FRIDAY ..

THE HOMESTEAD LAW IN A

JUNE 20, 1873

It will be seen from the opinion of the North Carolina Supreme Court, in the case of Garrett vs. Cheshire just delivered, which we publish in full in our local columns this morning, that the decision of Hill vs. Kessler, 63 N. C. R, is re-affirmed. Mr. Justice Reade delivered the opinion of the Court. Chief Justice Pearson and Justice Boyden were not present-being confined to their rooms by sickness. As Judge Pearson dissented in the case of Hill vs. Kessler, it is presumed of course that he will not concur in Garrett vs. Cheshire. It appears to be the general impression that Judge Boyden's views on the Homestead law are the same with those of Judge Pearson.

Mr. Justice Reade holds that the case of Gunn vs. Barry, recently decided in the United States Supreme Court, declaring re-troactive homestead laws unconstitutional, is not in conflict with the deci sion in the case of Hill vs. Kessler. He expresses the opinion that Hill vs. Kess ler will be sustained by the Supreme Court of the United States. We do not concur with his Honor in this opinion, but trust that he may be right. We will have more to say on this subject to-morrow.

To-day we give up our editorial space to the following able criticism, prepared by an eminent member of the North Carolina bar, which reviews the opinion filed by Judge Dick in the case of Poe vs. Hardy, 63 N. C. R., in which his Honor held that the Homestead is a determinable fee, and therefore excused of waste:

There has seldom been enunciated from the bench of any Supreme Court, a more illogical opinion than that delivered by Mr. Justice Dick in the case of Poe v. Hardy 65 N. C. Rep. 447, Janu uary Term, 1871, upon the question. whether it was the legal duty of the Sheriff, to sell the reversion or remainder dependent on a homestead-the homestead itself being exempt from execution du ring its existence.

In order better te understand the point let us ascertain the nature of the estate. The homestead is an estate during the lives of the husband and wife and the survivor of them, and in case of their other improvements? I can't enjoy deaths leaving children not yet of age, then during the minority of the youngest of their children.

The estate of homestead thus limited, is, in substance, an estate so long as A and B may live or any one of their children may be a minor. This estate created by the Constitution is, in law, precisely the same as one limited to A and B and the survivor of them for life, and | fering in want." then to their youngest child until he limited is the same in legal construction as if it had been limited to A and B and the survivor of them for life. The homestead, as understood by lawyers was a mere life estate in its nature, and was to be attended by all the incidents of a life estate, which were so well known to the people of the State. It was settled law of the State, and so had been from 1732, that vested reversions and remainders, dependent on any estates in possession and enjoyment, though such estates were uncertain as to the time of their durability, were such interests in real estate as might be sold under execution, being embraced under estate," used in Stat. 5 Geo. 2, and ment. copied into every revisal of the laws of the State since that time.

The extraordinary opinion of Mr. Jusfice Dick asserts, that the estate in the homestead, as created by the Constitution is "a determinable fee." It may be safely affirmed that not a scintilla juris, ancient or modern, supports the assertion. In vain may we search Coke and Blackstone, or any other writer, for such life cannot become a determinable fee; neither can an estate, during the surcan become a determinable fee, which cannot possibly continue longer than the lives of the homestead takers and twenty-one years thereafter, certainly was never known to my Lord Coke or Sir William Blackstone, and seems to have awaited its paternity from Mr. Justice

A determinable fee is "a base or qualified fee; or a conditional fee." Euch of this species of fee had the chance of perpetual durability. 2 Bl. Com. 109. The homestead has not. It cannot possibly last longer than two named lives in being and twenty-one years there-

In the recent case of School Committee v Kessler 67, N. C. 443. Chief Justice Pearson says, there "has never been in force or in use in this State" such an in the Western part of the State." .

The two opinions are irreconcilable.

left as a simple legal grant like that of dower, affected only by one or two provissions as to the capability of its disthe accepted rules of law which governed all other freehold estates less than comes Mr. Justice Dick in aid of the grant and gives it a more sacred position than had dower at common law, legal protection, side by side with life and liberty and clothes the estate in a mantle of his own manufacture, and gives it a status hitherto unknown in legal minds. The common law in its wisdom had

