

**CEREMONY FOR THE PRESENTATION
OF THE PORTRAIT OF
FORMER ASSOCIATE JUSTICE WILLIS J. BROGDEN**

On September 15, 1987, at 10:00 a.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable Willis J. Brogden, former Associate Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the morning of September 15, 1987, the Clerk of the Supreme Court sounded the gavel and announced:

“The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina.”

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

“Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Associate Justice Willis J. Brogden. God save the State and this Honorable Court.”

The Clerk was then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court:

The Court is pleased to be convened this morning on this ceremonial occasion for the purpose of receiving the portrait of one of its former members, Associate Justice Willis James Brogden. I want, first of all, to welcome the guests that are here. I'm not going to go through and call everyone by name, but we are pleased to have you all; and we are particularly pleased to have members of Justice Brogden's family with us this morning.

I would like to recognize former Chief Justices Bobbitt and Sharp, who are with us, and former Associate Justice William Copeland and his wife, Nancy. We have members of the Court of Appeals, and I see our venerable Clerk, Mr. Adrian Newton, in the back and I would like to recognize him and our former Librarian, Raymond Taylor. We are happy to have you all. It is always a pleasant occasion when the Court and

its former members gather for presentation of a portrait of a former member of the Court.

I will now call on the distinguished gentleman who will make the formal presentation: Mr. Claude Jones of the Durham County Bar. Mr. Jones was born in Elizabeth City. He received his undergraduate and legal education from the University of North Carolina at Chapel Hill, and was licensed to practice law in 1925. He has had a distinguished and long career at the bar; he has practiced entirely in Durham County. He for many years, I think over 35 years, was City Attorney for Durham. For over 30 years, he was counsel for the Hospital Care Association and its successor, Blue Cross and Blue Shield of North Carolina. He has been active throughout his professional life in the North Carolina State Bar. He has served as President of that organization; he has served as President of the North Carolina Municipal Attorneys Association; he has served as a Delegate from North Carolina to the American Bar Association. We are very honored to have Mr. Jones with us and I will call on him at this time to make the presentation. Mr. Jones.

REMARKS OF CLAUDE V. JONES, ESQUIRE, IN PRESENTING
THE PORTRAIT OF ASSOCIATE JUSTICE WILLIS J. BROGDEN
TO THE SUPREME COURT OF NORTH CAROLINA
ON SEPTEMBER 15, 1987

May it please the Court:

On behalf and at the behest of the members of his family, I have the distinct honor to present to this Court a portrait of the late Willis James Brogden, who served ably and with distinction as an Associate Justice of this Court from January 1926 to the date of his death in October 1935, a period of nine years and nine months.

Although at the time of his death then Chief Justice Stacy, Mr. Percy Reade, a former law partner, and others expressed the sadness of both Bench and Bar at his passing, the presentation of his portrait, preserving his physical likeness for succeeding generations, was unavoidably delayed until now.

And before I proceed further, I should like to pause in order to express the genuine appreciation of the family of Justice Brogden to the Minister and members of the congregation of the First Bap-

tist Church in Durham for making his portrait available for presentation to the Court. For many years this portrait has hung upon the walls of the Brogden Bible Class at the Church.

Because of your relative youth, I doubt if any of you who now constitute the membership of this Court knew Justice Brogden personally, or had the opportunity to observe him in the performance of his civic, religious, political, and community activities, or to have been familiar with the way he practiced law, or how he approached and performed his duties as a member of this Court.

I was blessed to have known Justice Brogden well. For about a year before he was appointed to the Supreme Court, I was a deputy Clerk of the Superior Court in Durham, serving in the courtroom, and had, as it were, a front row seat in all the trials which took place during that period. Durham then had a small but very strong Bar. It was a joy and delight to have been so placed as to witness, first hand, the exhibitions of skill and learning which were demonstrated in those trials. Justice Brogden had no superiors in the trial of a case, either civil or criminal; and his orderly and convincing arrangement of the facts before a jury was absolutely irrefutable.

He was a successful lawyer—a shining star in the practice of an honored profession.

But he did not conduct a legal business or manage a commercial venture dedicated to making money. He earned a modest income and he and his family lived simply and modestly.

