

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 5, 2005 Session

**TENNESSEE DIVISION OF THE UNITED DAUGHTERS OF THE
CONFEDERACY v. VANDERBILT UNIVERSITY**

**Appeal from the Chancery Court for Davidson County
No. 02-3095-I Irvin H. Kilcrease, Jr., Chancellor**

No. M2003-02632-COA-R3-CV - Filed May 3, 2005

WILLIAM B. CAIN, J., concurring.

I concur in the exhaustive and expositive opinion prepared by Judge Koch. I write separately to emphasize two points.

First, the intent of the parties is not established alone by the provisions contained in their written contracts of 1913, 1927 and 1933. The Chancellor held: “However, the course of dealing between the parties persuades the court to conclude that it was the intention of the parties that the building would be named ‘Confederate Memorial Hall.’”

At the very least, from the time when the architect prepared the architectural drawings of the dormitory for George Peabody College for Teachers (July 12, 1934), there could be no doubt as to what the parties intended. For 68 years, until June of 2002 when Chancellor Gee determined to change the name, both parties honored the agreement. This Court has held:

“The best evidence of how the parties to an agreement understood its terms is afforded by their acts under it, and these may be shown in order to aid the court in arriving at a proper interpretation.” *Pratt v. Prouty*, 104 Ia., 419, 65 Am. St. R., 472, 474.

“Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences “have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions.” 6 R. C. L., page 853, sec. 241.

See also 2 Williston on Contracts, sec. 623; *State ex rel. v. Vanderbilt University*, 129 Tenn., 279, 329, 164 S.W., 1151; *Canton Cotton Mills v. Overall Co.*, 149 Tenn. 18, 29, 257 S.W., 398; *Chicago v. Sheldon*, 76 U.S., 50, 54, 19 L.Ed., 594, 596.

Pigg v. Houston & Liggett, 8 Tenn. App. 613, 633-34 (1928).

Between the contracts of the parties and the conduct of the parties for nearly three-quarters of a century, the intent that the dormitory be named “Confederate Memorial Hall” is undisputed and, indeed, indisputable.

Second, the position of Vanderbilt is based on the misperception that somehow the dormitory is a memorial to the institution of slavery or, indeed, to the Confederate government. This assertion is in direct contradiction of the statement of former Vanderbilt Chancellor Joe B. Wyatt that historical information currently available reflected, “the absence of any indication that the naming of Confederate Memorial Hall by George Peabody College for Teachers was in any sense intended to support either slavery or any other form of prejudice toward blacks.” The history of the dormitory has not changed since this 1989 statement of Chancellor Wyatt. Nothing in the record is so complete a repudiation of this assertion as the plaque prepared by Vanderbilt in 1989 to be placed on the dormitory. The inscription thereon reads: “Constructed in 1935 by George Peabody College for Teachers, in part, with funds raised at personal sacrifice during the Great Depression, by Tennessee women of the United Daughters of the Confederacy, in memory of their fathers and brothers who fought in the war between North and South, 1861-65.”

While in the longer aftermath of history few will doubt that the outcome of the great war was a blessing to North and South alike, the word “confederate” has many meanings to many people. To those diminished few who would gladly fight the war again, it has an almost mystic significance. To the descendents of slaves whose “250 years of unrequited toil”¹ built a cotton empire and nourished it with blood, toil, tears and sweat until the Thirteenth Amendment to the United States Constitution swept the institution of slavery into the annals of history, it is a demeaning reminder of indignities and persecution. To others, it represents a remote chapter in history of little relevance to the global issues facing the world today. To the parties to this bilateral contract, its meaning under the record in this case cannot be clouded by any reasonable doubt. The plaque installed by Vanderbilt in 1989 said it all.