provided means to promote the pros-

very foundation of life-by the doctrine of waste. Self-interest lying at the bottom of all ownership of property, it was deemed safe to leave the protection of real estate to such as had fees therein. or had the power to convert their estates into fees. The property being either disposable by will or descendible on the family of the owner, he might be trusted more reliably than any other person, to protect it from waste, and to improve its value. Hence the owners of fees in estates were intrusted with the guardianship of the public interest in the improvement of real estate; for that interest and their own were the same. But when estates were of short duration and created by law without the consent of the absolute owner, and were destined soon to pass from the occupier and his family, this self-interest no longer existed to protect either the public or the owner in fee. Hence the owner for life only could not be trusted; inasmuch as for temporary purposes and with profit to himself alone, he would be often tempted to injure the estate to promote his own private fortunes. The life tenant in curtesy, or dower, even if young, would say "why should I foster the growth of young timber trees which I can never enjoy? I will convert them into fuel and save the expense of coalor costly transportation of wood. And it the tenant should be advanced in age he would exclaim: "why should I repair and keep up the buildings and them long; and the cost of repairs, if invested in my own property, will be mine to enjoy so long as I live, and at my death will be mine to bestow on others dear to me. I don't like to work for others, unless they be dearer to me than the mere remainder-man, who will come after me to enjoy the fruits of my labor, while my own family may be suf-

Such are the reasonings of tenants shall come to age. The estate, thus for life, who on death cease to enjoy either by self or family. Doubly active and powerful are the same motives which would govern the conduct of tenants for shorter periods of time, as for one year, or for a few years. To prevent the evil consequences of such temptations, the common law in its wisdom interposed its restraints against waste. Now let us hear Mr. Justice Dick upon the same subject :

"As it was determined that the State had the power to create the homestead, there can be no constitutional objection to the law making power of the State throwing around the homestead, while it exists, such safeguards as are necessary the words "lands, hereditaments and real for its protection and complete enjoy-

"The act of 25th March, 1870, (which forbids the sale of the reversion) is not only constitutional, but it carries out the wise and beneficent policy of the Constitution of the State, in securing a home to a householder and his family, beyond the reach of legal process on the part of creditors.

"The estate of the homestead, as created by the Constitution, is a determina position. If the learned Judge had able fee, and the tenant was not "inconsulted his law books he would have | peachable for waste," even before the found that an estate, determinable by a passage of the act above referred to. certain eyent which must happen, is not | That act was intended to protect the a fee of any kind. An estate for one owner of a homestead against any vexatious litigation which might be instituted by the purchaser of a reversionary vivorship of the longest liver of one interest. Such interest, if sold, would thousand persons. And how an estate | yield but little to an execution creditor in satisfaction of his debt, and in nine cases out of ten would be purchased by

"The entire interest and control of the homestead being now, by law, vested in the holder, encourages him to improve and beautify his home, make it more comfortable for himself and family, and more valuable to creditors at the expiration of the determinable estate, The Act also provides that the statute of limitations shall not run against the creditors of the holder of a homestead, during the existence of the estate."

So, it is the conclusion of his Honor, that the estate will be greatly improved by allowing to the life tenants and the minor children the utmost license to despoil the premises without restraint of law. If this be sound reasoning and estate as a base or qualified fee and practical sense, the common and statute never has been but one which resembled laws have been very foolish from time it, and that was the tenure by which the immemorial, and the wonderful discov-"Cherokee tribe of Indians held lands ery was reserved for this new era in the progress of human advancement.

Now, it is a clear rule of law that the The Constitution of the State, in terms owner of a fee may create a lease for of law language well known in judicial life or years to be held sans wasteinterpetration, set apart for the home (without waste). And so may the law

stead a life estate, with a limited con- create an estate with the same exemptinuation thereof, if the life tenancy tion either in dower or by curtesy; but should end during the minority of any why has not the law done so, and under child. The homestead estate being thus | the new discovery of this learned Judge set apart by the Constitution, it was why does it not do so now? Simply because, as the wisdom of the old law tells us, the owner of the remainder or reversion would be probably subjected position, to be construed, of course by to great damages in the value of his estate by the waste committed by the life tenant in the pursuit of his own selffees that were created by law. Then interest. Pray, why did the learned Judge resort to the device of announcing, that, by the rules of law an estate limited to A and B for their lives which stood under the same shield of and the life of the survivor, and in case of their deaths then to the youngest child till he arrive at twenty-one, was "a determinable fee," when in fact, such an estate was never known under that landed estates, and a perfect novelty to name, until it was so christened in that opinion? The device of placing the homestead under the designation of "a determinable fee" was evidently adopted perity of the agricultural interests-the to screen it from the penalties and liabilities of waste done on the premises, Now, would it not have been better, and certainly more courteous to my Lord Coke and Sir William Blackstone, if the learned Judge had simply said, "we will regard the estate of homestead in the same light as if the grant had been made sans waste?"

