated to secure clemency. The Negro had been convicted of burglary, the penalty for which was death; the law forbade commutation of any sentence by the governor; he could give full pardon or nothing. It appeared that the boy was guilty and had been involved in several offenses; yet the people of the county were willing to have him pardoned if he would leave. Since the governor could not commute the sentence, it was agreed that General Sickles would do so; young Davis received ten years in prison as a result. Less than a month later, he escaped from his military guard. In several cases former

128. Ibid. The correspondence contains many items. Homestead to Worth, December 14, 1866; January 9-10, 1867; J. A. Gilmer to Worth, January 15, 1867; D. F. Caldwell to Worth and J. R. McLean to Worth, both May 30, 1867. Both
concurred in saying that there never was a fairer trial. McLean was Davis's attorney. General Avery of the Freedmen's Bureau charged that the confession was extorted; these men denied the charge. The special order commuting the sentence, dated April 1, 1867, is in Senate Executive Documents, no. 14, 40 Cong. 1 Sess., 76-77 (S. O. no. 8).

owners of Negroes interceded for them, and in one such case a Negro had his sentence lessened by the judge.

It paid to be a "family Negro," though the governor

130. G. P., Worth, J. W. Albertson to Worth, January 9, 1867. The name of the former owner of Robert Davis, in the case of burglary discussed above, headed one of the pardon petitions. The best example of this intercession is in the case of Willis Weatherly, condemned to die for homicide. S. Weatherly, wrote Worth December 31, 1867. "Next Friday is the day that my poor unfortunate negro boy is to be hanged -- I am satisfied that he was led into the crime of which he was convicted by older and worse men...if you can do anything for him consistently with your view of the case, I will take it as a great favour, as his mother is in my family & a faithful servant and all the family feel an interest in poor unfortunate Willis had he been left in my family he would never have engaged in so great a crime."

did not always heed such pleas.

There is, on the other hand, evidence of unfairness to Negroes, especially before January and February, 1866. Most of this evidence was given before the Joint Committee of Reconstruction, by officers of the Freed-

131. This testimony and the report of the Joint Committee are given in House Reports no. 30, 39 Cong. 1 Sess., Pt. II. It will be referred to as Joint Committee on Reconstruction. The testimony was taken in January - February, 1866.
men's Bureau to show the necessity of continuing the bureau and military control in North Carolina. Their testimony concurred in asserting that the Negroes would be in great peril if military forces were not kept in the State and that the people of the State, especially the poorer class of whites, entertained bitter feelings toward the freedmen. They believed that, if the bureau

132. Ibid. J. A. Campbell testified: "It is a vindictive feeling, a determination to wreak upon them vengeance for what they think they have suffered themselves." 213. Campbell, as Assistant Adjutant General, was in position to hear of reports from all over the State. He said there were official reports of at least two hundred cases of maltreatment of Negroes, singling out for reference the cases of Temperance Neely, Mrs. Elizabeth Ball, and one or two others. He unfortunately cited the most controversial cases.

Lieutenant O. C. Sanderson stated: "The Confederate soldiers, in fact all of the poorer classes that were not Union all through the war, seem to feel bitter towards the free class on account of their being raised to an equality with them. They say they will drive them out of the country." 176. Sanderson was Superintendent of the contraband colony at Roanoke Island for nearly two years and was acquainted chiefly with Newbern, Roanoke Island, Wilmington, and Raleigh. He claimed a wide acquaintance with the people and felt that about one-half of the poorer class in this section felt as he had testified. 175-176.

Colonel Whittlesey testified that the better class of whites would not countenance outrages, but: "There are enough of the bitter and worthless people, who positively hate the negroes, to do them great wrong, and the better classes would not interfere. I am satisfied, to see these persons punished and justice done to the freedmen." 184.

and the military were withdrawn, slavery would be re-es-
133
stablished under the name of vagrancy laws. One felt sure

that if the Federal troops were recalled Negroes would not 

to testify in courts and would not receive 

justice at the hands of juries. Nearly all of them were 


able to cite instances of cruelty to Negroes, sometimes 

by individuals, occasionally by police companies. Such 

135. E. g. Assaults and shootings in Elizabeth City and 
in Wayne County, cited by correspondents of the New York 
Tribune. Given in Whittlesey's testimony, 195-199; 
Dexter H. Clapp, a native of New York, a lieutenant 
colonel of the 38th U. S. Colored troops and in charge of 
twenty counties for the Freedman's Bureau after July, 
1865, testified to whipping, mistreatment by the mili-
tary police of Sampson and Duplin Counties, and an 
instance wherein a freedman was sentenced to thirty-nine 
lashes and several hours of being tied by the thumbs for 
defending himself against a white assailter. 210-211; 

testimony provided excellent material for the Radical 
program being forged by Thaddeus Stevens et al. Though 

The relation of this investigation to the Radical Con-
gressional program is well described in Hamilton, op. cit., 
207-209. 

its value must be discountenanced in the light of its 
political implications, yet it cannot be disregarded. The 
conditions described by these officers, however, belong
to the period before much jurisdiction over Negroes had been allowed the civil authorities; their testimony has no bearing after February-July, 1866.

After General Robinson extended jurisdiction over most cases to the civil courts, the evidence points much more toward fairness than toward injustice to Negroes. In a few instances, pardons were issued for persons who had committed offenses against Negroes.

137. E. g. John Caudle, of Lenoir County, who killed a Negro while trying to keep him from stealing and who was sentenced to twelve months imprisonment by Judge Shipp. He was pardoned early in 1868 after only a few months imprisonment, probably because his health was poor. Judge Shipp considered the punishment a light one. C. P. Worth, W. T. Faircloth to Worth, J. M. Parrott to North, T. S. Ashe to Worth, February 7, 8, 13, 1868, respectively; Joseph Hardy, sentenced to six months for robbing a Negro, was pardoned almost immediately upon grounds of dependent family, a practice which Governor Worth generally refused to follow. The pardon petition was forwarded June 1, 1868.

General Robinson stated in November, 1866, that in some sections of the State many complaints had been made of injustice to Union men and freedmen mostly by inferior courts. In his opinion Negroes were more likely to secure justice in superior rather than inferior courts.

138. Senate Executive Documents, no. 6, 39 Cong. 2 Sess., 102.

But, on the whole, the evidence points to fair treatment.
On February 17, 1867, President Johnson could report no violation of the Civil Rights Act in North Carolina.

And even a most severe critic of the North Carolina "black code" has stated that the State courts dealt justly with the Negro.

140. Browning, "The North Carolina Black Code," loc. cit., 470. "It seems clear that the courts supported by the public did have a humanizing effect and in many cases, violators of the strict letter of the law were often unpunished; nevertheless, with the exception of a few outstanding negroes and mulattoes the general policy was in accord with the doctrine that the negro has few rights which the white man is bound to respect." (Browning was concerned with the laws of March, 1866, Supra, 77-83).

Whether or not the courts administered the laws fairly in cases involving negroes after 1868, especially 1869-1870, is a matter of great dispute. On the one hand, there was the accusation that the courts under the Republican regime let negroes off lightly and that, if negroes happened to receive just punishment from the courts, they were sure to be pardoned by Governor Holden, especially if they belonged to the Union League. On the other hand, there was the counter-argument that offenses against the negroes were perpetrated freely by the Ku Klux Klan for purely political motives and that it was impossible to convict offenders because fellow-members of the Klan sat upon petit and grand juries. This subject has
been discussed in detail. Inasmuch as these charges

141. *Supra.* 204 et seq.

were too often general in nature, based upon rumor and pre-conceived ideas, rather than upon actual knowledge, the truth or falsity of them is virtually impossible to determine. There were elements of truth and falsity in both; a more definitive statement cannot be made.

One of the most important developments of the Reconstruction period in North Carolina was the extension of jury duty to Negroes as well as whites. As has been noted, this came originally as a result of action by the military authorities in 1867, through which the privilege of voting became the basic qualification for jury duty, though the military orders permitted the jury lists to be purged of those who were morally and intellectually unqualified. This step was resented bitterly by Conservative whites. Under these orders, supplemented by a decision of Superior Judge Fowle that colored freeholders were eligible for jury duty according to the laws of the State, Negroes first became eligible for jury duty.


When the "Reconstructed" civil government came into existence, the General Assembly limited the qualifications for jury service to tax-payers possessed "of good
moral character and of sufficient intelligence." According to this legislation, the county commissioners were instructed to draw up lists of persons so qualified, from which juries would be drawn. No mention was made of


possible discriminations, and under this law Negroes continued to be chosen for jury service. On the other

144. Senate Report: George Laws (clerk of Orange Superior Court) said that juries were mixed in his county, 195; D. R. Goodloe testified that juries were mixed in Warren County, 234; A similar assertion was made by Judge C. R. Thomas for Lenoir, Craven, Greene, Jones, and Wayne Counties. 97-98; Also, Judge Russell said that Negroes were summoned, 195; William H. Battle said that Negroes sat on juries in Wake, Alamance, and other counties. 170.

hand, in some counties they failed to be called upon for service, and it is evident that many were disqualified upon grounds of incompetency. Complaints were made to

145. Ibid., D. R. Goodloe, 234; Judge Thomas testified that no Negro jurors were summoned in Carteret and Onslow Counties. 97-98; Judge Russell stated: "As a general rule, of course, negroes are not competent to sit on juries, and their names are not put on the list -- ought not to be in many instances --" 185.

Governor Holden, protesting that Negroes were shut out of jury service. It is interesting to note that this

146. G. P., Holden, Felix Grimes (Pres. of Asheville Union League) to Holden, June 24, 1869. "We wish to know if the laws are not the same here as every where else?"
Court will begin here next week, and there are a good many of our color on trial & we would like to know if we can't have colored men on the juries here as well as else where.'

government, which has been accused of "Africanizing" the State, placed the restrictions of moral and intellectual fitness upon the qualifications for jury service — restrictions that could easily be susceptible to wide interpretation. It is even more interesting to observe the fate of a bill introduced in the Senate in December, 1869, by Henry Eppes, a colored Senator. His proposition to require juries to contain at least six colored persons in cases wherein either of the parties were colored unless the colored parties waived their rights, was first modified and then rejected. A proposition of a

147. Legislative Papers, 1869-1870. Box 841.

148. Ibid., 1872-1873, Box 914.

149. Ibid., 1874-1875, Box 945.
In its decisions in cases involving the interests of Negroes, the State Supreme Court was quite liberal and favorable to those interests. This was true during periods of Conservative rule as well as during the period of Republican control. Mention has been made of its attitude in the apprenticeship cases arising in 1867. It has also been seen that the testimony of a

150. Supra, 94-97.

Negress against a white man, the alleged father of her bastard child, was receivable, and that a confession of crime extorted by whipping could not be received in evidence against a Negro. Moreover, although a State law

151. Supra, 357.

of 1860 forbade emancipation of slaves unless they were sent out of the State, the Supreme Court held that a master's last will and testament, dated 1867, in which he bequeathed freedom and property to a slave, was effective upon the master's death in 1864. The slave, emancipated as a result of the War, was entitled to the property.


In a similar case, a master had bequeathed freedom to his slaves, together with a sum of money sufficient to remove
them to Liberia or some other foreign country and to establish them there. The Supreme Court held that, although the slaves were emancipated without removal, they were entitled to the money set aside for that purpose: the slaves were the object of the testator's bounty, not his heirs. These decisions were all rendered before the establishment of the first civil government after the Reconstruction Acts.

It is interesting to note that the Supreme Court of the State ruled that the laws of the State relating to slavery continued to be applicable before the courts in civil or criminal cases arising out of actions occurring as late as 1865. For example, if slaves were hired out for the year 1865, the person to whom they were hired was liable for the full term, even though the slaves were emancipated by military action before it ended.

Again, a Negro was indicted for the murder of "one John Wilson, a person of color," in March, 1865. The Court held that the indictment was framed incorrectly, since Wilson was a slave at the time; consequently, there must be
a new trial, and the indictment must describe the slain 155
individual as "John Wilson, slave." It was even held


that the Confiscation Act of July 17, 1862, recognized the existence of slavery and that Lincoln's Emancipation Proclamation of January 1, 1863, was simply a war measure of the executive branch of the Government of the United States; therefore, since slavery was not abolished as an institution before the Thirteenth Amendment to the Constitution and the North Carolina ordinance abolishing slavery, the buying and selling of slaves in 1864 was not against good morals or public policy; it was simply an ordinary 156
business transaction, enforceable at law.

156. Harrell v. Watson, 63 N. C., 459-460; the entire subject of slavery and the effect of the Emancipation Proclamation and the Confiscation Act is discussed in Randall, Constitutional Problems Under Lincoln, 357-363, 382-385.

Thus, by virtue of the acts of the military authorities, the decision of Judge Fowle, and the legislation of 1868, Negroes became eligible for jury duty, a duty which they performed throughout the Reconstruction period, although not many of them, perhaps, sat in the jury box. If few Negroes were selected for jury service, it could not necessarily be laid to the door of race
prejudice, although there was much feeling on the part of the whites against the Negro's taking so active a part in government: the Negro was not educated, and was not ready for such service. And if there was race prejudice, it was shared both by Republicans and Conservatives, as is indicated by the law of 1868, and by the complaints addressed to Governor Holden. In the courts, except for the much-debated period of 1868-1870, justice was administered to the Negro. As for 1868-1870, though favoritism was probably extended the Negro in some cases, the amount has been exaggerated, and the favoritism was doubtless balanced by the failure of juries to convict in Ku Klux Klan cases. Finally, it may be said — and of this there can be no doubt — that the status of the Negro before the courts was raised greatly in the course of events following emancipation: not only was his testimony acceptable along with that of whites, but punishment for crime was equalized and he could do jury duty.

