

## CHAPTER XVI

### NOTABLE CASES AND DECISIONS

NOT ESPECIALLY CONTENTIOUS. Considering our ancestry and former isolation, we are not more contentious or litigious than others of our kind; but it must be admitted that we sometimes indulge in a lot of unnecessary litigation. Some of us are accused even of taking delight therein. Mr. J. H. Martin tells of an old Covenanter who announced with glee that all his children were married off, all his own debts paid, and that he had nothing else to do now but "to spend the balance of his life a-lawin'." Owing to the legislation regarding land grants and the registration of deeds, etc., much litigation has arisen, notably the large case of *Gilbert v. Hopkins*, involving many thousands of acres of land in Graham and Cherokee counties. That case was tried before Judge Connor in the U. S. Court at Asheville in 1910, but the jury disagreed. It was tried again before Judge Boyd at the same place, and he decided it in favor of defendants, plaintiffs appealing. A new trial was granted. But as no final decision has been reached in it, no results can be stated here. In it are involved almost every point of real estate law possible to arise. Pains have been taken to refer in this work only to the most notable cases that have been heard and decided. Each was of interest at the time it was tried.

LITIGATION AND LEGISLATION. James McConnell Smith was the first white child born west of the Blue Ridge, in Buncombe county, but he will be remembered longer than many because of his will. He died December 11, 1853, leaving a will by which he devised to his daughter, Elizabeth A., wife of J. H. Gudger, certain real estate in Asheville, "to her sole and separate use and benefit for and during her natural life, with remainder to such children as she may leave surviving her, and those representing the interest of any that may die leaving children."<sup>1</sup> A petition was filed in the Superior court asking for an order to sell this property, and such an order was made and several lots were sold with partial payments made of the purchase money, when a question was raised as to the power of the court to order the sale of the property so devised. In

Miller, *ex parte* (90 N. C. Reports, p. 625), the Supreme court held that land so devised could "not be sold for partition during the continuance of the estate of the life tenant; for, until the death of the life tenant, those in remainder cannot be ascertained." The sales so made, were, therefore, void.

But years passed and some of the property became quite valuable, while another part of it, being unimproved, was non-productive, and a charge upon the productive portion. But there seemed to be no remedy till the city of Asheville condemned a portion of the productive part for the widening of College Street. The question then arose as to how the money paid by the city for the land so appropriated to public use should be applied. On this question the Supreme court decided in *Miller v. Asheville* (112 N. C. Reports, 759), that the money so paid by way of damages should be substituted for the realty, and upon the happening of the contingency—the death of the life tenant—be divided among the parties entitled in the same manner as the realty would have been if left intact.

Upon this hint, on the petition of the life tenant and the remaindermen, a special act was passed by the legislature (Private Laws of N. C., 1897, Ch. 152, p. 286) appointing C. H. Miller a commissioner of the General Assembly to sell the land, the proceeds to become a trust fund to be applied as the will directs.

This was done; but the Supreme court (*Miller v. Alexander*, 122 N. C., 718) held this was in effect an attempted judicial act and therefore unconstitutional. The legislature afterwards passed a general act, which is embodied in section 1590 of the Revisal, for the sale of estates similarly situated, and under this authority some of the land was sold and the proceeds were applied to the construction of a hotel on another part. The proceeds, however, proved insufficient to complete the hotel, and in an action brought to sell still more of this land for the purpose of completing the hotel, the Supreme court held in *Smith v. Miller* (151 N. C., p. 620), that, while the purchasers of the land already sold had received valid title to the same, still as the hotel, when completed, would not be a desirable investment, the decree for the sale of the other land, in order to provide funds for its completion, was void because it did not meet the statutory requirements that the interests involved be properly safeguarded.