It is true that the interposition of these very substantial words would have been a bold judicial act, and perhaps alarming to the interpreters of constitutional language; but would there not have been more manliness in calling to account such jurists of the Convention as Rodman, who could have defended themselves, than to have insulted the learning of the renowned Cokes and Blackstones of a bygone age?

PROCLAMATION

Governor of North Carolina.

EXECUTIVE DEPARTMENT,

Be it known to all whom it may concern: That in conformity with section 8, chapter 153 of the acts of the General Assembly passed at the session of 1872-'73, in relation to amendments of the Constitution of the

I, TOD R. CALDWELL, Governor of the State of North Carolina, do order so much of the preamble of said act as sets forth the alterations proposed and agreed to, and the second section of said act to be published for thirty days preceding the first Thursday of August, 1873, in the Raleigh "Daily Sentinel," the "Daily Era" and the "Daily News", published in Raleigh, and also for the same length of time in the following Westly many published. Weekly papers, published in the various Congressional Districts of the state to-wit: First District-"North Carolinian," Eliza beth City; "Express," Washington. Second District—" News," Goldsboro

'Mail," Rocky Mount,
Third District—"Statesman," Fayetteville; "Star," Wilmington. Fifth District—"New North State," Greensboro; "Chronicle," Milton. Sixth District—"Democrat," Charlotte Spirit of the South," Rockingham. Seventh District—"American," States ville; "Watchman," Salisbury. Eighth District-"Pioneer" and "Exposi-

or," Asheville.

That portion of the preamble ordered to be published is in the following words to-wit:
"Whereas, the last General Assembly three-fifths of the whole number of mem bers of each House concurring,) the bill containing the same having been read

three times in each House, proposed the fol-lowing alterations of the Constitution of the State, to-wit: Alteration in relation to the public debt; alteration in relation to the office of Superintendent of Public Works; alteration in relation to the State ensus; alteration in relation to exemptions from taxation; alteration in relation to the University; alteration in relation to the sessions of the General Assembly; alteration in relation to the Code Commissioners; alteration in relation to Federa and other officers holding office." The second section of the said act ordered to be published is in the following words,

to-wit: "It shall be the duty of the Sheriffs in each and every county in the State to open polls at the several election precincts in his county on the said first Thursday in August next, and the same shall be kept open the boar of eight elections. or one day, from the hour of eight o'clock in the morning to the hour of seven in the atternoon, when all persons qualified to vote according to the Constitution, may vote for or against the ratification of each of the said amendments, those desiring such amendments to vote with the written or printed ticket 'For Amendments,' those of a contrary opinion to vote with a written or printed ticket, 'Against Amend-

The attention of County Commissioners and Inspectors of the Election is also called to the 4th section of said act of Assembly which provides that separate ballot-boxes shall be furnished for each amendment to

be voted on.

Done at our City of Raleigh, the
[L. s.] ninth day of Jane, A. D. 1873, and in the ninety-seventh year of American Independence. TOD R. CALDWELL. By the Governor;

J. B. NEATHERY, Private Sec'y. The papers named in the foregoing proclamation will publish as therein directed and forward bills to Executive office

RECEIVED.

The finest assortment of Single and Double Trusses, Men's, Youth's and Infants, Male and Female Shoulder Braces, Suspensory Bandages, Nipple Shields, Nursing Bottles, Self-Syringes, Sick Feeders Glass Tubes and Bath

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Of the VERY BEST kinds, such as cannot be found at Grocery Stores, always on hand. Cloves, African and Jamaico Ginger, Roots Cloves, African and Jamaico Ginger, Roots and Ground Clnimon, Nutmegs, Spices, Cloves, Pepper, grain and ground, Cream Tartar, Bi-carbonate of Soda.

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Bi-carbonic of Soda, &c. for sale at

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Would call attention to their large and complete stock of

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WHITE GOODS, DOMESTICS,

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CLOTHING, OF OUR OWN MANUFACTURE,

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HATS AND CAPS, BOOTS AND SHOES, TRUNKS, VALISES,

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A trial will convince you that we cannot be undersold outside of the City of New York.

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ICE CREAM SODA WATER, Something novel in itself, Come and try MOSELEY'S ICE CREAM SALOON

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PRIMROSE, PETTY & NEWSOM'S. All indebted to the firm are called on to ettle immediately. P., P. & N. THAMPION HOUSE MOVER.