It has been stated that the first years of Reconstruction in North Carolina witnessed a great increase in crime, blame for which has been placed upon military interference with civil courts and upon the political and social changes occasioned by emancipation and the political elevation of the Negro. Speaking of this sudden
increase, Governor Worth wrote in November, 1866:

"Our courts have been so occupied with the criminal side of the dockets, that little attention could be given to civil suits, and our jails are still crowded. Stealing, formerly regarded as the meanest of crimes, and of infrequent occurrence, in this State, from the manner in which the late war was conducted, and other causes, came to be regarded as a rather venial offence. The action of our courts has done much to check it. It is still frightfully common. Negroes compose much the larger class of these offenders... This evil must be remedied, if possible." 158

158. Legislative Papers, 1866-1867, Box 821. Worth to General Assembly, November 19, 1866.

His statements found response in the General Assembly.

Referring to this same subject, the Joint Select Committee of the General Assembly, in introducing a bill in December, 1866, for the establishment of a State penitentiary, commented:

"From a community in which there was a strict obedience to law, and as profound regard for order as has existed in any age or nation, our State has become infested with crime, the majesty of the law is disregarded, the rights of property are trampled under foot, and in many portions of the State, the honest husbandman striving under the primeval curse to gain a livelihood for wife and children does not know, when he lies down after the toils of the day, whether there will be food for either on the morn. There is a saturnalia of lawlessness, and what was once called petty theft, but which, from its frequency and universality, is sapping the very foundations of our prosperity. This is known to be the condition of things in the State, and if it is to continue, it will ruin our people.
"Our Court Houses are crowded with prisoners who go hence to eat the bread of idleness in the jails, or to the whipping post to return soon again to the Court House, to go through the same round. The administrators of the law thus present the spectacle of being engaged in the miserable past-time of 'dropping buckets into empty wells and growing old by drawing nothing up.' It is even worse, for in the mean time a horse has been stolen, a house has been broken open, some helpless female, whose natural protector, it may be, sleeps in a sheetless grave by the Rappahannock or the Chickahominy, and whose sole protection is the strong arm of the law, has lost her last piece of meat or her last bushel of corn." 159

159. Ibid., Box 818.

The committee felt that this state of things was responsible for discouragement and gloom in the State, a condition which was owing, not to war, nor to the unsettled relations with the Federal Government, but to a crime wave.

The criminal work of the courts from 1865 to 1867, except for cases brought before the State Supreme Court, may be summed up in one word — "larceny." On August 17, 1867, a form letter was issued from the governor's office to clerks of the superior courts requesting reports upon the number of felonies in the past two years, the type of punishment inflicted, the number of those convicted who were actually punished, and other information. The purpose of the letter was to secure data for the guidance of a board convened by General Sickles to study the problem of erecting a State penitentiary. Replies
were elicited from over two-thirds of the counties. Though these replies often failed to designate types of offenses and the punishments meted out for each and though, in several cases, they failed to answer even the simple questions put by the board, they do furnish sufficient data to make some general statements upon the criminal work of the county and superior courts. The courts convicted a large number of persons — perhaps eight hundred to one thousand a year. Of the cases, a good ninety per cent were for larceny, ranging from the pettiest kind to horse-stealing. There were a few cases of murder and manslaughter, with scattering cases of robbery, burglary, rape, arson, highway robbery, and assault with intent to rob. Approximately forty to forty-five per cent of the larceny cases were punished by whipping: 10 to 39 lashes; and another forty to forty-five per cent of persons convicted were released upon payment of costs. Of the remainder, most had their punishment remitted, some outright, others by taking an insolvent debtor’s oath. A fair number re-
ceived prison terms ranging from twenty days to six months. A few were sentenced to pay a small fine. Occasionally the use of pillory and stocks was noted, and the workhouse cared for a very few. As has been noted, whipping was forbidden by military order in 1867, and, consequently, this form of punishment was applied in 1886 only. As there was no penitentiary and as the county jails were often none too secure and always unheated in winter, it seems that persons convicted of

162. Supra, 216-217.

larceny, who ordinarily would have received a whipping, were often released upon paying costs or else were just not sentenced. In consequence, the number of cases

163. E. g. Bladen County reported many cases of judgment suspended upon payment of costs, giving as a reason "Genl Sickles order prohibiting whipping"; Union County reported a case of no judgment owing to this order; Sampson County report indicates that after the order forbidding whipping, payment of costs was the only judgment; the Gates County clerk confessed his belief that persons were often acquitted because there was no penitentiary.

wherein persons were released either outright or upon payment of costs was rather heavily increased in 1887. It is probable also that the infliction of brief prison terms and small fines increased at the same time. Of the more serious crimes, manslaughter was punished by a year's
imprisonment — sometimes by branding; murder, burglary, arson, and rape merited hanging.

It is most interesting to note that the committee which introduced the bill for the establishment of a penitentiary and whose report has been quoted fully, believed that whipping was an inefficient punishment for fully one-third of the criminals and that Negroes considered it only as a smart wound, not a stain upon their name or honor. Hence, it was best to provide other and more efficacious punishment. Since county jails would be too expensive and, furthermore, were notorious as schools of crime, the committee suggested the establishment of a penitentiary, where productive employment could be utilized and the expense of which would be borne by the State. However, no penitentiary was forthcoming until 1870, although the civil and military authorities had begun conferences upon the subject at the instance of General Sickles in 1867.

Most of the larceny was committed by Negroes, a fact which R. F. Moore attributed to the degradation occasioned by slavery. However, much of it seems to

164. Supra, 373-374.
165. Senate Report, 198.
have been due to the fact that white men encouraged
stealing by buying goods from Negroes. A long letter
from H. M. Watson, who claimed to have had much experi-
ence with Negroes since the War, to Governor Holden in
1868, describes this state of affairs:

"The temptations outside are too strong for the
freedman and so many find it so much easier to steal
than to work for a living in the present state of affairs
and so many low white men have shops at nearly every cross
road and buy promiscuously whatever the negro will steal
and bring them, pay him off at half its value perhaps a
little mean whiskey and seasons nor prices is no considera-
tion in comparison to this blight on ones crops and what
is worse it doubles each year with no prospects except to
become worse. .. my negroes now walk the fields at night
and do what they can to keep off the thieves but it un-
fits them for work the next day and they cannot properly
guard cornfields, tobacco barns, and cotton houses and I
have to tell them frankly that I will cease planting
unless they take care of the crops. .. I will not pay
for the neighborhood rogues in the country who gather our
crops at night .. "He cited several robberies, both in
North and South Carolina, and said he could give several
others.

"I am very sure they will never succeed at their
own discretion and management; I say further in my hum-
ble opinion unless some radical change takes place in re-
gard to the vagabond negroes and their abettors, no
respectable white man who can possibly avoid it will
continue to plant in this section of the country; and if
you ever heard of any country that can and does thrive
where the agriculture is decaying, and where those who
think does [sic] not govern those who toil; I confess
my ignorance."


His statements were confirmed by several other reports sent
to the governor upon the prevalence of crime among the
colored people, often aided and abetted by white men.
Throughout 1866 and 1867, crime continued unabated. Heading the list was larceny. At least two-thirds,

and probably even more, of offenses committed belonged in this category. Apparently, however, there was an increased number of graver crimes: manslaughter or felonious slaying, arson, burglary, rape, and murder. Yet it is doubtful whether the extent of crime differed from that under Governor Worth's administration; the increment lay, not in numbers, but in heinousness — a condition for which the violent politics of the age might well be blamed.

After 1869, the Governor's Papers contain no more reports upon crime from the counties. The penitentiary was built by 1870, and the committee no longer required such data from North Carolina's eighty-odd sheriffs and
and clerks. The absence of such reports, however, does not necessarily indicate any abatement in the prevalence of crime; on the contrary, by the number of requests for extra sessions of court scattered through the Governors' Papers, one is forced to believe that the abolition of the whipping post and the erection of a penitentiary had not cured lawlessness. A communication from Governor Vance to the General Assembly in January, 1877, gives a glimpse of conditions in the courts. The governor reported that the administration of justice was greatly impeded by crowded dockets, even after special terms of court had been granted: the criminal docket was taking up over half the time of the courts.

169. Public Documents, North Carolina, 1876-1877, no. 25, p. 11.

It is evident that the courts were faced with economic and social problems of far-reaching significance during the period of Reconstruction. Diverse solutions to meet the economic ills of the time were presented to them by legislators, military authorities, and constitution makers for interpretation and application. The hopes and fears of many individuals rested upon their decisions. The stay law, once the hope of many, was found wanting and was discarded as worse than useless; in its
stead, the homestead exemption was presented as the panacea for society — it, too, was overruled, at least in its retrospective features; but one remedy, the abolition of imprisonment for debt, went unchallenged. When the first of these solutions was ruled unconstitutional, the flood of actions upon debts contracted during the time of the Confederacy, which had been dammed up until 1868, broke upon the courts; this release of dormant cases necessitated decisions upon the validity of such contracts and rulings upon the means of ascertaining the value of those declared valid. Guardians and administrators, whose action in accepting Confederate money in the administration of the property for which they were responsible had been called in question, presented themselves before the courts for settlement of their difficulties. The fact of emancipation called forth the best of thought in deciding the status of the Negro in this post-war society. Nor was it a small matter to decide cases to which Negroes were parties, in an era filled with partisan political feeling and shot through with crime. The courts, in handling all these problems, performed a diverse and herculean task, which one can appreciate only by seeing the extent and scope of the decisions.
VI

FEDERAL AGENCIES IN THE
ADMINISTRATION OF
JUSTICE

The Reconstruction Era witnessed a great expansion in the powers of the Federal Government, much of which directly affected the administration of justice. The Radical Congressional program of reconstruction embodied such features as the extension of the Freedmen's Bureau, the Civil Rights Acts of 1868 and 1875 (although the latter was more a gesture than a really vital part of the program), the Reconstruction Acts of 1867, the Fourteenth and Fifteenth Amendments to the Constitution, and the notorious Enforcement Acts of 1870-1871. Through these acts and amendments, the powers and jurisdiction of the Federal Courts were extended remarkably; an important, though relatively short-lived agency in the administration of justice was established; and the military authorities were employed freely for the same purpose. Their activities in North Carolina greatly affected the courts and their work there. No study of this type would be complete without a description of these agencies and their activities.

In the years 1865 and 1866, the military courts and the Freedmen's Bureau were the outstanding Federal
instrumentalities in the administration of justice in North Carolina. Federal Courts may be dismissed as of little importance in those years, for, as has been seen, no set of District Court officials was confirmed until January, 1866, and Chief Justice Chase refused to hold Circuit Court until June, 1867. Attention, then, cen-


tered upon the military courts and the Freedmen's Bureau.

The extent of jurisdiction and the working of the military courts has been discussed in detail else-


where. However, for clarity at this point, it may be re-

stated that military courts entertained all criminal cases of whatever nature until August 11, 1865, at which date, by virtue of the Holden-Ruger arrangement, they surrendered to the provisional civil courts jurisdiction over cases of crime involving whites only. In January, 1866, General Ruger remitted jurisdiction in cases wherein Negroes were accused of crime to the civil courts under Governor Worth's administration, and, on June 13, 1866, the military authorities yielded all jurisdiction with the exception of cases involving contracts for wages which had been approved or witnessed by officers or agents of the
Freedmen's Bureau. However, the military retained supervision over the civil courts and could interfere in any action to secure justice to the parties involved or to bring alleged offenders to trial. On the whole, there was little interference with the State courts from June, 1866, until the First Reconstruction Act went into effect, with the exception of some difficulties over "persecution" of Union men, the matter of apprenticeships, and the whipping issue. In the first two difficulties, accommodations were made; in the last, the civil authorities won a clear victory. No military commissions for the trial of civilians accused of crime were held between May 1, 1866, and March 21, 1867, the date upon which General Sickles assumed command of the Second Military District, pursuant to the First Reconstruction Act. After that date, military commissions could and did handle cases of civilians accused of crime. Yet, not many cases were so handled; the ones that did come up were given wide publicity, particularly those in which there was maladministration of justice. On the whole, the military courts during the existence of the Second Military District (whose control over North Carolina terminated July 24, 1868) took cognizance only of cases involving Negroes and "persecution" of men of Union feeling. Such was the extent of their jurisdiction.
The establishment of the Freedmen's Bureau and its early activities in North Carolina have also been discussed in another connection. Its judicial work in


the State began soon after its establishment on July 1, 1865. Bureau officials were empowered in October, 1865, by orders of Assistant Commissioner Whittlesey, to punish light offenses against Negroes by fines not exceeding one hundred dollars or thirty days imprisonment. Cases of grave crime were to be investigated by bureau officials and the facts together with the list of the charges preferred and the names of citizens reported to the nearest district commander for trial by military commission. Also, since the bureau was part of the War Department, all agreements reached between the civil and military authorities affected its jurisdiction. Thus, the arrangements made in August, 1865; January, 1866; and June, 1866, were operative upon it.

Statistics of judicial cases handled by the bureau may be had in full to the end of March, 1866. From July to September, 1865, the bureau investigated twelve cases of grave character and handled "several thousand" minor cases, of which two hundred fifty-seven were reported in full. From September to December, 1865,
it reported thirty-seven cases of grave character for trial by military commission, and handled three thousand three hundred sixty-eight minor ones, of which three hundred twenty-five were reported in writing. At the end of March, 1866, it had reported five more cases for trial and at least thirty-nine minor cases, but no figures are given for the total number of such minor affairs handled.