Justice Brogden was born in Wayne County on October 18, 1877, and died October 29, 1935, almost 52 years ago. He was in the prime of his life, only 58, when he died; and, because of such an untimely death, cutting short his service upon the highest Court in this State, the people and their institutions suffered a great loss.

His experiences were varied, and he derived knowledge from each. He was a farm boy in Wayne County. He was a school teacher and school principal. He was County Attorney of Durham County. He was Mayor of the City of Durham. He was a Trustee of the University of North Carolina, as well as Chairman of the Board of what is now North Carolina Central University. He was a teacher in a Bible Class which has borne his name for many years. He was a political adviser. He was an active and brilliant lawyer and

a distinguished jurist; and all the while he was a faithful and loving husband and a kind and considerate father to his two sons, Willis J. Brogden, Jr. and Blackwell M. Brogden, both now deceased, who were good lawyers in their own right, and whose children and grandchildren are Justice Brogden's surviving grandchildren and great-grandchildren, the latter having been chosen to unveil the portrait upon this occasion.

In the relatively short span of his adult life, Justice Brogden acquired and built upon a host of experiences, skills, and knowledge in disparate fields; and all of his wisdom and experiences he generously shared, thereby enriching the lives of many.

He was such a person as was equally at ease in discussions with learned people on high educational and cultural levels as he was with the boys at the filling station, the workers at the cotton mill, and the farmers who came to town on Saturday. He accommodated his use of language to the forum in which he was speaking, always to the end that what he said was clear and understood by his listeners.

He was humble, but not obsequious—self-confident, but not arrogant.

When he served as a jurist, the North Carolina Supreme Court consisted of only five members; and when he went on the Bench in 1926 the members of the Court, including him, were: Walter P. Stacy, Chief Justice, George W. Connor, W. J. Adams, Herriott Clarkson, and W. J. Brogden, Associate Justices. The Supreme Court was located in the building across the street in the quarters now occupied by the Court of Appeals.

There were no District Courts and no Court of Appeals in the State Judicial System at that time. Appeals were taken directly from the Superior Court to the Supreme Court. What we now call District Attorneys were then known as Solicitors.

In his nine and three-fourths years as an Associate Justice of this Court, Justice Brogden wrote 717 Opinions for the Majority, 7 Concurring Opinions, 18 Dissenting Opinions, and of the 955 Per Curiam decisions filed during that period of time I am certain that he authored his share.

His Opinions may be found in bound Volumes 191 through 208 of the North Carolina Supreme Court Reports.

He was concise in his writings. You could almost see his brain working in analyzing the case, separating the chaff from the wheat, to reduce the subject matter to a dispositive query, thus permitting brevity in posing the question, as well as in stating its answer, which contributed substantially to the clarity of the Opinion.

By my actual count, examination, and computation, I found that in all of his Opinions, not including dissents or, of course, per curiams, the average length of Justice Brogden's Opinions, excluding the statement of fact, was 1.54 pages. Because of two unusually lengthy Dissenting Opinions, their average length was 2.82 pages.

And the beauty of it is that these Opinions are not only short and concise, but clear and understandable.

A perusal of his Opinions will yield the information that in writing them he would often begin with language such as:

"Brogden, J. The question is this:"

Tankersley v. Davis (1928), 195 NC 542, 142 SE 765; *Brooks v. Garrett* (1928), 195 NC 452, 142 SE 486, and many other cases decided throughout Justice Brogden's tenure on the Bench.

"Brogden, J. The case is this:"

Sheets v. Stradford (1930), 200 NC 36, 156 SE 144.

"Brogden, J. The decisive point in the case is"

State v. White (1928), 196 NC 1, 144 SE 299.

"Brogden, J. The pleadings and the judgment produce the following question of law:"

Barber v. Benson (1931), 200 NC 683, 158 SE 245.

"Brogden, J. Eliminating scenery and background, the case is this:"

Bd. of Education v. Hood (1933), 204 NC 356, 168 SE 522.

"Brogden, J. Chapter 2, Public Laws 1921, commonly known as the Road Act, when stripped of all bare technicalities and thin-spun discriminations, creates certain unmistakable objectives. These objectives may be classified as follows:"

Newton v. Highway Com. (1926), 192 NC 54, 133 SE 522, reh. den. 192 NC 834, 134 SE 134.