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400 Bushels N. C. Bran & Shorts, 400 Sacks Oats,

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COTTON SWEEPS, Dixons' Pattern, Manufactured by SAM'L COLLINS & SON.

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and which in variety, price and terms, will compare favorably with any south of New We return our thanks to the Merchants of this State and North Carolina, for the manner in which they have sustained us in our efforts to establish a First Class Wholesale Dry Goods House in this city, and with ample means, increased experience and a determination to give satis faction, we feel sure we shall in the future. as in the past, deserve the confidence of our friends and the trade generally.

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The AVIARY has been recently re-stocked with Canaries, Gold and Bull Finches, Java Sparrows, South American Parrots, and the American Mocking and Red Birds. The

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For anything and everything, go to NAT. L. BROWN'S.

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Large stock of Toys and China Goods

PUBLIC PROPERTY

At a meeting of the Board of Managers of the Cape Fear and Deep River Naviga tion Works, at the Executive office in Raleigh, on the 3d of June, 1873, the following resolutions were passed: 1. Resolved, That in accordance with the

Act of the General Assembly, 1860-61, chapter 122, it is deemed advisable to sell the interests of the State of North Carolina, in the Cape Fear and Deep River Navigation 2. Resolved, That the same be sold in two sections, viz: 1st, from Fayetteville to Sharp's Field Dam. 2d, from Sharp's Field Dam, including the same, up the Cape Fear

and Deep River to the limits of the original charter. 3. Resolved, That the respective purebas ers shall pay one-third of the price of their purchases in cash, and the remainder in one and two years from day of sale, with interest from said date, and that the same be secured by satisfactory bond, and a lien on the interests purchased. Title not to be made till payment in full. 4. Resolved, That the sale be upon the expressed condition, that the respective

purchasers shall complete and put in operation, according to the terms of the charter the portion purchased as follows, viz: from Fayetteville to Sharp's Field Dam, within years from day of sale, and from Sharp's Field Dam, including the same to Fysor's Mill in Moore county within 3 years from 5. Resolved, That H. A. London, Secretary, and B. I. Howze, Attorney of the Board, be authorized to make said sale at Lock-

ville, in Chatham county, on the 8th of July, 1873, and that they give notice of the same in the "Era" and News in Raleigh, the "Eagle" and "Statesman" in Fayette-ville, the "Star" and "Post" in Wilmington, until day of sale and by posters.

We shall offer the above property for sale according to the above resolutions.

H. A. LONDON, Secretary. B I. Howze, Attorney.

OLD CUSTOMERS, FRIENDS, &c J. A. JONES having this day sold out his stock of

Books Stationery, Sheet Music, &c., to me, I resume business as his successor

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mh25-3m E BOOKS Just received I Let Methodist Hymns. Maury's Geographies.

" Baptist Hymns. Call soon. L. BRANSON. oct2-tf Raleigh, N. C. WYATT, GREEN & CO.,

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Ladies Dress Goods, Mens' and Boys' Goods, Children's Goods, Silk Goods, Linen Goods, Cotton Goods, Lace Goods

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This last, with the former purchase of this Spring, makes our stock the

Largest and Most Complete

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BARRELS "A" SUGAR, 10 Barrels extra C Sugar,

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150 Cords OAK, HICKORY and other hard WOOD. mar 15-tf W C. STRONACH. BLANK BOOKS IN VARIETY. Initial Paper, elegant, just to hand. L. BRANSON, Bookseller, mar 13-tf Raieigh, N. C.

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your inquiries His Honer, HENRY POTTER, late Jud. the United States Court for the Distri North Carolina, gave the following a opinion of Beckwith's Pills: "For some ten or twelve years past been in the habit of using DR I WITH'S ANTI-DYSPEPTIC PILLS family, and consider them so vadomestic medicine, that I never su stock to be exhausted. I have use with good effect in dyspeptic cas various modifications, and have them efficacious in relieving from Headache, and from all the usual toms of functional derangement of t

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PRATT'S ASTRAL OIL, has a worldeputation as the surest and best illim ting oil. Over two million gallons been sold for the past two years, from wh no accidents of any description have curred. Send for circular. Oil House Charles Pratt, established 1770, New Y THE following statement, from one oldest and most respectable merchant the city of Petersburg, speaks for itself needs no comment:

WHITE GOOD We ask attention to our large stock

Nainsook Muslins, Mull Muslins,

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