4. Supra,64:5; House Executive Documents, no. 120, 39 Cong., 1 Sess., 10.

Beyond these figures, there is no definite guide to the extent of the judicial activities of the bureau in North Carolina. The extension of jurisdiction in almost all

5. General Howard reported in 1869 that 3,405 cases were decided in North Carolina in one quarter. Though he gave no date, the total corresponds exactly with the figures for the quarter ending December 31, 1865. House Executive Documents, no. 143, 41 Cong. 2 Sess., VI, 14.

cases to the civil courts in June, 1866, certainly cut down the judicial activity of the bureau greatly until the Reconstruction Acts were put in force in 1867. After 1867, its judicial functions were probably largely investigative, for criminal cases of grave nature were tried by military commission, while minor cases were probably tried before provost courts. Also, the civil courts continued to operate freely throughout 1867-1868,
as is attested by the large number of criminal punishments reported in the Governor's Papers for 1867. The greatest amount of judicial work accomplished by the bureau came from July, 1865, to June, 1866, after which its activities were circumscribed. However, it must have handled several thousand cases before its existence terminated in January, 1869.

Opponents of the Radical reconstruction program of Congress felt that it was unconstitutional to grant judicial powers to this instrumentality. Their opinions can be best seen in the debates in Congress upon the proposition to renew the life of the bureau, which was accomplished by the act of July 16, 1866. Among other things, section fourteen of this act provided that, in every state where the ordinary course of judicial proceedings had been interrupted by the "rebellion," until the same was fully restored to its constitutional relations with the United States and was duly represented in Congress,

"the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secure to and enjoyed by all citizens of such States or districts without respect to race or color, or previous condition of slavery. And... the President shall, through the Commissioner and officers
of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall pre-
scribe, extend military protection and have military juris-
diction over all cases and questions concerning the free enjoyment of such immunities and rights, and no
penalty or punishment for any violation of law shall be
imposed or permitted because of race or color, or previous
condition of slavery, other or greater than the penalty
or punishment to which white persons may be held liable by
law for the like offense."6


This provision released a flood of criticism centering in the question of its constitutionality and in the right of establishing military supervision over judicial pro-
ceedings. Senator Marshall, of Illinois, well voiced the opinion of opponents of the measure when he stated that it was "a fundamental principle of American law that the regulation of the local police of all the domestic affairs of a State belongs to the State itself, not to the


Federal Government." Senator Davis, of Kentucky, struck

February 2, 1866.

a different note in declaring that the Constitution assigned the judicial power to the courts established by the Con-
stitution and to such inferior courts as Congress might from time to time establish; therefore, it was unconstitu-
tional to clothe the bureau, which was not a part of the judicial branch but rather a department of the Government,
with judicial power. Senator Hendricks, of Indiana, ob-

8. Ibid., 347-348. January 22, 1866; Senators Davis and Guthrie of Kentucky were especially fearful that the judicial operations of the bureau might extend to Kentucky. Ibid., 334-336, January 20, 1866, and 383-400, January 24, 1866.

jected to the establishment of military despotism and was seconded in the objection by Senator Saulsbury, of Delaware. These declarations were representative of the

9. Ibid., 319. January 19, 1866. "In times of peace, in communities that are quiet, orderly and obedient to law, it is now proposed to establish a government not responsible to the people. . . . a government more cruel, more despotic, more dangerous to the liberties of the people than that against which our forefathers fought in the Revolution." Ibid., Part V, 3841, (Saulsbury).

thought of all who opposed the extension of the life of the bureau and this grant of military jurisdiction.

Those who voiced such opinions based their constitutional thinking upon the ground that the resistance of the Southern States to the Federal Government was a rebellion, an opinion which, as we have seen, coincided with the views of the Federal Courts. This view received its best expression in the words of Senator Dawson from Pennsylvania.

"I maintain that when the rebellion was suppressed the law resumed its authority. The law was suspended during the rebellion, because it could not be executed; but it was not repealed, destroyed, or abolished. . . . We must remember that this Government has not been revolu-
tionized by the southern rebellion. . . . .

* * * * * * * * * * * * * * * * *

"The people of the South have submitted to the authority and government of the United States. What is that Government? The Constitution and laws. But our radical friends say their submission was made to the will of the dominant party in this House and the Senate.

"Did secession destroy the Union? Certainly not, for secession was a nullity. Did the war which we carried on to enforce the laws destroy the obligation of the laws? A secessionist might say so, but in the eyes of a Union man there can be nothing more absurd or disloyal. Where, then, is the authority to govern without law? It will not be pretended that there is a divine right. We must come back, then, to the fundamental law, which is the true source of all power, and the true standard of duty for all the people who are under our jurisdiction." 10

10. Ibid., Part I, 542, January 31, 1866.

On the other hand, those who favored the bureau and its judicial activities justified the extension of such power by the Thirteenth Amendment to the Constitution and cited the tales of outrages upon Negroes and Union men in the South as proof that such judicial powers in military hands were necessary. To quote Representative Elliot, of Massachusetts:

"A race of men enslaved by force and kept in bondage for generations. . . . is declared free. . . . Now what legislation do you deem appropriate to enforce that act of freedom? Manifestly some is needed; for if the startling facts that come to us from the recent rebel States, of fiendish oppression and brutal outrage, were wholly undisclosed, we yet should know that masters who had rioted in the lusts of slavery would not let their bondmen go in peace; or if they did, we still should know that a race prostrate for generations beneath the heel of tyrannous power could not have their freedom made effectual without our legislative aid." 11
11. Ibid., Part III, 3773, May 23, 1866.

His colleague in the Senate, Henry Wilson, appealed to the same sentiment, and cited reports of outrages in North Carolina sent in by Colonel Whittlesey, the assistant commissioner, as partial proof of the need for the bureau.  


These statements were typical of those brought forth to justify the judicial work of the Freedmen's Bureau.

The character of this work of the bureau as a whole in North Carolina has been very much disputed. It has been held that, while it prevented injustice in some cases, it perpetrated injustice in more, and usually accepted Negro testimony as of more value than white.  


Much depended upon the character of individual officers and agents of the bureau. The accepted opinion concerning them, taking the bureau as a whole all over the South, has been that the superior officers were generally men of ability and character, but that the local officials did not measure up to such standards. Undoubtedly, in North
14. Peirce, Freedmen's Bureau, 154-157; A most severe indictment is made by John W. Burgess, Reconstruction and the Constitution, 1866-1876, (N. Y., 1902), 89. "While its superior officers were generally men of ability and character, a large number of the subalterns were canting hypocrites and outright thieves. They kept the negroes in a state of idleness, beggary and unrest, and made them a constant danger to the life and property of the whites; and their veritable tyranny over the white population did more to destroy Union sentiment among the whites and make them regard the United States Government in a hostile light than anything which had happened during the whole course of the rebellion. It was an institution which ought to have been dispensed with the instant that the necessity which called it into existence had passed away,"; Henry, Story of Reconstruction, 60-61.

Carolina, the officers and agents varied greatly in ability and tact. The course of the first assistant commissioner, Colonel Whittlesey, was marked by good sense and moderation. One of his successors, Colonel James V.


Bomford, won the hearty respect and admiration of Governor Worth, despite the latter's opposition to the policy of Congress. Several of the subordinate officials

16. Worth Correspondence, II, Worth to Bomford, May 1, 1868.

"I am pained to learn this morning that you have been displaced as Commandant of this Post. [Raleigh].

"During the entire period of your command here I have had much personal and official intercourse with you; and candor requires I should say that my unqualified repugnance to the legislation of Congress, which you were required to execute, did not predispose me to regard your
action with undue favor; but I deem it due to you, and to justice, to say to you on retiring, that I heartily concur in the judgment of every virtuous and intelligent man in this community, that your whole conduct, official and social, has been such as becomes a veteran officer of the United States Army — always strictly performing your duty — always urbane — always eschewing partizan politics so thoroughly that I do not know what are your party predilections, if you have any.

"I make this voluntary testimonial to you as an act of sheer justice."

also were liked. Of these, the best known was General Clinton A. Cilley, a native of New Hampshire, who gained enough respect by his course as an officer of the bureau at Salisbury to be recommended by Governor North 17 to replace Superior Judge Fowle. Captain John C.

17. Supra, 180; House Executive Documents, no. 130, 39 Cong. 1 Sess., 36; Wheeler, Reminiscences, 98. "Judge Cilley, having settled since the war in North Carolina, is a standing reproach to the idea that meritorious men of northern birth are not welcome to the State, and an evidence that North Carolina appreciates and elevates integrity and talent wherever found."

Barnett in Charlotte and Captain Teal in Goldsboro 18 were also popular with both blacks and whites. On the


other hand, charges of inefficiency, cruelty, and dishonesty were lodged against certain officials, only to meet complete denials; and it seems that, in some cases, the charges were made too hastily and upon incomplete 19 evidence. One or two of the bureau agents and officers
made particularly bad reputations for themselves. One, H. C. Vogell, was among those who accepted Negro testimony as of much more value than that of whites. But of them all, Gen-


eral Robert Avery was the one who made the name of the Freedmen’s Bureau most odious to Conservative whites. His conduct in the arrest and trial of Duncan McRae and as a member of the Court of Inquiry in the case of Henderson Cooper, had much to do with two of the worst examples of


maladministration of military justice. In another case, in answer to a gentleman’s polite greeting, he sneered that if the gentleman was really pleased to see Avery himself and Colonel Bomford, he “had had that honor before when they marched into Goldsboro in May last [1865]. . .”


It was conduct of this sort that was sure to be published state-wide and to give the Freedmen’s Bureau a bad name,

Although the Freedmen’s Bureau and the military courts proved to be the most important Federal agencies
in the administration of justice during the years 1865-1868, the First Civil Rights Act contained far-reaching provisions which made the Federal Courts extremely potent instruments. This act, passed over President Johnson's veto on April 9, 1866, declared that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States and were entitled to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property" regardless of race, color, or previous condition; they likewise were entitled to equality in respect to punishment for crime. Any one who attempted to deny to any citizen these rights was to be prosecuted; and any citizen who felt that he could not have justice in State courts was entitled to transfer his case to the United States Courts. Jurisdiction in all cases arising under this law, which carried penalties of fine up to one thousand dollars or one year imprisonment or both, came within the province of the Federal Courts. Persons knowingly and willfully obstructing the execution of warrant or process issued under the provisions of the act were punishable by fine of not more than one thousand dollars or
imprisonment of not more than six months or both. The United States Circuit Courts were directed to increase the number of commissioners, in order to secure speedy arrest and examination of alleged violators; these commissioners, district attorneys, and marshals were specially authorized and empowered to institute proceedings against such offenders. Finally, the President might employ the land and naval forces of the United States, or the militia, to prevent violation of and to enforce the execution of the act.


Proponents of the act, in the debates in Congress, justified its passage upon the ground that it was necessary to give effect to the Thirteenth Amendment to the Constitution. As Senator Trumbull put it: "There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect."


In the House, the same point was stressed by Representative Wilson, of Iowa:

"The end is legitimate because it . . . is the maintenance of freedom to the citizen. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the
possession of these rights insures him against reduc-
tion to slavery. This... settles its constitution-
ality."25

25. Ibid., Part II, 1118, March 1, 1866.

And Senator Howard, of Michigan, a member of the Judi-
ciary Committee which drafted the Thirteenth Amendment,
stated:

"I take this occasion to say that it was in
contemplation of its friends and advocates to give to
Congress precisely the power over the subject of slavery
and the freedmen which is proposed to be exercised by
the bill now under consideration."26


Supporters of the act referred time after time to the
passage of the "black codes" as proof of the necessity
for its passage. Others not only admitted that some of

27. Ibid., Senator Wilson (Massachusetts), 803, February
2, 1866; Representative Thayer (Pennsylvania), Part II,
1153, March 2, 1866; Senator Trumbull (Illinois), Part I,
474, January 29, 1866.

its provisions — notably those providing for the ap-
pointment of commissioners to aid in its enforcement —
had been based upon the Fugitive Slave Law of 1850, but
frankly gloried in the retributive justice. Senator Lane,
of Kansas, declared:

"I have suffered no suitable opportunity to de-
nounce the monstrous character of that fugitive slave act
of 1850. All these provisions were odious and disgraceful in my opinion, when applied in the interest of slavery. But here the purpose is changed. These provisions are in the interest of freemen and freedom, and what was odious in the one case becomes highly meritorious in the other. It is an instance of poetic justice and of apt retribution that God has caused the wrath of man to praise Him. I stand by every provision of this bill, drawn as it is from that most iniquitous fountain, the fugitive slave law of 1850.28

28. Ibid., Part I, 602, February 2, 1866; The same sentiments were echoed by Representative Wilson, of Iowa. Part II, 1118, March 1, 1866.

Opponents of the legislation argued, in turn, that the Thirteenth Amendment could not be interpreted as the constitutional foundation for the law:

"That amendment... was simply made to liberate the negro slave from his master. That is all there is to it. ... Nobody pretends that it was to be wider in its operation than to cover the relation which existed between the master and his negro African slave."29

29. Ibid., Senator Cowan (Pennsylvania), Part 1, 429; January 30, 1866; The same point was made by Senator Saulsbury (Maryland), 476, January 29, 1866.