The institution of slavery was indefensible by any standards, and to the extent that the war was fought by the South in defense of slavery, no excuse can be made. There is another dimension to the struggle. A great majority of those who fought in the Confederate armies owned no slaves. Their homeland was invaded, and they rose up in defense of their homes and their farms. They fought the unequal struggle until nearly half their enlisted strength was crippled or beneath the sod. The dormitory is a memorial to them, and their place in history is best defined by their counterparts in the Union army who defeated them on the field of battle.

¹From Abraham Lincoln’s 2nd inaugural address on March 4, 1865.

Joshua Lawrence Chamberlain was a professor at Bowdoin College when the war started and volunteered for service in the Union Army. He rose rapidly through the ranks and, as a Lieutenant Colonel, led the 20th Maine in the near suicidal charge up Marye's Heights at Fredericksburg. As a Colonel, he saw the strategic importance of holding Little Round Top at Gettysburg following the first day of the battle and stood his ground against the best that the Confederate Armies could send against him. As a Brigadier General, he was designated to accept the formal surrender of Robert E. Lee's army of Northern Virginia at Appomattox. Contemporaneously, he recorded his thoughts for posterity.

Before us in proud humiliation stood the embodiment of manhood: men whom neither toils and sufferings, nor the fact of death, nor disaster, nor hopelessness could bend from their resolve; standing before us now, thin, worn, and famished, but erect, and with eyes looking level into ours, waking memories that bound us together as no other bond; – was not such manhood to be welcomed back into a Union so tested and assured?

Instructions had been given; and when the head of each division column comes opposite our group, our bugle sounds the signal and instantly our whole line from right to left, regiment by regiment in succession, gives the soldier's salutation, from the "order arms" to the old "carry" – the marching salute. Gordon at the head of the column, riding with heavy spirit and downcast face, catches the sound of shifting arms, looks up, and, taking the meaning, wheels superbly, making with himself and his horse one uplifted figure, with profound salutation as he drops the point of his sword to the boot toe; then facing to his own command, gives word for his successive brigades to pass us with the same position of the manual, – honor answering honor. On our part not a sound of trumpet more, nor roll of drum; not a cheer, nor word nor whisper of vain-glorying, nor motion of man standing again at the order, but an awed stillness rather, and breath-holding, as if it were the passing of the dead!

As each successive division masks our own, it halts, the men face inward towards us across the road, twelve feet away; then carefully "dress" their line, each captain taking pains for the good appearance of his company, worn and half starved as they were. The field and staff take their positions in the intervals of regiments; generals in rear of their commands. They fix bayonets, stack arms; then, hesitatingly, remove cartridge-boxes and lay them down. Lastly, - - reluctantly, with agony of expression, - - they tenderly fold their flags, battle-worn and torn, blood-stained, heart-holding colors, and lay them down; some frenziedly rushing from the ranks, kneeling over them, clinging to them, pressing them to their lips with burning tears. And only the Flag of the Union greets the sky!

What visions thronged as we looked into each others eyes! Here pass the men of Antietam, the Bloody Lane, the Sunken Road, the Cornfield, the Burnside-Bridge; the men whom Stonewall Jackson on the second night at Fredericksburg begged Lee

to let him take and crush the two corps of the Army of the Potomac huddled in the streets in darkness and confusion; the men who swept away the Eleventh Corps at Chancellorsville; who left six thousand of their companions around the bases of Culps and Cemetery Hills at Gettysburg; these survivors of the terrible Wilderness, the Bloody-Angle at Spottsylvania, the slaughter pen of Cold Harbor, the whirlpool of Bethesda Church!

Here comes Cobbs Georgia Legion, which held the stone wall on Maryes Heights at Fredericksburg, close before which we piled our dead for breastworks so that the living might stay and live.

Here too come Gordons Georgians and Hokes North Carolinians, who stood before the terrific mine explosion at Petersburg, and advancing retook the smoking crater and the dismal heaps of dead – ours more than theirs – huddled in the ghastly chasm.

