

1960

## The Carolina Law Journal of 1830

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### Recommended Citation

Sarah Leverette, *The Carolina Law Journal of 1830*, 12 S.C.L.R. 193. (1960).

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## THE CAROLINA LAW JOURNAL OF 1830

SARAH LEVERETTE\*

Today the "blue-back" of the *South Carolina Law Quarterly* is a familiar sight in the libraries of the Bar of this state. Its regular appearance along with occasional special issues has added greatly to the rather sparse collection of local materials available to the South Carolina lawyer.

Less familiar to the contemporary bar, however, is a very interesting but short-lived publication of the 1830's, the *Carolina Law Journal*. The circumstances surrounding its birth and the reason for its early demise are not easily determined. Inquiries on the local level as well as through the Library of Congress have revealed very little. One reference was located in the sesquicentennial publication, *Columbia, Capital City of South Carolina, 1786-1936*, ed. by Helen Kohn Hennig, R. L. Bryan Company, 1936, p. 167:

What is believed to be the only law journal ever published in this state, and certainly one of the earliest to appear in the entire country, was edited by Abram Blanding and D. J. McCord. The *Journal* was not a financial success, and ran for only one year, 1831.

Perhaps, this brief review will serve to accomplish two purposes — to bring to light an additional bit of the legal lore of our state and, perhaps, to find an historian who can add to our meager knowledge concerning this publication.

The *Carolina Law Journal* edited by A. Blanding and D. J. McCord and printed by "The Times and Gazette" office of Columbia was published in four issues dating from 1830 to 1831. The last page of the last issue carries the following note:

Note. — This number completes the first volume of the Law Journal. For reasons, which it is unnecessary to state, the work will be discontinued.

Those who have not contributed the amount of their subscription will see the propriety of remitting the same immediately, that the business relating to the Law Journal may be brought to a close as early as possible.

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Though the *Journal* carries no table of contents, the very brief index reveals an infinite variety of legal information, from a digest of the Acts of Assembly from 1813 to 1830, to an unsigned article on the subject of "Denization."

In this day of controversy over the jury system in America it is interesting to note that 129 years ago the first issue of the *Journal* carried an article on the rights and powers of juries, a discussion from the *Westminster Review*, the object of which "is to prove that Juries have, and always had, and of right ought to have, the power of deciding, incidentally, questions of law [in all criminal cases, or cases involving constitutional questions] — or in other words, to determine the whole issue submitted to them, by pronouncing the general verdict, and that that power imposes upon them the obligation of so doing." Quoting further from the *Westminster* article:

. . . Our answer is, that we consider the right of Juries to give a general verdict, and to decide upon the whole question of the guilt or innocence of those who are tried before them, to be absolutely essential, not merely to the liberty of the press, but to the general existence of constitutional freedom in this country. If this right be wrested from them, and transferred to the Judges, the protection of trial by Jury, in all cases of contest between the crown and the subject, would, in our opinion, be destroyed; and though we undoubtedly think that better securities might be provided for the due administration of justice than can be obtained from the Jury system, in any shape, yet it is of the highest importance that the securities which such a system undoubtedly may and does offer to that all-important end, should not be swept away by the arbitrary determination of our Judges, aided and assisted by the misrepresentation of despotism-advocating scribes.

Such would indicate that the judge vs. jury question is not a new one.

More incredible for its modern turn is the article reprinted from the *Charleston Mercury* of October 20, 1823 referring to and quoting the *Columbia Telescope* on the subject of "Coloured Marriages". The *Telescope* writer severely criticizes the opinion of Judge Johnson (though no first name is given in the article or the case, O'Neill's Bench and Bar confirms identification of William Johnson, United States Supreme

Court Justice) in the case of *Ellison v. Deliesseline* (Fed. Cas. 4,366, Circuit Court, District of South Carolina, August 1823) in which a state law authorizing the seizure and imprisonment of free negroes brought into the state on board any foreign vessel is held unconstitutional. He states:

. . . [T]he Judge's opinions are greatly to be regretted. Everybody knows that a suspicion, from political motives, has been industriously propagated that the Supreme Court of the United States has gradually been encroaching on state rights. A Judge of that Court should be particularly, anxiously cautious not to add weight to that suspicion. Has Judge Johnson been so? Has he not given force and currency to it?