More important than this argument, however, was one that the law could be used to punish State judges for conscientiously discharging their duty according to State laws. Thus, if a judge in a State court refused to admit Negro testimony or sentenced a Negro convicted of crime according to a State law (provided the law imposed different punishment upon whites), he could be punished in Federal
Court for violation of this act. Democratic Senators and Representatives castigated this interference with States' rights. Representative Cowan declared that it was the first time "in the history of civilized legislation that a judicial officer has been held up and subjected to a criminal punishment for that which may have been a conscientious discharge of his duty." Representative Eldridge, of Wisconsin, deemed it "a most flagrant and tyrannical interference with the independence of the judiciary"; there was no doubt that it was "designed to accumulate and centralize power in the Federal Government."

And Representative Rogers, of New Jersey, appealed to conservative men to "rally to the standard of sovereign and independent States, and blot out this idea which is inculcating itself here, that all the powers of the States must be taken away and the power of the Czar of Russia or the Emperor of France must be lodged in the Federal Government." Nevertheless, the bill passed; it was part of the Radical program, and there were enough votes to be had to override President Johnson's veto.
As far as North Carolina was concerned, the Civil Rights Act of 1866 need not have been passed, for there is no record of any case being tried under it until 1871. One should hasten to add that General O. O. Howard, Commissioner of the Freedmen's Bureau, felt that there was no need of hurrying discussion upon the transfer of jurisdiction over all cases to the civil courts in March, 1866, since the Civil Rights Bill was before Congress.

33. Supra, 85.

His attitude would indicate that the threat of this law supported the military and bureau authorities in their resistance to the demand of the civil authorities that, before the State law of March 10, 1866 (extending to Negroes the right to testify in all cases wherein their interests were in question and in all other cases by consent of the parties), could go into effect, jurisdiction in all cases must be remanded to the civil courts by the military authorities. However, the additional power of this law was hardly necessary: the military authorities had the upper hand without it. Finally, after June, 1866, when the State convention abolished all differentiation between whites and blacks in their standing before the courts, it seems clear that Negroes received justice at the hands of the State courts. On February 17, 1867,
President Johnson had no civil rights cases from North Carolina to report to Congress. Not until 1871 is a case to be found. In that year, the trial of a Negro, Lee Dunlap, who had been indicted for the murder of his former master, was transferred to the United States Circuit Court, upon Dunlap's affidavit that he could not have a fair trial — an action which the State prepared to contest. During the violent campaign of 1868, Dunlap had twice taken part in affairs in Charlotte; pardoned for the first offense by Governor Holden, he later became involved in another and shot his old master and present political opponent when all the participants were taken to the mayor's office for questioning. With such a record, Dunlap might well prefer taking his chance in the United States Court. However, in 1874, Dunlap escaped from the Federal authorities and was not recovered.

The case is interesting because, after its transference, another one came up in Mecklenburg County wherein a white man named Baker was convicted of killing a Negro. Race feeling in the county was so aroused that Solicitor Bynum,
in his closing argument to the jury, stated that he had been informed of a general feeling and purpose among the white citizens of the county -- a feeling which had been expressed freely during the course of this trial -- that no white man should be convicted for killing a Negro until Dunlap should be convicted for killing a white man. The solicitor claimed that he made this charge, not to create a prejudice in the minds of the jury against the prisoner, but to remove all prejudice from their minds and to secure a fair verdict. A great number of petitions poured into Governor Caldwell's office during the closing months of 1873 for pardon or commutation of Baker's sentence. Many of them were signed by colored as well as white persons; some indicated that the race feeling was still prevalent. Nevertheless, Baker was not pardoned: he was hanged in early January, 1873. Dunlap, however, escaped. It is

36. State v. Baker, 69 N. C., 147-148; The number of petitions is entirely too numerous to cite, there being at least twenty-five. Some of the more important were from W. H. Bailey, December 10, 1873; W. R. Myers, December 30, 1873; H. B. Williams (foreman of the jury), December 30, 1873. Letters from Calvin J. Cowles and W. R. Bynum to Caldwell, both December 30, 1873, indicate that the race feeling was still prevalent. All are in G. P., Caldwell.

quite apparent that the Civil Rights Act played a very minor role in the administration of justice in North Carolina. Of course, it may have exercised a restraining effect, the extent of which cannot be weighed. But,
judging from the paucity — one might say almost non-existence — of cases, it had but little effect.

The high tide of the activities of Federal Courts in North Carolina came with the passage of the Enforcement Acts of 1870-1871, the first of which was enacted May 31, 1870. This act, which was intended to secure the privilege of voting to all persons, regardless of race or color, and which restated the essential provisions of the Civil Rights Act of 1866, contained certain far-reaching provisions, the extent of which can best be appreciated by liberal quotation from the law itself:

"Sec. 4. . . . That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

"Sec. 5. . . . That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself
or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

"Sec. 6. . . . That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, ---the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years, --- and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"Sec. 7. . . . That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.

"Sec. 8. . . . That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, arising under this act, except as herein otherwise provided, and the jurisdiction hereby conferred shall be exercised in conformity with the laws and practice governing United States courts; and all crimes and offences committed against the provisions of this act may be prosecuted by the indictment of a grand jury, or, by indictment or information filed by the district attorney in a court having jurisdiction.) 37.

37. U. S. Stat. at Large, XVI, 140-146.

The same means of execution employed in the Civil Rights Act were used in this law: the United States Circuit
Courts were empowered to increase the number of commissioners in order to secure speedy arrest and examination of violators; commissioners, district attorneys, and marshals were authorized and required to prosecute offenders; persons who knowingly or wilfully hindered the execution of any warrant issued under the law were punishable by fine up to one thousand dollars or imprisonment up to six months or both. The President might employ the land or naval forces or the militia to aid the United States judiciary.

As did all of the Reconstruction measures, this legislation occasioned considerable debate in Congress, in the course of which it was revealed that John Pool, Senator from North Carolina, had written the provisions against unlawful combinations to intimidate voters. Its


Radical supporters stressed the well-known and oft-cited arguments that violent disregard for law and human rights prevailed in the South and that State governments therein were unable to protect life, liberty, and property. However, the Fourteenth and Fifteenth Amendments to the Constitution vested in the Federal Government the duty of protecting those individuals whose constitutional rights
were impaired. To render such protection, the Government must reach the individual offender; hence, Congress had a right to invade the province of a State to do so. Lawless conditions in the South had called forth the exercise of this power. Their Democratic opponents made no serious attempt to disprove the existence of lawlessness, but disowned it, claiming that it was well within the control of the local and State governments. They denied that the Constitution granted power to Congress to enact legislation of this type. As Senator Thurman, of Ohio, ably argued, the language of the Fifteenth Amendment distinctly referred only to the United States and to States, not to individuals and mobs. Thus, any State laws or constitutions discriminating against citizens because of race or color were null and void, but Congress could not enact laws applying to individuals. The latter were amenable only to State laws. He also struck vigorously at the use of troops.

39. H. W. Davis, "The Federal Enforcement Acts," in Studies in Southern History and Politics: Inscribed to W. A. Dunning. (New York, 1914). 205-207; Perhaps the best general expression of this point of view is found in Carl Schurz's speech of May 18, 1870. Congressional Globe. 41 Cong. 2 Sess., Part IV, 3607-3611. Vide also Senator Pool's speech of May 19, 1870, pp. 3611-3613. Senator Howard, in a bitter exhibition of "bloody-shirt" waving, declared: "The leopard cannot change his spots. Treason and rebellion are today as odious and hateful and as little worthy of trust and confidence as they were in 1866, as they were in 1881." 3615.
40. Davis, "The Enforcement Acts," loc. cit., 205-208; Thurman's speech of May 20, 1870 is found in the Congressional Globe, 41 Cong. 2 Sess., Part IV, 3662-3663; Senator Davis, of Kentucky, emphasized the same point, 3685-3686.

at election times: one might as well make the President a monarch immediately. The Democrats, however, were

41. Ibid., 3563-3566. Thurman's speech of May 18, 1870.

unable to defeat the Republican program; the legislation passed by a large majority in each House.

A noted authority has stated that during 1870

"North Carolina was the scene of the most notorious lawlessness and probably the widest application of the Federal force act." Yet, Attorney General Aikman's report for


1870 indicated that there were no convictions in North Carolina under the act in that year, while thirty-two convictions were secured elsewhere; and that there were but five cases pending in North Carolina on December 31, 1870, whereas there were two hundred seventy-one total cases pending at that date throughout the United States. The statistics upon crime for that year were inaccurate in many respects, but these figures may be accepted as
valid. Moreover, although the military authorities in

43. The statistics are given in House Executive Docu-
ments, no. 90, 41 Cong. 3 Sess.; District Attorney D. H.
Starbuck later called Akerman's attention to the other
inaccuracies. The latter's report, for example, recorded
that all the internal revenue cases (one hundred eighty
in all) were decided against the United States; the
reverse was true. Also, the report cited six convictions,
ten acquittals, and fifteen nol. progs. in Post Office
cases; in reality, there were eleven convictions and no
acquittals. As for the ten acquittals and fifteen nol.
progs. entered, they were for all the cases tried in North
Carolina, over two hundred in all. Starbuck called these
errors to Akerman's attention, because they made him out
a poor district attorney! Starbuck to Akerman, March 13,
1871, original ms. in Department of Justice Archives.
The writer accepts the figures as quoted upon the En-
forcement Acts because Starbuck did not point out any
errors therein.

the State were required at first to comply with all
requisitions made for troops to enforce the law, they
used every endeavor to check the indiscriminate use of
44. troops. As a result of this military policy, which re-

44. Senate Executive Documents, no. 16, part 2, 41 Cong. 3
Sess., 34. John H. Coster (Aid-de-Camp to General McKeever,
Assistant Adjutant General, Department of the East) to
Captain R. T. Frank (post commander, Raleigh), June 22,
1870. 'Comply with all requisitions of the United States
marshal and district attorney for troops to enforce United
States Laws. Make detailed report of circumstances, so that
proper judgment may be formed of the necessity for United
States civil officers requiring military aid.'

Ibid., 35. General McKeever to Frank, July 18,
1870.

'When called upon by a United States marshal, or
other competent civil authority, for troops to aid in the
enforcement of the laws, instead of merely telegraphing
that fact the post commander should state all the circum-
stances connected with the application, and his opinion
as to the propriety of furnishing the detail, as without these there is nothing on which the general can base intelligent action.

'The general is desirous the troops should only be employed when their services are imperatively necessary, and after the civil authorities have exhausted all other measures.'

quired the United States civil authorities to show that they had exhausted all measures within their power before resort was made to the use of troops, only two such requests made by United States Marshal Carrow were granted by the post commander at Raleigh during the year 1870.

45. Ibid., 15-19, 21.

In one of these cases, a detail was employed to arrest a circus party which maltreated a deputy internal revenue collector and took the taxes which he had collected from it; the circus party escaped arrest. In the other case, nine men who had wounded a Negro were arrested and brought to Raleigh for examination; four were bound over to District Court, no other requests were granted, although

46. Ibid., 15-19.

the marshal protested that it was impossible to arrest members of the Ku Klux Klan by means of a posse and that offenders, once warned of their danger, would have ample time to flee from the military detail. If this be in-
dicative of the use of military forces throughout the State, there could have been but little employment of troops in 1870 to enforce the Federal law. Seven companies were sent to North Carolina at the urgent requests of Governor Holden and in an endeavor to keep an eye upon conditions during the "Kirk-Holden" war, but they were under instructions to act with extreme caution. Their opinion of the State militia was rather contemptuous, the Captain at Yanceyville (Caswell County) describing them as 'nothing more than an armed mob' of pillagers.

The years 1871-1872, however, witnessed a different story. On December 16, 1870, the United States Senate requested President Grant to furnish it with all information in his possession relative to organized bodies of disloyal persons in North Carolina. The President replied by sending, on January 13 and 17, 1871, a mass of documents (not all dealing with North Carolina) composed of military reports and communications, testimony of Ku Klux prisoners taken before Judge Thomas in Lenoir County, affidavits of persons in Alamance and Caswell Counties who had belonged to the Klan, and reports
of outrages (some signed, others anonymous) from various parts of North Carolina, gathered by Governor Holden. These papers were referred to a Select Committee of the Senate which proceeded to examine fifty-three witnesses from the State: twenty-nine Republicans, twenty-two Conservatives, and two neutrals. Their testimony covered subjects from motives behind the origin of the Ku Klux Klan to acts of individual terrorism. Some of the best of this testimony has been cited. Out of the mass of testimony the Repub-

49. _Supra_, passim, 248-263; The documents sent by President Grant are given in _Senate Executive Documents_, no. 16 and no. 16, part 2., 41 Cong. 3 Sess. They are also given in the testimony before the Select Senate Committee, cited as _Senate Report_.

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these accusations were but part of a "cut and dried" plan to keep in power a group of corrupt politicians, headed by W. H. Holden.

51. Ibid., Minority report, 3.

Shortly after the publication of these reports (March 10, 1871) the whole question of conditions in the Southern States was referred to a Joint Committee of seven Senators and fourteen Representatives, which was authorized to investigate and report upon the same with such recommendations as it deemed advisable. However,


long before an investigation could get under way, President Grant sent his well-known message of March 23, 1871, to Congress:

"A condition of affairs now exists in some of the States of the Union rendering life and property insecure. . . . The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities, I do not doubt. That the power of the Executive of the United States, acting within the limits of existing laws, is insufficient for present emergencies, is not clear."53

53. Ibid., 1.

The President was unwilling to send such a message, but was
prevailed upon to do so by Radical Republicans who
realized that the type of legislation they desired would
not be passed without his request. Soon afterward, Rep-

54. William Best Hesseltine, Ulysses S. Grant, Politician.
(N. Y., 1935), 244-245. This is the best biography.

resentative Shellabarger introduced the bill which, after
which debate and amendment, became the Third Enforcement
Act.