And in a case in which a testator had bequeathed a total of over \$100,000 to various churches and other institutions and causes; the executor had embezzled \$40,000; securities owned by the estate had decreased in value; and there remained only \$59,000 to be distributed, Justice Brogden, in his down-to-earth manner, stated:

“It would seem that the bald question is: On whom should the axe fall?”

Clement v. Whisnant (1935), 208 NC 167, 179 SE 430.

The Judge was a cheerful man with a great sense of humor. Sprinkled throughout his Opinions we find expression of this trait. He would often recite some humorous story to make or emphasize a point.

Perhaps lawyers are more familiar with his stirring defense of the mule in a case wherein plaintiff had sued to recover damages for injuries sustained when kicked by a mule. In that case Justice Brogden said, in part:

“A mule is a melancholy creature. It is *nullius fillius* in the animal kingdom. It has been said that a mule has neither ‘pride of ancestry nor hope of posterity’ . . . Men love and pet horses, dogs, cats, and lambs. These animals have found their way into literature . . . But nobody loves or pets a mule. No poet has ever penned a sonnet or ode to him, and no prose writer has ever paid a tribute to his good qualities . . . Yet, withal, he has a grim endurance and a stubborn courage which survives his misfortunes and enables him to do a large portion of the world’s rough work . . . The idealist may dream of a day when the ‘world is safe for democracy’, but this event will perhaps arrive long before the world will be safe from the heels of a mule.”

Rector v. Coal Co. (1926), 192 NC 804, 136 SE 113.

Another manifestation of Justice Brogden’s ready wit surfaced one day when the Court was hearing oral argument, and the lawyer who was then addressing the Court was so carried away with his argument that he inadvertently said, “Now, Gentlemen of the Jury . . .,” whereupon Justice Brogden turned to Justice Clarkson and said: “He’s talking to you and me, now, Judge.”

In another case involving the activities of an animal, this one in which plaintiff was injured by having been gored by a bull, Justice Brogden sort of played down the plaintiff's contention that the bull was vicious, in these words:

"The ancestry and social standing of a bull antedates the pyramids of Egypt. Indeed, the written record reveals that in the first civilization along the stretches of the Nile a bull was a god

It is true that a witness said that each morning when the bull was turned out of the pen 'he would bellow, paw the ground, and burrow in the ground with his head.'

Those bred to the soil perhaps know that such acts on the part of the normal bull constituted per se no more than boastful publicity or propaganda, doubtless designed by the animal to inform his bovine friends and admirers that he was arriving upon the scene."

Banks v. Maxwell (1933), 205 NC 233, 171 SE 70.

Justice Brogden's style of writing, as well as being clear and understandable, was also colorful and expressive.

Thus, by way of illustration, we find in various of his Opinions these expressions:

On the question of deciding the case on the theory upon which it was tried below:

"The law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court."

Weil v. Herring (1934), 207 NC 6, 175 SE 836.

When there was some lurid testimony in a seduction case, he said:

"Much conflicting evidence was introduced at the trial, but it would serve no useful purpose to embalm all the sordid testimony for future generations."

State v. McDade (1935), 208 NC 197, 179 SE 755.

In the Lawrence murder case in which he dissented because he felt the evidence was insufficient to be submitted to the jury, Justice Brogden wrote:

"It is contended that the facts and circumstances are so slight in probative value that in themselves and standing alone they would not amount to evidence, but when taken in combination they constitute a rope of great strength. I do not concur in this reasoning. Unless the principles of mathematics have been recently changed, adding a column of zeros together produces zero; neither can a multitude of legal zeros beget a legal entity."

State v. Lawrence (1929), 196 NC 562, 146 SE 367.

In a case involving the question of whether or not the General Assembly can ratify a void deed, he wrote:

" . . . but the power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead."

Booth v. Hairston (1927), 195 NC 8, 136 SE 879.

In an appeal in which appellants had assigned 162 errors, and appellees 73, Brogden, J. cited the late Justice Allen as having remarked:

"It is highly improbable that a trial judge could make 235 errors in one game."

Morrison v. Finance Co. (1929), 197 NC 319, 148 SE 458.