Following these timely discussions are a subjoined opinion and order of Chancellor William Harper in the case of *Reynolds v. Scarborough and Brewer* on the question of dealings between trustee and cestui que trust "because some of the points are new, and all of them are questions of interest to the community and the Profession." The subject of adverse possession is "very fully considered" in an argument of Chancellor Harper before his promotion to the Equity Bench in the case of *Willison and Watkins* and in the opinion of the Supreme Court of the United States in their "late decision of the same case".

In view of the omission of dates in the next case it must be placed by circumstantial evidence. The editors referring to it state:

As the case of *Henderson v. Laurens* has never been published except in a newspaper, and is one which the regular course of reporting will not embrace, it is thought proper to give it a more permanent form, by inserting it in this journal.

The case referred to sets out in detail the opinion of Chancellor DeSaussure on the subject of compound interest and arose out of the same subject matter as the case of that name reported in 2 DeSaussure 170 (1802) — opinion of Chancellor Rutledge. Both cases involved settlement of the estate of Henry Laurens.

Though the instant case has no date nor is there certainty as to the court from which it came, it seems from a review of the equity court system of that time that it was heard by Chancellor DeSaussure sitting as a single district equity

judge. Apparently, reports of cases from these courts were not published unless the case went up on appeal to the full bench of judges in equity and often not even then.

This issue also contains a "tribute of respect to the memory of Judge Nott (Court of Appeals) . . . on behalf of the Bar of Columbia" made by Col. Blanding (most likely Col. Abram Blanding, son-in-law of Chancellor DeSaussure and one of the editors of this Journal). The tribute included a resolution on the part of the members of the Bar to "wear the usual symbol of mourning for thirty days". Reply to this tribute was made by Judge David Johnson of the Court.

The recent American Bar Association convention held in England, the dedication of the memorial to Magna Carta, and the return visit of the English Bar planned for 1960, all attest to the awareness of the contemporary American Bar of the great debt owed to that country for our heritage, the common law. However, by comparison with the lawyer and the legal system of the 1830's, the profession of today is somewhat removed from this source by time and adaptation of the system to an American pattern. In the early 19th century, the fact that the legal profession in this country was still closely linked with the English as well as civil systems is indicated by the interest exhibited in continental and English law and lawyers.

The *Carolina Law Journal*, in its initial issue, carried a reprint of an article entitled "Sir Edward Coke" and "Published under the Superintendence of the Society for the Diffusion of Useful Knowledge" in London in 1828. Though this writing is to some extent a discourse upon the character and works of Lord Coke, it is also concerned with legal education. Here again a subject of much contemporary interest was discussed with keen perception 129 years ago — and oddly enough the same conclusion is reached concerning pre-law training that is being advocated today. Though couched in the language and terminology of the day, the following statement seems to wholly espouse the cause of the "broad cultural base" as a prerequisite to legal education:

We do not believe that any branch of human knowledge, requires in a higher degree a good preparatory education particularly in the classics, history, moral philosophy, logic, metaphysics, and a familiar acquaintance with the language and thoughts of the best English writers of poetry and prose.

The second issue of the *Journal* opens with a biographical sketch of the "celebrated Chancellor D'Aguesseau". The sketch reveals Henri Francois D'Aguesseau, not only as one of the most learned and scholarly men of France in the late 17th and early 18th centuries, but indicates his high rank as a reformer of French jurisprudence.

One or two cases appearing in the *Journal* have been previously noted, one of which was a so-called "unreported case" (*Henderson v. Laurens*). Of the numerous other case reports appearing throughout the volume, we will discuss only those which are unreported (the reported ones may be found in the South Carolina Reports of that period) and those which for some other reason would be of interest.