This act contained the most comprehensive pro-
visions of all the legislation intended to secure equal
civil and political rights. It provided that if two or
more persons within any State conspired together to ac-
complish any of several purposes (hindering the execution
of any Federal law, intimidating or injuring any United
States officer, intimidating any witness before or juror
in any Federal court, hindering the constituted authori-
ties of any State from securing to all its residents the
equal protection of the laws, or preventing any United
States citizen from exercising his political freedom law-
fully, to cite only a few), such persons were to be
deemed guilty of a high crime, punishable by fine of five
hundred to five thousand dollars or imprisonment of six
months to six years. It further prescribed a definition
of "rebellion," which, however, was never applied in prac-
tice in North Carolina. And it provided that the President might employ the militia or the land and naval forces of the United States to suppress insurrection, domestic violence, or unlawful combinations operating to obstruct the execution of State and Federal laws or to deprive any portion or class of people of the rights, privileges, and immunities secured to them by the Constitution and this law.


As in the case of the First Reconstruction Act, the legislation aroused a storm of debate in Congress. Proponents came forward with the usual arguments that it was absolutely necessary to protect the Negro in the rights guaranteed him by the post-war constitutional amendments. Senator Pool, of North Carolina, pointed out that Governor Holden's appeal to State military force had failed; he thought that similar attempts in all the Southern States would likewise fail; therefore, in view of the fact that the State civil tribunals did not afford protection to citizens, he believed this law was necessary.

56. Congressional Globe, 42 Cong. 1 Sess., Part II, 604, April 12, 1871.

Representative Shellabarger and others repeated the familiar
refrain that it was the duty of Congress to enforce every provision of the Constitution by appropriate legislation.

57. Ibid., Appendix, 69, 85, March 31, 1871.

In addition, there was considerable bloody-shirt waving, with emphasis upon the activities of the Ku Klux Klan. Ben Butler was at his worst in this:

"The Ku Klux spirit is abroad. The Ku Klux spirit is down South... What shall be the fate of the poor suffering black man down South, all alone and undefended? It is for that purpose we wish to send down United States troops."

Why, he asked, did the Southern representatives come back and undertake to tell those who had stood by the Constitution and had fought for it against Southern guns what the meaning of that Constitution was? Others referred to the

58. Ibid., I, 490, April 5, 1871.

Klan as an organized, armed, and trained conspiracy of ex-Confederate soldiers in the interests of the Democratic party.

59. Ibid., I, 516 (Shelabarger), April 8, 1871; 339 (Kelley, of Pennsylvania), March 29, 1871.

Opponents of the law admitted the existence of crime in the South, but claimed that it was not limited to that region; moreover, its cause could be traced to the
policy of Radical reconstruction. Senator Trumbull

60. Ibid., II, 601-603, (Saulebury); I, 330. (Representative Morgan, of Ohio).

pointed out, as Thurman had done the year before had done the year before, that the United States could legislate only against State laws, not against individual activities. And Representative Beck, of Kentucky, believed

61. Ibid., I, 578-579, April 11, 1871.

that if this law were passed, "the States may as well make bon-fires of their statutes—books and barracks of their courthouses." Re, Eldridge, of Wisconsin, and Swann,

62. Ibid., 363, March 30, 1871.

of Maryland, struck directly at the military clauses of the bill, which, they believed, made the President an absolute despot. Perhaps the most interesting argument

63. Ibid., 353, March 30, 1871; 363, March 31, 1871; 511, April 6, 1871.

of all was that of Representative Beck: it bristled with economic interpretation. In replying to "Pig Iron" Kelley's description of the deplorable conditions in the South, Beck retorted that this condition existed because
of the work of high-tariff, class legislation. It was the representatives of the great iron and manufacturing regions — Stevens and Sumner — who had raised the cry of disloyalty and had made the Southern States conquered, military-ruled provinces. Knowing full well that the South and the West and the Southwest would never support their high-tariff program, representatives of this stamp had foisted the program of Reconstruction upon the South.

The Freedmen's Bureau was organized: "Men were sent there from Maine and Massachusetts, from all over New England, and elsewhere, who were known to be high tariff, protective men, or were willing to become so, or anything else that would give them power and money." Corrupt carpet-baggers had been sent to Congress, men like Dewees from North Carolina, who, motivated by fear of expulsion for misconduct, voted the high-tariff program to keep their positions. And now these politicians were losing their power. North and South, because people were turning against the tide of corruptions.

"It is because the scepter is departing from Judah, and other and better men are coming here who will stand by their States, who will stand by the West, who will vote for their interests, and not for pig iron and other like jobs; that you are now seeking to reconstruct these States, and put them again under the ban, those of you who are actuated by other motives than to make General Grant Emperor."

This bill was
"a flank movement to excite the people by the cry of murder, Ku Klux &c., when the people are thinking of calling you to account for your plunder, extravagance, corruption, nepotism, class legislation, banks, tariffs, bonds, railroad swindles, and everything of that sort that lies at the door of and is being conclusively proved upon the dominant party.

"...you have corruption festering everywhere. You have legislated to make Bessemer steel and pig iron, bunting, coal, and salt, and everything in which a few men in the eastern States and in Pennsylvania are interested, pay so high a duty that these things and others of that class cost the people hundreds of millions of dollars more than they would under a just government." 64

64. Ibid., 354-355, March 30, 1871.

Nevertheless, the legislation passed.

Investigation and prosecution of alleged violators of this act commenced with vigor. Governor Caldwell, aroused by the news of outrages in Rutherford County, wrote to Senator Pool, suggesting the employment of a discreet detective from New York or Washington to ferret out the leaders of the Ku Klux Klan, a proposition which Pool referred to the Attorney General with a favorable endorsement. 65

65. Caldwell to Pool, March 29, 1871. Original ms. in Department of Justice Archives.

A similar suggestion came from S. S. Ashley, Superintendent of Public Instruction in North Carolina. 66

66. Ashley to Pool, May 3, 1871, in Ibid.
requests, Joseph C. Hester was appointed a detective, acting under the instructions of the Department of Justice, "in the detection and prosecution of crimes against the United States in the State of North Carolina and the country contiguous thereto." His salary of eight dollars per diem and expenses (in advance of the usual pay of detectives at the time) was paid out of an appropriation of $50,000 made by Congress in March, 1871, for the detection and prosecution of crimes against the United States.

It is interesting to note that this legislation marked one of the steps in the beginning of the investigative activities of the Department of Justice. At least $20,000 of the fund was allowed to the agency headed by Col. H. C. Whitley of New York for the detection of crime under the Enforcement Acts. Hester worked under Col. Whitley. Ibid., Akerman to Whitley, June 28, 1871, 777-778. A dissertation upon the investigative activities of the Department of Justice is forthcoming by Mr. Gerald J. Davis, Assistant Archivist in the Department of Justice.

Through his activity and that of the various deputy marshals, a large number of arrests was made for violation of the Enforcement Acts; by September, 1871, sixty-one bills of indictment had been found, involving a total of seven hundred sixty-three defendants. At the close of
1871, the total had swelled to ninety-eight indictments embracing nine hundred thirty defendants, a number which was increased by fifteen indictments affecting one hundred eighty-eight defendants during the course of 1872.

70. Senate Executive Documents, no. 32, 42 Cong. 1 Sess., I, 10. (Attorney General’s Report).

Although the number of defendants cited in these indictments is misleading, inasmuch as the same names appeared upon several bills, the activity of marshals, detectives,

71. Riddick’s letter, cited in footnote 69, supra, 419.

and United States Commissioners was widespread.

Almost all of the trials of these alleged violators indicted in 1871 and 1872 were held in the former year. The evidence indicates that twenty-four were convicted, twenty-three pleaded guilty, thirteen were acquitted, and a nol. pros. was entered for nine of the remainder at the September term of United States Circuit Court held in Raleigh in 1871. The remaining indictments were continued to 1872. In that year, there was one conviction, one acquittal, and one nol. pros.; as a matter of fact, very few trials were held. This is accounted for largely by virtue of the fact that North Carolina was divided into two Federal districts in 1872, and eighty of the ninety-eight indictments pending were transferred to the
newly-created Western District, which was not organized in time to handle any cases at June term; the other eighteen indictments and fifteen new ones found in the Eastern District were continued by reason of the absence of Judge Bond from circuit duty.

72. Ibid.; Senate Executive Documents, no. 32, 42 Cong. 1 Sess., i, 10. (Attorney General's report). Again, the figures given in the Attorney General's report was misleading. This document, which contained the statistics for 1871, gave forty-nine convictions, six acquittals, and ten nol pros. Yet the letter of W. J. Riddick (referred to in footnote 59 of this chapter) gave forty-seven convictions (twenty-three of them persons who pleaded guilty), thirteen acquittals, and ten nol pros. The deviations are not highly important in this case, but a reference to the errors in the report of 1870 (supra, footnote 43) will show that public documents ought not to be trusted implicitly.

The most interesting of these trials was that of Captain R. A. Shotwell et al for participation in a raid upon James W. Justice perpetrated June 11, 1871. Justice was a Republican lawyer and member of the State legislature, who had been active in politics and in hearings upon State Ku Klux proceedings. Although thirteen men were named in the indictment, the chief efforts of the prosecution were directed to secure conviction of Shotwell, an editor and a chief of the Rutherford County Ku Klux, who contended that he had never been on a raid nor had he ordered one, but rather that he had done all in his power
to prevent the raid in question. In the testimony before the court, which is printed in the *Ku Klux Testimony* for North Carolina, several of the men who took part in the raid swore that Shotwell not only was present, but ordered it and took a leading role throughout. This Shotwell denied, claiming that the testimony of these men was secured under promises of little or no punishment: to use his undignified term, but one which obtained general currency at the time, they were "Pukes." He contended that the testimony was "framed", that it was but a mass of "malicious falsehoods," that the jury was "packed," and that Circuit Judge Bond acted the part of a Jeffrey. From such conflicting material, truth is hard to find. It is in order to point out that those who took part in the raid and afterward testified against their chief were not convicted; indeed, they were not even prosecuted. Also, the original jury was discharged and a new one selected by the marshal in collaboration with District Attorney Starbuck. For that matter, the
Federal Courts had been in the habit of selecting jurors with care in order to obtain convictions in Enforcement and Internal Revenue cases. All of these circumstances tend to support the charges. On the other hand, it was a question of the word of four or five men against one man’s (the defense witnesses had fled); Shotwell’s defense was written four years after the trial and embellished with all the hardships he had undergone in prison; and his own counsel, Colonel T. C. Fuller, entered a plea for mercy and did not question the propriety of the conviction on the evidence presented. Whatever the justice

76. Shotwell Papers. III, 49. "What, then, was my amazement, mortification, shame, when he began by saying he would not question the propriety of the prisoner’s conviction as the Jury had convicted on the evidence before them (yet Col. Fuller knew that the jury was "packed", and the evidence "false"). The Ku Klux organization was broken up, the court could fairly infer that no fresh crimes had been committed since the Justice affair, and as the law had been vindicated no good purpose could now be subserved by severe punishment. "Shotwell was a young man, respectably connected, the son of an aged, poor Presbyterian minister, whose heart had often bled for the indiscretions and recklessness of his son in these transactions. He appealed to the clemency of the Court for the sake of the prisoner and the aged father, and asked them to deal tenderly with the boy. He knew he must be punished, but as the object of the prosecution had been accomplished by the conviction he prayed for mercy! Mercy! Mercy!!!

"Had the waters of the Deluge suddenly arisen around my feet, I could have not been more shocked —

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overwhelmed -- agonized. ... I could only glare at the Judge in dumb horror. ... A thousand times during my long imprisonment I wept tears of bitterness over this most unkindest out of all (though not unkindly meant!), the heaviest blow that had yet fallen upon my luckless head."

of the conviction, Shotwell received no mercy at the hands of Judge Bond, who gave him the maximum sentence.

After sentence had been pronounced, Captain Shotwell was sent to the penitentiary at Albany, New York, to serve his term of six years. While in prison, he was visited by Gerrit Smith, who apparently urged him to confess and give up what Smith regarded as his "defiant" spirit. This Shotwell refused to do. However,

77. Ibid., 374. Smith to Shotwell, October 31, 1872. "You are young -- only 28 you told me -- you have talents and education; and I wish you were out of prison, and doing good in the world. But I see not that your term of punishment can be shortened if you feel and express no regrets; for being, as you admit you were, the Ku Klux Chief in your part of the country."

in the course of his first few days in the penitentiary, he expressed a willingness "to appear in evidence against certain parties whose trials are pending in the Federal Court at Raleigh." A few days after expressing this feeling, he wrote Attorney General Akerman:

"Whether the Government will see fit to take advantage of this offer, I do not know, but on reflection I am satisfied that I can be of more service -- in short, that I
can be instrumental in unmasking the Supreme Councils of the Klan, in another field, viz — South Carolina. For several years I have resided in a section of N. C., bordering on S. C. and in my capacity as a Grand Chief, and Editor of a Democratic newspaper have come by a variety of interesting information concerning the Order, and its High Priests, in S. C. which would certainly be useful to the Govt. and might lead to more important developments.

"I therefore respectfully request that, if summoned to Raleigh, I may be taken by Washington City, and accorded a private interview with yourself. If not taken to Raleigh, I nevertheless urge the importance of allowing me said interview. I would not feel free to communicate on the subject with any other person, or in any other manner — particularly from the circumstance that if my views meet with your approbation, a third party would lessen the chances of success. I will only add, I am confident I can materially assist in disrupting the Klan in S. C. and Georgia — if not in the entire South — a consummation devoutly to be desired."