The Town of Smithfield sued the City of Raleigh to enjoin it from polluting the waters of the Neuse River, from which Smithfield obtained its supply of drinking water for its citizens. The case had been appealed from a judgment entered by Superior Court Judge Henry A. Grady, who had decided the case against Smithfield. Justice Brogden, in his inimitable style, wrote:

"Indeed, it seems that the trial judge subjected the question to 'trial by water', because the Record discloses that His Honor 'had drunk of the water, bathed in it, and suffered no ill effects.' The ancient mode of 'trial by water' was aforesaid deemed efficacious in determining the guilt or innocence of witches, and by applying the practices of the ancient law the distinguished jurist has found the waters of Neuse River not guilty."

Smithfield v. Raleigh (1935), 207 NC 597, 178 SE 114.

In referring to the rule not to send the case to the jury if the evidence only raises conjecture, he said:

"This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation."

Poovey v. Sugar Co. (1926), 191 NC 722, 133 SE 12.

And, further, he expressed a need for balance in saying that while it is the mandate of sound public policy to encourage commerce and to lend to its legitimate expansion the full power of the law,

" . . . it is also true that the sanctity of commerce must yield to the sanctity of life 'for the life is more than meat, and the body than raiment.' "

Willis v. New Bern (1926), 191 NC 507, 132 SE 286.

Justice Brogden was learned in the law. He understood the philosophy of the law, its history, its adaptation to changing times, and its essential function as the glue which holds together a civilized society. He also appreciated the fact that laws must be just and fairly interpreted and administered in order to be respected and obeyed by the people; and that judges are also subject to the law.

Thus, I am sure he would have approved the sentiment expressed in the admonition carved in granite at the entrance to the courthouse in Kansas City, Missouri, which reads:

"The people shall obey the Magistrates; The Magistrates shall obey the law."

Justice Brogden had all of the qualifications required or desired for service on the Bench of the Supreme Court of the United States. His presence would have graced and added dignity and strength to that Court. Unfortunately, however, the geographical factor, alone, was sufficient to make highly unlikely any favorable consideration to his nomination or confirmation.

He was a great believer in the separation of powers, i.e., that the legislative branch should enact laws, the judicial branch should interpret laws, and the executive branch should administer laws, with each subject to checks and balances.

He agreed with the principle, enunciated in the sixteen hundreds by Sir Francis Bacon in his *Of Judicature*, that

"Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law and not to make law, or give law."

I should like to close these remarks by repeating Justice Brogden's own words which he wrote 61 years ago in the case of *Carlyle v. Highway Commission*, 193 NC 36, 136 SE 612 (1927), when our Supreme Court consisted of 5 members:

"The function of the court is to construe laws and not to make them. If the courts attempt to read into the law words of their own or read out of the law other words contrary to their conception of what the law ought to be, then this would amount to erecting a legislative despotism of five men, which would perhaps be more pernicious and subversive of the State's peace than the judicial despotism mentioned by Chief Justice Pearson in *Brodnax v. Groom*, 64 NC 244."

I thank you very much for permitting us to make this presentation and these remarks, and for your kind attention to them.

The Chief Justice announced the unveiling of the portrait by John Brogden, the great-grandson of Associate Justice Brogden, assisted by his father, Blackwell Brogden, Justice Brogden's grandson.

[UNVEILING OF PORTRAIT]

The Chief Justice then made his remarks accepting the portrait:

Mr. Jones, the Court wishes to express its appreciation to you for your diligence in preparing these remarks and for calling to our minds the many accomplishments and the distinguished career, in such an interesting and informative way, of Associate Justice Brogden. There is certainly much in the way he approached his work as a member of this Court and in the way he accomplished his work that those of us who come after him would do well to emulate. His portrait, when it hangs in these halls, will serve, of course, to remind us of these things. We appreciate very much the eloquence of the presentation.

The Court also wishes to express its gratitude to the family and to the First Baptist Church of Durham for presenting the portrait and for making it available to the Court. The portrait will be hung in an appropriate place in the halls of the courthouse, where it will serve to remind us of the many accomplishments, the erudition, and achievements of the man it portrays. Mr. Jones' eloquent address will be spread upon the minutes of the court and published in our official reports.

PRESENTATION OF BROGDEN PORTRAIT 733

The Clerk then escorted the Brogden family to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.