Although the case of *Williamson v. Farrow* appears in the reported cases, it is interesting to note that the *Journal* version of the facts is worded somewhat differently than that appearing in the reports. This case involved a question of computation of time as set out in a court order calling for resale of property previously sold under mortgage foreclosure. Not appearing in the reports, however, is the argument of Mr. Blanding upon a point not covered by the Court in its opinion. The somewhat lengthy argument is introduced by the editors as follows:

The Court of Appeals having given no opinion on the second ground submitted by the defendants to sustain the nonsuit; at the request of several members of the profession, we publish the argument of Mr. Blanding on that point.

The case of *Farnandis v. Henderson* was cited only this year in a student note written for publication in the *South Carolina Law Quarterly*. This case, reported only in the *Carolina Law Journal*, involved the effect of religious opinions on the competency of testimony. The opinion of Chancellor DeSausure apparently sitting as a single district equity judge in Union District was affirmed on appeal. The witness involved held a belief in a Supreme Being, in Jesus Christ and in the Holy Scriptures and varied from the norm only in that he believed that rewards and punishment for our deeds would take place in this world and not the hereafter. Chancellor DeSausure resolves the question of competency herein as follows:

. . . The real question, however, is, whether the belief of God and his Providence, and that he is the avenger of

falsehood, though the vengeance is confined to punishment, in this world, does not give this tie, this hold on the conscience which is sought for? In my judgment, it does, so far at least as to impose on the Court an obligation to forbear its interference with the civil rights of the man, which would be violated by excluding him from being a witness.

A discourse upon the "Liability of Corporators" is contained in the circuit decree of Chancellor DeSaussure and the appeal decree of Judge David Johnson (dissent by Colcock, C. J.) in the case of *Hume v. Winyaw & Wando Canal Co.* (not found in the table of reported cases). Under the heading of "Commandite, or Partnerships of Limited Responsibility" the editors propose the enactment of legislation providing for such partnerships prefacing the proposed bill with these words in part:

It will be seen that according to the decision in *Hume vs. The Winyaw and Wando Canal Company*, published in this number, that corporations are wholly unsuited to the prosecution of commercial business, and it is most evident, that joint stock companies should never be chartered by the Legislature, except for the purpose of effecting some work of great public utility, which is too extensive for the enterprise of a single individual. Where private interest alone is concerned and joint efforts are necessary to effect the object, those efforts should be directed under a personal responsibility, which will afford security to all, who deal with them. The common law has regarded that security, attainable only by having the liability of the partnership funds, and the personal and individual liability to all the partners. The extent of this rule, we think, has been unfavorable to commerce, and has prevented much capital from being vested in trade. There are many persons, who have surplus funds, which they would be willing to put into trade, with a prudent partner, but for the circumstance, that, however small their interest in a copartnership may be, their whole private fortunes are liable to satisfy the copartnership debts in case of misfortune. A medium between the utter responsibility claimed by corporators, and the unlimited liability of copartners is certainly desirable, provided it can be obtained without introducing fraud and ruinous speculations; and in case those who credit such a concern

can do it with security and with ordinary diligence, may be able to ascertain the extent of the security they have for the payment of their demands.—This, it is believed, can be obtained by the establishment of copartnerships of limited responsibility, or what the French call *commandite*.

Thus there seemed to be no hesitancy on the part of the Bar of this period not only to criticize existing legislation or lack of it but to submit proposed remedies for such situations. This is further borne out by articles pointing out the imperfection of the Registry Acts, attacking the state of the law as to a husband's liability for the debts of his wife and suggesting remedial legislative measures for both:

We believe that South Carolina is the only country, among civilized nations, where at the present time, marriage is regarded as perfectly indissoluble . . . .

The endurance of partial suffering, from incompatibility of tempers, or vicious habits, among married people, is an evil vastly less, in our opinion, than that which arises in other countries, from the facility with which divorces are granted.