To Lieutenant McEwan, the soldier who took him to Albany after the trial and who was to bear the message to the Attorney General, he wrote a letter requesting the former to endorse his (Shotwell's) good faith to Akerman:

"I think the steadfastness with which I have kept faith with the comrades of the late Invisible (now rather too visible) Empire ought to warrant some confidence in my integrity in future." 78

78. Original mss. letters of Shotwell to Akerman and McEwan, October 22, 1871. Department of Justice Archives.

Whether these offers were meant in good faith is extremely doubtful. Shotwell's diary of his prison days indicates that he was under great strain, almost to the breaking point, caused by his reaction to the hardships of penitentiary life. At this very time, offers of pardon
79. Shotwell Papers, III, 174-183; One must discountenance the diary since Shotwell had undergone prison experience during the war.

were held out to him if he would help the Government against the Klan. This might explain his willingness to go to Raleigh. However, neither Lieutenant McEwan or the Attorney General had any faith in the offer of October 22. The soldier believed that Shotwell was not ready to come clean, and refused to endorse his good faith.

80. McEwan to Akerman, October 28, 1871. Original mss. in Department of Justice Archives.

Akerman concurred in this opinion.

"I agree with you there is no good reason for taking Mr. Shotwell to Raleigh at present. Indeed I do not incline to invite, though of course I should not refuse confessions and statements made from the prisoners at Albany. The prospects are that the secrets of the Ku Klux in North Carolina can be otherwise found out: and these persons might have a sort of claim to some mitigation of their sentences; if their statements are encouraged."

81. Letter Book I, Department of Justice, Akerman to McEwan, November 15, 1871.

McEwan was right in his suspicion, for the Rutherford Chief had no intention of making any disclosures. He only desired to get to Columbia, South Carolina, where he hoped to make his escape.

82. Shotwell Papers, III, 188. The Diary. It contains an accurate summary of the letter of October 22 to Akerman and
adds: "My object is to get down there[to Columbia] where a few courageous friends may be of service to me, especially as the authorities will suppose me resolved to

This was the outstanding Ku Klux case. Three
of the others involved in the same trial received three
to six months imprisonment and five hundred dollar fine.
The rest received two, three, or four years imprisonment
and fine of five hundred dollars, the maximum penalty
being imposed on one other. Six were imprisoned at
Albany, where prisoners were sent from North and South
83
Carolina. Lesser punishments were imposed upon the re-

83. Ibid., Appendix; House Executive Documents, no. 266,
42 Cong. 1 Sess., XII, 20. This gives the names and
sentences of thirty-seven persons convicted in 1871 in
North Carolina.

remainder of the persons convicted before the Circuit
Court at Raleigh, although some suffered two years im-
prisonment. Apparently, the court intended to make
examples of these men.

There can be little doubt that these prosecu-
tions had a political bearing and that the severe pun-
ishment meted out, especially to Shotwell, was intended
to set an example. Detective Hester, who possessed none
too good a reputation and had himself been a member of
the Klan at one time, telegraphed Senator Pool on Oc-
tober 1, 1871, before the first sentence was pronounced:
"An effort is being made by leading Democrats to have Judgment suspended in Ku Klux cases & adjourn the Court under certain promises. The plan is endorsed by two or more leading Republican officials bring [sic] some pressure to bear against it for Gods [sic] sake or we are ruined."

The North Carolina Senator endorsed this: "I hope that Gen [syr] 1 Bristow [Solicitor General and Acting Attorney General] will not countenance such a proceeding. If this is done there is no more safety in North Carolina, for Republicans." Bristow telegraphed District Attorney

84. Letter to Pool, October 1, 1871. Pool's note is on the telegram. Original ms., Department of Justice Archives.

Starbuck immediately to press the cases and to resist suspension of judgments to the utmost:

"The higher the social standing and character of the convicted party, the more important is a vigorous and prompt execution of judgment." 85

85. Instruction Book B-1, Attorney General's Office, 654-655, Bristow to Starbuck, October 2, 1871.

As has been seen, these instructions were obeyed. And in his report of the 1871 convictions, District Attorney Starbuck wrote:

"These indictments are for conspiracies to commit deeds of violence or terror, to deter and drive from the ballot-box Union men, and to destroy the freedom of elections. . . ."

"Had it not been for the passage of said acts of Congress, and the active enforcement of them, the spirit of treason would to-day revel in high carnival over the entire South, and effectually crush out and overawe the
Union sentiment of the southern country, as it did in the
days of the rebel government.

"But the conviction of a number of these persons, and their punishment, and the indictment of this large number of others... seem for the present to have broken the power of this widespread conspiracy against the friends of the Union in the South. Yet the utmost vigilance in the rigid enforcement of these acts of Congress is and will be necessary to suppress the spirit of treason lurking in the hearts of the disaffected and treacherous enemies of the Government, and to preserve the freedom of the elective franchise, and the rights and immunities of citizenship." 86

86. House Executive Documents, no. 268, 43 Cong. 1 Sess.,
xii, 29-30. Starbuck to Attorney General Williams,
February 24, 1872.

"One more such blow as they were struck by our convictions
last September," he wrote the Attorney General, "and the
work of the destruction of this dangerous organization is
completed now & I trust forever." Clearly, the indictments

87. Starbuck to Williams, April 9, 1872. Original mss. in
Department of Justice Archives.

and convictions had a strong political import, especially
when it is considered that the Conservative party had
started a movement in 1870-1871 to amend the State constitu-
tion and that State elections and the presidential cam-
paign came up in 1872.

However, it is a mistake to assume, as several
writers have done, that prosecutions under the Enforcement
Acts ceased after the elections of 1872, or that the in-
tention was purely political. For, although the prisoners
at Albany were pardoned in 1873, they had served two
years, which, in several cases, was the limit of their
sentence; moreover, by far the most convictions under
the Acts occurred after December 31, 1872. If the
statistical reports of the Attorneys General may be
trusted, there were two hundred sixty-three convictions
under the Enforcement Acts between December 31, 1872, and
June 30, 1873, and thirty-five more between June 30, 1873,

88. Senate Executive Documents, no. 32, 42 Cong. 3 Sess.,
I, 38; House Executive Documents, no. 6, 43 Cong., 1st Sess.,
VIII, 28.

and June 30, 1874. After that date there were but two

90. House Executive Documents, no. 7, 43 Cong. 2 Sess., V.

convictions up to 1877. These same figures indicate that,
while there were one hundred fifteen indictments pending
under the acts at the close of 1872, there were eight
91
hundred sixty-two pending on July 1, 1873. If, then, the

91. The following table, taken from reports of the Attorn-
eys General, covers the statistics on the Enforcement Acts:

<table>
<thead>
<tr>
<th>Year</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>No. Pros.</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>5</td>
</tr>
<tr>
<td>1871</td>
<td>49</td>
<td>6</td>
<td>10</td>
<td>102</td>
</tr>
<tr>
<td>1872</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>115</td>
</tr>
</tbody>
</table>
The figures as of 1870, 1871, and 1872 are for the year closing December 31. The figures after 1872 close the judicial year on June 30.

* For rectification, consult footnote 72, supra, 421.

The great bulk of indictments and convictions occurred after the election of 1872 and during the year 1873, the political motive becomes less clear.

On July 31, 1873, Attorney General Williams announced that, although the Government entertained no doubt of the validity or necessity of the Enforcement Acts — or of the necessity of the convictions already made — it felt that the Ku Klux Klan was now almost entirely broken up. Therefore, the prosecutions then pending would be suspended, but for exceptional cases, and persons who had fled their homes on account of complicity in Ku Klux cases might return without fear of prosecution, unless, of course, their crimes were exceptional. The President had already pardoned many persons imprisoned for violation of the Acts; other pardons would probably follow. However, any future violations would be punished, for the Government intended to protect its citizens in the enjoyment of their civil and political rights. The definitive order to end prosecutions
was addressed to U. S. Attorney Virgil S. Lusk on April 25, 1874:

"Yours of the 15th inst., referring to the prosecutions in the United States Courts at Statesville and Asheville commonly known as the Ku Klux cases, has been received.

Since then a communication upon the same subject has been made to this Department by the Hon. W. A. Smith, M. C. from North Carolina; also one by Plato Durham, Esq. of North Carolina, favorably endorsed by the Hon. R. P. Dick Judge of the District Court, etc. etc.

Upon consideration of the whole matter, I here-with instruct you to order a \textit{nolle prosequi} in each of the above prosecutions, excepting such as involve charges of high crime committed in furtherance of the object of the conspiracy.

The Government has reason to believe that its general intentions in prosecuting these offences in North Carolina hitherto, have been accomplished, that the particular disorder has ceased, and that there are good grounds for hoping that it will not return. At all events, it affords the Government pleasure to make an experiment based upon these views. Therefore, in all cases in which the charge is merely that of belonging to the association above alluded to, of co-operating in its general purpose, or of committing some minor misdemeanor, in connection therewith, you will order a \textit{nolle prosequi}.

In other cases, no instructions are hereby given. I leave you entirely free to manage these according to the rules which ordinarily control officers of the Government in positions like yours."
By that time, also, the Ku Klux Klan was dead — and had been dead for two years.

It has been said by an authority on the subject that, on the whole, the Enforcement Acts were a failure in the long run for several reasons. It was difficult, for example, to prove "conspiracy" and "intent" to deny rights guaranteed by the Constitution, and the Federal Courts insisted, as a rule, upon reasonable testimony. Furthermore, white men came into numerical or moral supremacy on juries, and white judges inclined toward leniency toward the white man prosecuted. Perhaps a more basic reason lay in the fact that there were only twenty-four Federal District Courts in the South, and they were choked with the amount of litigation. As a consequence, they were unable to handle four-fifths of the cases brought before them; yet, the indictments found constituted but a small percentage of the gross violations. Undoubtedly factors of this


type operated in North Carolina, but perhaps the Enforcement Acts were more effective there than elsewhere, for the figures show that there were a large number of convictions. However, when one considers that, at the close
of the judicial year of 1873, there were 362 Ku Klux cases and 436 internal revenue cases pending, the congested condition of the courts can be readily pictured. This was not a typical year, but it showed the condition at its worst. Finally, the disintegration of the Republican governments in the South and the United States Supreme Court decisions of U. S. v. Reese and U. S. v. Cruikshank in 1876 sounded the death knell for the acts. But as far as North Carolina was concerned, their practical strength had ended two years before.

With the passage of the Enforcement Acts the expenses of the Federal Courts greatly increased, beginning in 1872. Attorney General Williams wrote Marshal S. T. Carrow on July 13, 1872:

"The expenses of the courts generally throughout the country and particularly in the South, have, of late, reached such an enormous sum, that I am constrained to invite the attention of the several United States Marshals of the fact, and to express the hope that in the future more economy may be exercised by them. It appears to me that with due economy the expenses of your courts should not be near as heavy as they are. It has come to my knowledge that a very large portion of these expenses is for witnesses fees and their travel. Much abuse exists in the summoning of witnesses. They are summoned from great distances and kept at the place where the court is being held for weeks at a time, when the testimony they may be able to give is immaterial, or, perhaps, they may have no knowledge whatever of the circumstances of the case in which they are called as witnesses."95

95. Instruction Book C, Department of Justice, 385-386.
This letter is illuminative of conditions in the Federal Courts of North Carolina for the period following 1872. Attorney General Williams was sure that the sum of $40,000 per year should be sufficient to run the courts, yet the expenses for the year ending June 30, 1872, amounted to $184,368.31, and the amount spent from July 1. to December 2, 1872, totaled $25,163.53. The Attorney General made this theme of expenses a prominent part of his report to Congress in January, 1873, adding that in addition to the fact that too many witnesses were called, the activity of United States commissioners had helped greatly to swell the expenses of courts generally:

"These officers are paid by fees, and it is to their interest to have as many examinations and issue as large a number of subpoenas for witnesses as possible, and frequently their warrants are issued on frivolous grounds, thereby entailing expenses upon the Government without corresponding benefit."98

98. Senate Executive Documents, no. 32, 42 Cong. 3 Sess., I, 7.

The subject of increasing expenses in Federal Courts generally continued to perturb the Attorney General, whose remonstrances to the United States marshals and others met
with only indifferent success. Sessions of courts and grand juries had been unnecessarily protracted, many prosecutions were carried on "before commissioners and grand juries more from personal than public considerations," and judicial officers were too indifferent to increasing costs. All these conditions had served to increase expenses greatly; in addition, another partial cause seemed to be a growing inclination among people to litigate questions in Federal, rather than in State courts. Of course, these complaints of the Attorney Gen-


eral embraced court actions in general throughout the United States; but they were addressed mainly to judicial officers in the Southern States, and North Carolina was the subject of close attention. It was pointed out that the expenses in that State were double that of the Federal Courts of Ohio and compared unfavorably with

100. House Miscellaneous Documents, no. 140, 42 Cong. 2 Sess., III.

As a result of these vigorous communications from Attorney General Williams, court costs in North Carolina were reduced by $45,000 during 1873. Even so, it was not
enough for Attorney General Williams, who wrote Judge Dick:

"In looking over the reports from your District, it would seem that a large number of cases are prosecuted merely with a view to enlarging the fees of the officers of the Courts... I think many cases are commenced unnecessarily, the prosecution of which would only tend to involve the Government in expense and not subserve the ends of justice... Something must be done whereby this great expenditure in your District must cease."

But, instead of decreasing, court costs mounted; the Attorney General informed Congress that costs in the Western District alone were over $114,000 in 1874. By 1876, however, court costs for all the Federal Courts in North Carolina had decreased to approximately $95,500, and the total appropriation estimated for them for 1877 was $74,000. It seemed clear to Washington that the
expenses of North Carolina's Federal Courts ran far beyond what was necessary and that the expenses could not be justified. However, these expenses were not nearly as much as they have been estimated. And, of course, an increase was inevitable when an additional district was created in 1872.