Here are the men of McGowan, Hunton, and Scales, who broke the Fifth Corps lines on the White Oak Road, and were so desperately driven back on that forlorn night of March 31st by my thrice-decimated brigade.

Now comes Andersons Fourth Corps, only Bushrod Johnsons Division left, and this the remnant of those we fought so fiercely on the Quaker Road two weeks ago, with Wisers Legion, too fierce for its own good.

Here passes the proud remnant of Ransoms North Carolinians which we swept through Five Forks ten days ago, – and all the little that was left of this division in the sharp passages at Sailors Creek five days thereafter.

Now makes its last front A.P. Hills old Corps, Heth now at the head, since Hill had gone too far forward ever to return: the men who poured destruction into our division at Shepardstown Ford, Antietam, in 1862, when Hill reported the Potomac running blue with our bodies; the men who opened the desperate first days fight at Gettysburg, where withstanding them so stubbornly our Robinsons Brigades lost 1185 men, and the Iron Brigade alone 1153, – these men of Heths Division here too losing 2850 men, companions of these now looking into our faces so differently.

What is this but the remnant of Mahones Division, last seen by us at the North Anna? its thinned ranks of worn, bright-eyed men recalling scenes of costly valor and ever-remembered history.

Now the sad great pageant – Longstreet and his men! What shall we give them for greeting that has not already been spoken in volleys of thunder and written in lines of fire on all the riverbanks of Virginia? Shall we go back to Gaines Mill and Malvern Hill? Or to the Antietam of Maryland, or Gettysburg of Pennsylvania? –

deepest graven of all. For here is what remains of Kershaws Division, which left 40 per cent. of its men at Antietam, and at Gettysburg with Barksdales and Semmes Brigades tore through the Peach Orchard, rolling up the right of our gallant Third Corps, sweeping over the proud batteries of Massachusetts – Bigelow and Philips, – where under the smoke we saw the earth brown and blue with prostrate bodies of horses and men, and the tongues of overturned cannon and caissons pointing grim and stark in the air.

Then in the Wilderness, at Spottsylvania and thereafter, Kershaws Divison again, in deeds of awful glory, held their name and fame, until fate met them at Sailors Creek, where Kershaw himself, and Ewell, and so many more, gave up their arms and hopes, – all, indeed, but manhoods honor.

With what strange emotion I look into these faces before which in the mad assault on Rives Salient, June 18, 1864, I was left for dead under their eyes! It is by miracles we have lived to see this day, – any of us standing here.

Now comes the sinewy remnant of fierce Hoods Division, which at Gettysburg we saw pouring through the Devils Den, and the Plum Run gorge; turning again by the left our stubborn Third Corps, then swarming up the rocky bastions of Round Top, to be met there by equal valor, which changed Lees whole plan of battle and perhaps the story of Gettysburg.

Ah, is this Picketts Divison? – this little group left of those who on the lurid last day of Gettysburg breasted level cross-fire and thunderbolts of storm, to be strewn back drifting wrecks, where after that awful, futile, pitiful charge we buried them in graves a furlong wide, with names unknown!

Met again in the terrible cyclone-sweep over the breast-works at Five Forks; met now, so thin, so pale, purged of the mortal, – as if knowing pain or joy no more. How could we help falling on our knees, all of us together, and praying God to pity and forgive us all!

Joshua Lawrence Chamberlain, *The Passing of the Armies* 260-62 (Stan Clark Military Books 1994) (1915).

It is to the memory of these men that Confederate Memorial Hall was built and, to that end and at great personal sacrifice in the midst of the Great Depression, that the United Daughters of the Confederacy raised and contributed to Peabody College more than one-third of the total cost of the construction of the dormitory.

I reluctantly concur in the remedy fashioned by Judge Koch, as I can think of no alternative other than the compulsion of a mandatory injunction, which, justified or not, leaves at least a perceived impediment to the primary mission of a renowned university.

WILLIAM B. CAIN, JUDGE