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Keillboro N.C.  
Nov. 6<sup>th</sup> 1887.

Hon. Edwin G. Rouse:

My dear Judge:

While at

Person Court, in conversation with you upon the principle enunciated in McCulloch vs Benbow you very kindly invited me to place my ideas upon the subject, in writing and submit them to you. In accordance with that request the following pages have been hastily penned, and are respectfully submitted for your consideration:

I must, however, be allowed to preface them with a few words of apology. You are well aware that it is from no spirit of cavilling at the decision of the court that this is done, neither is it from any petty spirit of pique because the decision which was overruled was one of mine. There such the spirit by which an unassisted you cannot but be well aware that I would seek and secure another and a very different method of expressing my opinion as to the logicity and correctness of this decision of the court. It is true that I do blame myself most seriously for neglecting to set

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forth in detail the grounds of my decision in the court below. Although I may not flatter myself that, such a recital of my position would have changed or modified the views of any member of the court, yet I may say without assumption that, it would have presented a view of the case not referred to in either of the opinions, at any length, and, as I was informed with embarrassment in the argument. —

Neither is it with any feeling of disrespect for the very eminent jurist whose learning and subtlety have furnished the opinion which the court finally adopted. — On the contrary, and with the highest respect and admiration for His Honor the

Chief Justice, I am earnestly and sincerely convinced that there has been an entire and serious misapprehension of the question at issue, which has resulted in a decision, illogical, erroneous and eminently dangerous.

With this feeling, whether correct or not, I have unhesitatingly submitted to your consideration, and I trust that if you & others of the bench should so signify my views upon the matter at some length.

Let us first consider then, what was the issue actually presented in this case. The act of assembly of March 17<sup>th</sup> 1869, provided that

- 1- Writs should be made returnable to the regular term of the Superior Court.
- 2- That the defendant should be summoned there by the commons to appear and answer at the next ensuing

term of the Superior Court.

After the ratification of this act, the writ was commenced by the issue of a summons returnable "~~at the office of the Clerk of the Superior Court within~~ + + within twenty" commanding the defendant "to appear at the office of the Clerk of the Superior Court within twenty days and answer the complaint, &c." Of this summons the Sheriff is commanded to "make due return".

Just here I wish to call attention to two facts,

- 1<sup>st</sup> It seems to have been generally accepted as a fact, that the summons in question commanded the defendant to appear "before" the clerk, thus of necessity recognizing, and involving the question of the "clerk's jurisdiction" in this case.
- Not so, however, it commands the defendant to "appear and answer, at the clerk's office." The filing of the defendant's answer in the clerk's office, under the records of the court was the only act required of him.

2- It was not made returnable  
to the Clerk by the Sheriff in any technical sense but merely to his possession, "with the date and manner of its execution." The "return" technically goes to the Court, the enclosure to the Clerk as the custodian of its records. It was precisely the same as under the old practice. The Sheriff of Person received writs returnable to Guilford. He executed them and enclosed on due the time and manner of its execution. This was his technical "return". It was to the Court of Guilford. The Sheriff then enclosed these writs, thus enclosed to the Clerk of the Superior Court of Guilford. Yet this enclosure was never suspected of being a recognition of any "jurisdiction" in said Clerk. Nor was it, and yet this is all the recognition of a jurisdiction of the Clerk which is contained in this summons or the decision which was made in the Court below -

I call attention to these facts  
 points here, from the fact that they con-  
 stitute the distinctive feature of the  
 view which I hold, distinguishing  
 it from all others which I have seen  
 upon the question. In other words,  
 I am aware that neither the constitu-  
 tional nor statutory "jurisdiction of the  
 Clerk of the Superior Court", is in the  
 slightest degree involved in this ques-  
 tion.

The defendant demurred, upon the  
 ground that he is named in the action  
 commenced in accordance with the two  
 provisions of the act of March 17<sup>th</sup>  
 1867, heretofore set forth. The demurrer  
 was overruled upon the ground that  
 these provisions of the act viz-

1<sup>st</sup> That the return was ~~shall~~ be made  
 returnable to the regular term of the  
 Court, and.

2<sup>nd</sup> That the defendant should be ~~made~~  
 summoned to appear and  
 answer at the next ensuing regular  
 term. —

were in conflict with Section 28"  
 (Art. 14) of the Constitution of the State,  
 which is in these words, viz:  
 "The Superior Courts shall be at all  
 times open, for the transaction of all  
 business, within their jurisdiction, ex-  
 cept the trial of issues of fact requiring  
 a jury."

Broader and more comprehen-  
 sive language than that of this section  
 cannot be found in our English vocab-  
 ulary. It is a provision without paral-  
 lel or analogy in any other Constitution ex-  
 cept as it may occur, in any State of  
 the Union. From its context and struc-  
 ture viewed in its phraseology it demands  
 particular consideration. Section 33 of  
 Article 1 well enumerated that  
 basic principle of Saxon Liberty,  
 the pride and boast of our English  
 law,

"All courts should shall be open and  
 every person for an injury done him  
 in his ~~person~~, lands goods person,  
 or reputation, shall have remedy by

"due course of law, and right and justice without sale, denial or delay."

This opens the whole course of justice to all citizens alike, not denying to the poor the remedies allowed to the rich. It was the blinding of English Justice, the universalizing of the poor's remedies. This noble utterance had been engrafted on our Constitution by the Convention, and its advantages and safeguards were not its addition to this the Convention goes further and incorporates in the Constitution this 28th section of the 4th Article.

It would be contrary to every principle of construction to give to this latter section the same interpretation which has universally adhered to the former. In a majority of decisions and in almost every American court, it has been held that the former



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Section (Sec. 85, art. 1) is a simple declaration that the course of justice, the due course of the law, should not be denied to any, nor delayed in one case more than in another. This opens the door for the institution of motions, the issuance of writs, and all things. It allows to every citizen the right to be heard in his own case, and to answer his charges.

This amounts to this solemn command of the court, under all systems of procedure, issues from the hand of the clerk, without the specific personal presence of the judge. Not that thereby the clerk obtains any "jurisdiction" of the action, but because it is considered and held so, as a mere clerical act, necessary as an exercise of the court's power, and not as being a part of the court's own jurisdiction. The clerk's duty is to execute the court's orders, and not to exercise its jurisdiction.

This being the force and effect of Section 34, Article IV, what effect must be given to Section 23, Article IV? Evidently it must not be considered as a mere reaffirmation of the previous section. It must be given a distinct and separate significance. It means something more than that the courts must be, at all times, open to all citizens, open for the initiation of actions, the management of suits, the settling in violation of "the due course of the law." It is, in effect, the conduct, the carrying out of that due course.

The language also is familiar. The Superior Courts shall be at all times open for the transaction of all business etc. — Notice the word "transaction" in its connection with the "transaction," the performance, the carrying on to completion of "all business within their jurisdiction."

What is the force of this mandate of the constitution and upon whom is it binding? The Legislature regulates and

Letter to  
Judge Beade

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