But Judge Dick had a story of his own to tell—one which justified, to his mind at least, the rising cost of Federal justice. Pointing to the geographical size of his district (the Western), with its twenty-five thousand square miles of territory, he claimed that between seven and eight hundred cases annually came up in his court. These cases, he asserted, covered some pretty desperate offenders, and they involved heavy costs. He had sent eleven counterfeiters and one Ku Klux Klan member to Albany during 1874; he had disposed of over four hundred cases at regular term at Asheville, and found it necessary to hold a special term at Hendersonville, where he disposed of one hundred fifty cases in twelve days the same year. Moreover, the claims of the Cherokee Indians against pre-war Indian agents had come before his court in 1874, with the approval of the Department of the Interior.
And then there were the violators of internal revenue laws whose name was legion. The Comptroller of Internal Revenue had urged rigid enforcement of the laws; this had had a salutary effect. Dick could not enforce these instructions and save expenses, too. Even so, he could not reach all cases, despite his strenuous efforts. But, to satisfy the demands for economy, he would save every cent: he would compound petty offenders upon payment of costs, would punish only hardened offenders and men guilty of felony, and would close court when the funds were exhausted! Already he had continued the bulk of the cases to the fall term, 1875, which would save witness costs in the spring, and he had instructed the United States commissioners not to issue any internal revenue warrants except upon affidavit of persons who had personal knowledge of the facts deposed to and who were credible witnesses. Mild punishment, in his opinion, based upon his own experience, was to no avail: severe punishment only was efficacious in these internal revenue cases. But, although the total number of cases coming before the court when these cases were pressed to the limit constituted less than one-third of the law violators, he would return to the old procedure of rendering mild sentences in order to save expense -- against his better judgment. He welcomed a Congressional investigation; he would like Congress to know the extent of crime, and then,
perhaps, it would furnish the courts with adequate means to enforce the law. Such was Judge Dick's defense.


There was a good deal of truth in it, for the Attorney General's Reports indicate that there were seven to eight hundred cases in the Western District and that there were a large number of revenue cases. The Cherokee land case involved over fifty thousand acres of land and cost the Government at least fifteen thousand dollars. Never-


theless, the House Committee on Expenditures in the Department of Justice concluded that two districts in North Carolina were unnecessary, that the amount of business did not warrant them.

109. *House Reports*, no. 278, 43 Cong. 2 Sess., VII, 758. Despite this report, no change was made in the districts.

Judge Dick's emphasis upon the internal revenue laws indicated another activity of the Federal Courts that was seriously questioned. It has been claimed that indictments were found, for political purposes, against many Ku Klux in the western part of North Carolina in 1872 for violation of the internal revenue laws. On the other
hand, it is evident from the annual reports of the Attorneys General, that there were fewer internal revenue cases in 1873 than there were in 1871 and much fewer than in any year through 1876. It would be difficult to make

111. The figures, taken from the reports, are:

<table>
<thead>
<tr>
<th>Year</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Mol. pros.</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>1871</td>
<td>172</td>
<td>19</td>
<td>32</td>
<td>273</td>
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<tr>
<td>1872</td>
<td>150</td>
<td>29</td>
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<td>348</td>
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<td>1873</td>
<td>350</td>
<td>31</td>
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<td>436</td>
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<td>1874</td>
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<td>44</td>
<td>94</td>
<td>663</td>
</tr>
<tr>
<td>1875</td>
<td>320</td>
<td>80</td>
<td>167</td>
<td>557</td>
</tr>
<tr>
<td>1876</td>
<td>337</td>
<td>84</td>
<td>167</td>
<td>348</td>
</tr>
</tbody>
</table>

a case for political motive therein; the increase seems to be a matter of general policy. However, the United States internal revenue laws were heartily disliked in North Carolina. Of this feeling, District Judge Brooks testified:

"The enforcement of the internal revenue laws there is exceedingly obnoxious to a very large class of people; I reckon about as obnoxious as almost any law that has been enacted." 112

112. Senate Report, 272.

It was made evident in the form of resolutions passed almost yearly by the General Assembly, condemning the laws
and directing North Carolina's Senators and Representatives to work for their repeal. For example:

"Whereas, the practical workings of the Internal Revenue laws of the United States in their present form are prejudicial to the best interests of the people in many localities in this State; and whereas, the rigorous effort now being made by revenue officers to enforce these laws are creating much discontent and confusion among the people; and whereas, the enforcement of the laws is not only arousing prejudice among our citizens, but is absolutely alienating the hearts of the people from the government; itself. . . .

"Be it resolved &c." 113

113. Laws of North Carolina, 1873-1874, pp. 483-484. Resolution of December 2, 1873. Similar resolutions were passed in 1874 and 1875.

In 1873 and 1874, details of United States soldiers were required to assist in the arrest of illicit distillers. 114

114. H. C. Whitley to Attorney General Williams, November 24, 1873; H. C. Crosby (Chief Clerk War Department) to Attorney General Williams, October 27, 1874. Original ms. in Department of Justice Archives.

And Judge Dick's charge to the jury not to be influenced by any feelings pro or con upon the revenue laws in making up a verdict in the case of a revenue officer accused of murder still further indicates the feeling:

"The revenue laws have been the subject of much exciting discussion. Some persons advocate their rigorous enforcement, while others denounce such laws as unjust, inexpedient, and oppressive. All persons engaged in the execution of these laws have their warm friends and bitter opponents." 115

The truth is that opposition to the revenue laws and their enforcement was prevalent throughout the Reconstruction period. Judge Dick's emphasis upon them throws light on one of the fundamental problems of the Federal Courts.

A most important factor in the administration of justice by the Federal Courts lay in their method of selecting jurors. The system used by the courts from 1865 to 1872 was given in full in a communication from District Judge G. R. Brooks to Attorney General Williams—a communication so self-explanatory and valuable that it is worth quoting in full.

"I was appointed District Judge in August 1865—I adopted the rules of my predecessor (with no material alterations) in regard to selection and summoning of jurors—These in substance were as follows:

*For the District Courts which were held in April and October at Edenton, Newbern and Wilmington, Five or Six* Counties were selected of those most convenient to the place for holding the Court. A box prepared for each of the Counties so designated, Each box prepared with two apartments, The County Officers (usually the Shff or Clerk) were requested to furnish a list of Citizens from 100 to 150 in number who were known to possess the qualifications *Stated*, These related to their physical and mental capacity mainly—

"In some instances the Officers who were so requested to furnish lists flatly refused with offensive expressions both as to the Government and the Court, Lists were however with great difficulty procured and the jurors were drawn from these boxes..."

"The Circuit Court for the District was held only at Raleigh—and the same rules were observed in obtaining jurors from that Court—except that they were drawn from a larger number of Counties."
"These rules were strictly conformed to until after June Term 1867. At that time the Chief Justice sat with me. A rule was adopted requiring that the
drawing or summoning of jurors, for the U. S. Courts, no discrimination should be made on account of color.
"From quite a number of the Counties and after
repeated efforts the Clerks could obtain no names of any
Colored Citizens. To the requests of the Clerks made
by direction of the Courts, the County Officers would
reply that there were no colored persons in their
Counties or elsewhere, fit to serve as jurors.
"Finding so much difficulty in procuring names
of persons from the Counties and so many in the lists
furnished who were not of the qualification required,
the rules thencefore existing were rescinded at June
Term 1869, or the next Nov [Embe] r Term and the Clerk
directed to issue after each Term a venire extensible
to the next term directing the Marshall to summon from
the body of the District a given number of good and
lawful men to serve as jurors.&c. observed
"This has been the mode/since that time."116

116. December 18, 1872, Original mss. in Department
of Justice Archives.

This extremely interesting document indicated how the
courts met the problem of selecting jurors in the face of
hostile criticism and the later task of securing any
colored jurors. The Rough Minutes of the Federal District
and Circuit Courts of North Carolina in the Department
of Justice Archives reveal that there were several col-
ored men on both grand and petit juries from 1867 to
1870; beyond 1870 they do not indicate which jurors were
white and which ones colored. And the following testimony
was given by Judge Brooks before the Select Committee of
the Senate in February, 1871:
"I have had no cause to complain of the character of the juries, until the last circuit court in Raleigh; then my associate, Judge Bond, complained seriously. 

* * * * * * * * * * * * * * * * * *

"Judge Bond remarked two or three times, during the term, that he thought many of them were incompetent; and we consulted, and almost came to the conclusion that we would discharge the panel and order a new one. The most of them were not intelligent men."

117. Senate Report, 283.

After 1870, the chief item of interest to note concerning the selection of juries was the care exercised to secure juries that would convict — a matter which has been already noticed in the case of the Shotwell trial. Another most interesting communication upon this subject was made by Judge Dick to Attorney General Williams. This, too, is worthy of full quotation, for its frankness and for Judge Dick's analysis of the weakness of the system of permitting the marshal to select jurors.

"I have just received your letter of the 2d inst. enquiring as to the manner of selecting juries of the U. S. Courts in this District; — and requesting suggestions from me as to any additional legislation that may be necessary on the subject.

"Under a rule of Court made in the Circuit Court of the former District of North Carolina, I carried writs of venire facias to be issued to the Marshal to select jurors from the body of the District for the Courts which I have just held. — This rule has been the subject of some complaints, but it was necessary under the peculiar condition of things in this State.

"If jurors had not been selected with some care it would have been impossible to secure convictions of guilty persons indicted under the Enforcement Acts, and Revenue Laws."
"In my order requiring writs of venire facias to issue to the Marshal he was directed to summon good and honest men belonging to both political parties. — Even with this precaution there were some jurors returned, who in plain cases prevented the conviction of guilty defendants.

I am glad that you have this subject under consideration as the Marshal ought not to be allowed the discretion of selecting jurors, — and I have determined to make a rule about the matter conforming as near as possible to the manner of selecting juries in the State Courts. It will not do to take the jury lists as formed in the various Counties for we would then get many men who from political prejudices would not enforce the laws of the United States.

"I think a jury list for such Court should be made up by the District Judge, Clerk and Marshal and the names be drawn by two, by the Clerk in the presence of the Judge to form a panel for the succeeding term. The jury list should consist of the most intelligent and honest men who live in Counties within a distance of fifty miles from the place where the Court is held. This will reduce the expenses of jurors and secure all the ends of justice.

* * * * * * * * * * * * * * * * * *

"Political discussions & associations have produced much prejudice against the Enforcement Acts and Revenue laws, and they cannot be fully enforced in the Courts unless the juries consist of men who are not influenced by political prejudices and secret political obligations. Unprejudiced and honest men can be found in both parties who will make grand jurors and they can be selected in the manner above mentioned."

118. December 5, 1872. Original ms. in Department of Justice Archives.

The best opinion upon the subject agreed that power to select juries ought not to continue in the hands of the marshal; Attorney General Williams endeavored to secure legislation whereby jury lists would be drawn up by commissioners designated by the Federal Courts, from which lists the names would be drawn by lot according to the
standard practice, but he secured no results. Meantime,

119. House Executive Documents, no. 6, 43 Cong. 1 Sess., VIII, 17.

the General Assembly of North Carolina protested against
the manner of selecting jurors — to no avail. In his

120. House Miscellaneous Documents, no. 54, 42 Cong. 3 Sess., II.

report for 1875, the Attorney General objected to the
practice of permitting the marshal to draw up the lists;
it was too productive of favoritism everywhere. The same
objection was reiterated in the report of 1877, indicating
that no changes were produced — at least in the Recon-

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131. House Executive Documents, no. 14, 44 Cong. 1 Sess., IX, 7; no. 7, 45 Cong. 2 Sess., X., 798.

Toward the close of Reconstruction, Congress
passed the Second Civil Rights Act, with its provisions
for social equality, as a gesture to Senator Sumner. It
may be said that this act was not enforced at all in the
North Carolina Federal Courts, and with good reason. The
best example of the attitude of the courts is seen in
Judge Dick's charge to the Federal Grand Jury of his dis-

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131. House Executive Documents, no. 14, 44 Cong. 1 Sess., IX, 7; no. 7, 45 Cong. 2 Sess., X., 798.
Carolina secured ample protection of equal rights to all persons without respect to color in all inns and public conveyances, he held that the State merely required innkeepers and common carriers to furnish accommodations to colored men, equal to those provided for white men, when the same price was paid. Separate rooms and accommodations and separate coaches on trains worked no hardship; rather, they protected each race from the unwelcome intrusion of the other. Finally:

Every man has a natural and inherent right of selecting his own associates, and this natural right cannot be properly regulated by legislative action, but must always be under the control of individual taste and inclination. There have always been different circles in society, and this condition of things will ever remain among men. . . . The hope and expectation that there will ever be a nation on earth in which all men will associate upon terms of social equality is a wild dream of fanaticism, which can never be realized. It certainly cannot be a matter of surprise that among the white people of the Southern states there should be strong opposition to according equal social privileges to the colored race. The colored men were formerly slaves, and the condition of servitude rendered them greatly wanting in education, refinement and social culture. White men often came in contact with colored men, but the association was that of superiors with inferiors. Before the war, white men who associated with colored men on terms of social equality became degraded in the eyes of the community. These social prejudices naturally resulted from the condition of things and are too deeply implanted to be eradicated by any legislation. Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious."

Although he refused to discuss the constitutionality of the
Second Civil Rights Act, it is clear that no true bills were found by the Federal Grand Jury!