Thus, is reflected an attitude upon this subject which prevailed in South Carolina law until the 1949 amendment of the State Constitution permitting divorce for the first time, and this begins in the January 1831 issue of the *Journal* a discussion of the effect of foreign divorces on South Carolina marriage. So that long before the courts entertained either a *Haddock* or a *Williams* on this point, it was being resolved in South Carolina in the negative:

All these questions will be settled, when our Judges, following those of England, shall declare, *that a marriage solemnized in South Carolina, is indissoluble by the sentence of any earthly tribunal, foreign or domestic*. And we have every confidence, that when the question comes before them such will be their judgment.

Compelled by these observations the editors include the Consistory Reports version of the case of *Dalrymple v. Dalrymple* embodying the lengthy opinion of Sir William Scott upon the subject of "The validity of a *Scotch marriage, per verba de præsenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland, than as quartered with his regiment in that country."



Apparently not of the most constant turn of mind the English "gentleman" upon his return to England made a subsequent marriage. The court, however, seemed inclined to force constancy upon the "gentleman" and the first marriage in Scotland was held valid in England.

Attesting further to the professional interest of the time in continental legal systems, the *Journal* in the issue of October 1830 published a rather scholarly article from the *Foreign Quarterly Review* of January 1829 entitled "Meyer's Work on the Spirit, Origin and Progress of the Judicial Institutions of the Principal Countries of Europe" stating with reference to the work:

It was written with a view to the state of things in England; and the reader will, therefore, find some views which we would not consider perfectly orthodox on this side of the Atlantic: yet, on the whole it contains so much matter that is applicable to our own country, that we have laid it before our readers; few of whom have an opportunity of consulting the original or the English view of it.

The final issue of this publication carries an article the preface to which would seem to indicate (as have certain other comments) that the *Journal* was not intended wholly for professional consumption but was designed to enlighten the "general reader" as well. The editorial introduction to the republication of "Huberus, de Conflictu Legum" after commenting upon the increasing variety of legislative enactments and judicial decisions among our several (24) states and the resulting conflict of laws adds this statement — "The profession have access to the translation in 3 Dallas Rep. 370 but the general reader has not the same advantage. The reporter is only found on the shelf of the lawyer." To digest such esoteric fare it would seem that the interest and intellectual level of the general reader of the 1830's was of a somewhat higher quality than that of today.

The *Carolina Law Journal* ended publication on a contemporary note with a lengthy journalistic account of the "Trial of the French Ministers". Unable to obtain a fully reliable account of this trial elsewhere "We have at last been compelled to take it from *Galignani's Messenger*. We are not certain that we have the whole evidence, but what we have, is so interesting, and communicates so much information in relation to the

late (July 1830) Revolution in France, that we are sure it must be acceptably received by our readers." From other comments it is evident that the oratory of the French Bar as contained in this account was in part reason for its inclusion.

The Revolution referred to was the uprising in 1830 which overthrew the Bourbon dynasty and restored the house of Orleans to the throne of France. The trial was that of Prince Polignac, churchman, royalist, confidant and representative of Charles X (then deposed) and other ex-ministers before the Court of Peers on December 15, 1830. Charged "with conspiring, through the means of the memorable ordinances of July, to overthrow the charter and liberties of the French people", each registered a protest against the competency of the Court to question their acts by command of the King in Council. Much of the detailed account of this trial is in the question and answer form of a transcript closing with the lengthy (52 pages) argument of M. de Martignac, counsel for the defense on behalf of Polignac and final pronouncement of the sentence: imprisonment for life. This account is highly recommended for its interesting detail and for the usual attraction that contemporary relation of historic events holds for every reader.

The review of this interesting journal proves that we are inclined to bury much of value by relegating volumes of this nature to a dusty grave. The literature of an era when thinking was a practised art and meditation was possible can fill a great need at any period. It behooves us to disinter such works at intervals that the product of deliberative thought and artistic expression be not lost.