The Federal Courts in North Carolina played a relatively minor role in the first years of Reconstruction. The Freedmen's Bureau and the military courts were the dominant agencies from 1865 to 1868, despite the passage of the First Civil Rights Act, under which but one case was transferred, and it was never tried. The character of the former depended upon the character of its individual agents, some good, some bad; its reputation has been poor in the minds of most people. The workings of the latter have been summarized in detail elsewhere. The Circuit and District Courts replaced the Freedmen's Bureau and the military courts as the dominant Federal agencies in the administration of justice after the former two had passed away by the close of 1868. Aside from their activities in the "Kirk-Holden" war, in which Judge Brooks received high praise for requiring Kirk to obey the writ of habeas corpus, while Judge Bond received considerable odium for permitting Kirk and his lieutenant, Bergen, to flee the State before they could be tried by State process, these courts exercised their strongest influence under
the Enforcement Acts and in the administration of the internal revenue laws. The latter earned them the anti-
pathy of the people, who thoroughly disliked the laws; through the former, the motivating force of which was undoubtedly mainly political, the courts became the in-
strument of politics. However, the political motive has been somewhat overemphasized, since most of the convictions came at a time when political need had little to do with convictions, and the order to *nol. pros.* was made in the year of Congressional elections. The courts took care that the Negro was permitted the privi-
lege of jury duty; and marshals picked juries sure to convict in internal revenue and Enforcement cases. But when it came to enforcing social equality among the races, the line was drawn. Not even a Federal Court would go that far.
VII

CONCLUSION

In the administration of justice — that is to say, in the application of the laws by the judiciary — in North Carolina during the period of Reconstruction, problems and difficulties that were vital to every phase of life appeared. A society prostrated economically by war and its aftermath sought desperately to secure to its debt-ridden citizenry the means of earning a living and time within which to pay their obligations; it sought to provide economic security to those who, under pre-war laws, would have found themselves in a debtor's prison, but who were now regarded as honest, if insolvent men, suffering as a result of conditions over which they had no control. The remedies proposed were not the work of any one class or group of men; they found support in all classes, for, as Governor Holden observed: "The losses incurred by the rebellion are not confined to particular cases. They were general, affecting the whole people of the State in every walk of society." Conservatives, military men, and Republicans alike — all proposed almost identical remedies for the solution of this economic problem. This same society found itself faced with a tremendous social problem occasioned by emancipation and accentuated
by war feeling and racial prejudice. The remedies proposed were far more diverse than in the case of economic difficulties; the differences of opinion resulted in political estrangement and bitterness. Finally, political issues, the result of diverse and factional opinions upon the proper mode of reconstruction, complicated and confused the situation; partisan feeling marked the entire period. These problems were held in abeyance during the first months of presidential reconstruction, but they broke in full force in the early months of 1866.

The judiciary before whom these problems, together with the enforcement of law and order, were presented was, at first, a composite of civil and military tribunals. Only after months of protracted negotiation over the issue of racial equality in the State courts, ending with the capitulation of the civil government, the military, who possessed full jurisdiction over all cases at the close of the War, gradually yielded jurisdiction over both civil and criminal cases to the civil courts, until, in 1866, the latter obtained almost complete possession of the administration of justice, only to lose it by virtue of the Reconstruction Acts of Congress. However, the State courts operated freely during 1867-1868, although subject to military orders, a fact which irritated the judges and resulted in the resignation of two. Matters of contro-
versy between civil and military officers over court proceedings and punishments for crime arose in 1866; the civil authorities yielded on the issue of Negro testimony in the courts, the military authorities lost on the whipping controversy, while a deadlock or draw was reached in other matters. In 1867, the two authorities engaged in bitter controversy over such questions as these: the limitation of basic qualification for jury duty to the privilege of voting (subject to intellectual and moral fitness), military removals from office, military interference in cases involving Negroes tried before civil courts, trial of civilians before military commission, "persecution" of Union men, and the establishment of provost courts to try civil cases. In these matters of controversy, the army unfortunately accepted the worst samples of its action (chosen by the civil authorities and published throughout the State) as the typical examples for debate; though they were wrong in these particular cases, the military commanders maintained their positions. But, when the storm of State politics in 1868 distracted attention from these burning issues, and when an accommodation was reached in the appointment of Judge Gilley, better feelings replaced those of bitterness, and cooperation replaced contention, although General Canby refused to retract his stand.
On the whole, the judicial proceedings and judgments rendered by military commissions were unquestionably marked by fairness, except in cases involving offenses against Negroes by whites. In such matters, a few noted cases of marked unfairness were published throughout the State as typical examples of military justice, with the result that military courts received a bad name. This was the natural reaction to continued army control. But the military courts, in the relatively few cases which they handled, endeavored to mete out justice, and their punishment of soldiers accused of crime of a civil nature could not be decried, although some examples of remissness occurred. The trouble lay not so much in the military courts as it did in civilian objection to military control, a fact which can well be appreciated. The work of the Freedmen's Bureau, on the other hand, was more open to question. Much depended upon the character of individual officers and agents; the poor ones received the most publicity. The final estimate of its work in North Carolina, however, will not be made until the large amount of manuscript material in the Department of Justice Archives, hitherto unworked, can be examined. The bureau did decide several thousand cases of petty offenses and investigated and reported grave cases of crime against Negroes for trial by military commission.
During the years of presidential and congressional reconstruction, the civil courts of the State handled few cases involving important economic questions, beyond laying down some fundamental rules for the adjudication of contracts made under the Confederacy and for guidance in cases implicating persons who acted in a fiduciary capacity in North Carolina during the Civil War. Most economic questions were stayed by State laws and military orders, the latter having the legal effect of an injunction. Although the courts refused to concede that the Confiscation Act of July 17, 1862, and the Emancipation Proclamation of January 1, 1863, affected slavery as an institution, nevertheless, in cases of social import, wherein the interests of Negroes were involved, they definitely tried to secure justice to the blacks, and, in cases of doubt, inclined to favor their interests. It can, of course, be pointed out that the presence of the Freedmen's Bureau, the military courts, and the Civil Rights Act guaranteed justice in case of failure and that the legislation securing Negroes complete equality with whites before the courts was granted with reluctance; yet the evidence indicates that justice was rendered voluntarily by the judges. The only instances in which the charge of injustice might be levied would be the use of whipping as punishment for crime and
the opposition to Negroes in the jury box. However, Judge Fowle decided that colored freeholders were so eligible. And as for whipping, it was meted out to whites and blacks alike; it had been the customary form of punishment; and the order forbidding whipping caused great inconvenience, inasmuch as jails were insecure and were not heated during winter. However, it may be conceded that the military orders upon these points represented a social advance.

With the termination of the authority of the Second Military District and the inauguration of the new State Government in 1868 under the auspices of the Reconstruction Acts, several very important changes were made in judicial structure and procedure by the Constitution of 1868. The most important of these, the abolition of the distinction between actions of law and suits in equity, followed as it was by the adoption of a code of civil procedure based upon that of the State of New York, constituted a frank acceptance of a commercial and industrial point of view which, although it met with serious objections from a bar trained under the time-honored procedure, has since been generally accepted. Other changes — the abolition of the county courts and the constitutional provision making judges elective —
though similarly opposed, have likewise been accepted. The justice of the peace was bereft of much of his dignity and powers, but few worried over this loss after observing the quality of many of the justices appointed and elected soon afterward. Finally, the provisions limiting the number of crimes punishable by death to four and the types of punishment to fine, imprisonment, removal from office, and death were undoubted social advances. There can be no question that the Constitution of 1868 embodied many excellent features.

The State judiciary elected under this new government was, on the whole, competent, although one of the superior judges was evidently thoroughly incompetent, and two others were morally unfit for office. With these exceptions, the superior judges were reliable, if not brilliant, and some of them made excellent records on the bench. The Supreme Court was a very able body of diverse economic and social outlook. The justices of the peace, however, both elective and appointive in 1868 and 1869, could hardly be regarded with approval. A very large number were obviously unqualified, and often those that were elected failed to qualify for one reason or another, and thus left their districts with no magistrates at all. It must be remembered, however, that semi-illiterate justices were not unusual before the War in
North Carolina and that lack of learning may not necessarily disqualify a man from service as a magistrate. Nevertheless, in view of the quality of those selected in 1868-1869, one can only say that it was a good thing for the State that the office of justice of the peace was bereft of much of its dignity.

To this State judiciary fell the work of solving the economic and social problems left untouched or barely touched by the judges of 1865 to 1868. In declaring the stay laws unconstitutional, the Supreme Court rendered a most far-reaching decision and opened the way to judicial application of the laws relating to the adjudication of contracts made under the Confederacy. In this ruling, the Court indicated its moderate economic outlook. To counteract this semi-conservative decision, it declared valid the retrospective features of the homestead exemption, only to be overruled at the close of the Reconstruction period by the Supreme Court of the United States. And the decisions of the State and the United States Courts upon the subject of contracts made under the Confederacy were of great significance. It was of vital importance to people to know whether or not those contracts were valid; it was almost as important to know just which ones could stand in the courts. Also, persons who had accepted Confederate currency in payment
of debt while acting as fiduciaries during the Civil War appreciated knowing whether or not their actions were valid: the decision of Emerson v. Mallett settled this question. Difficulties of long standing were settled by certain fundamental rules governing contracts: only original contracts directly in aid of the Confederacy were invalid; the valid ones were payable in their value in gold at the time of making, which value was to be translated into existent United States currency, unless the contract specified currency, in which case the legislative scale was to be applied. All these were important economic as well as constitutional decisions.

Obviously, the work of the courts in handling criminal cases was of vital social significance. The fact that there was a great deal of crime in the period immediately following the War is not surprising, for war always brings a backwash. What is interesting to the person concerned with social welfare is the extent of crime throughout the period and the diversity of ideas on handling it. Men like Governor Worth, who had no objection to a penitentiary, per se, nevertheless objected strenuously to military interference with the age-old whipping post and felt that a good lashing would do more good than a prison sentence in the prevention of larceny;
also, it would be less costly to the State. Conservative whites, reared with that outlook, agreed heartily with this opinion. Yet, a committee of a Conservative General Assembly felt justified in saying that whipping would not be sufficiently efficacious to halt the crime wave that followed the Civil War and that a penitentiary where prisoners could be trained in some craft would be efficacious and beneficial, as the convicts would not only learn citizenship but would help pay for the institution as well. This was an advanced social outlook for members of a Conservative legislature. Punishment for crime is necessarily an essential element in the work of the courts and the proper administration of justice. Definite progress was made in limiting the types of punishment, in circumscribing the number of crimes punishable by death, and in building a penitentiary. Yet, even after the abolition of whipping and other like punishments and the subsequent erection of a penitentiary, the rate of crime continued as before. Some of this could be laid to the door of the Union Leagues and the Ku Klux Klan, organizations which intensified and colored crime with political outrages. Because of the political use made of such outrages, their exact extent is difficult to determine. May not the political "outrages" on both sides — barn burnings, murder, whippings, theft, burglary,
and rape -- have been exaggerated? For it is highly interesting to know that the criminal dockets were as crowded in 1876-1877 as they were in 1866, if not more so. Apparently, the problem of crime had not been solved.

The State courts often entered into the political arena and rendered decisions in the interests of the political party favored by the judges. For this reason, they were severely criticized by members of the Conservative party. The action of Judge Pearson in refusing to execute the writ of habeas corpus against Kirk, the ruling of the Supreme Court in the "Protest of the Bar" case, the rulings of superior judges in similar cases, and the decisions of the Supreme Court upon the term of office of superintendent of public instruction and that of superior judges were cases of this description. On the other hand, the Supreme Court saved the State at least $10,000,0000 in railroad bonds and a very large sum in the form of taxation by its decisions in the railroad cases. Its course was not entirely political.

Finally, the Federal Courts, although they played a relatively minor rôle in the early years of Reconstruction, assumed a most important one after 1870. Most of this increased importance came through the Enforcement Acts in which Congress had clearly granted them powers beyond its constitutional right. These acts were
passed for a political purpose; to keep the Republican party in power. Undoubtedly the courts administered the act with a similar purpose in view. However, the facts that the prosecutions continued after the election of 1872 and that the order to nol. pros. was made in 1874 need more emphasis. The activity of the courts in the internal revenue cases earned them as much antipathy as their work in the Enforcement cases; indeed, they have been charged with having exercised their jurisdiction in these cases with a view to political intimidation. It cannot, however, be held that this was the policy of the courts in these cases, unless one contends that it was a settled policy from 1870-1876, a charge which has not been made. The truth seems to be that people disliked paying internal revenue and hated revenue officers — after all, no new thing in American history.

The Federal marshal picked juries with a view to securing conviction, a course which met with much criticism and disfavor, but which was not changed during the period. But however much the Federal Courts acted against the tide of public sentiment in these matters, they endeavored to uphold the hands of the State Supreme Court in its battle against the United States Supreme
Court's decision upon the homestead by attempting to apply the exemption in bankruptcy cases. Judge Bond, however, in Circuit Court, overruled this course. And when the Second Civil Rights Act was passed, although the Federal Courts had endeavored to enable colored men to enjoy the privilege of jury duty within their domain, Judge Dick's charge to the jury clearly indicated their lack of sympathy with this act.

The workings of the courts — State, Federal, and Military — in the period of Reconstruction covered a wide range of problems: economic, social, and political. In their decisions and in their interpretations, they brought the laws, both State and National (including military orders), directly to the people. Therefore, their course, clothed in the language of legal terminology, was most important to the history of North Carolina during the period of Reconstruction — for the interpretation and application of the law in concrete cases has more bearing upon the people than the law itself.
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