2-1-1950

Criminal Law -- Constitutional Law -- Defendant's Right of Confrontation

Marshall B. Sherrin Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol28/iss2/11

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Criminal Law—Constitutional Law—Defendant’s Right of Confrontation

In 1776 the first Constitution of North Carolina was adopted. The experiences of that period were naturally conducive to the idea that certain rights and privileges of the governed were fundamental and should be placed beyond legislative, executive, or judicial control. These fundamental rights were so jealously regarded that the North Carolina Constitutional Convention of 1788 refused to ratify the proposed Federal Constitution until the adoption in that instrument of the Bill of Rights, calculated to secure these rights, was assured. Among the rights thus protected, in both Federal and State Constitutions, is that of the accused, in all criminal prosecutions, "... To confront the accusers and witnesses with other testimony. ..." Agreeably to the admonition that "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," it is the purpose here to examine the measure of protection this provision affords the accused, its nature and extent, and the circumstances under which it may be lost.

Confrontation may be claimed as of right "In all criminal proceedings . . .", which includes trials of common law and statutory crimes. A question arises, however, as to whether it may be so claimed in cases of a hybrid nature. Proceedings to disbar attorneys, to commit lunatics, etc.

2 N. C. Const., Declaration of Rights, §7 (1776); N. C. Const., Art. I, §11; U. S. Const., Amend. VI. The federal right is differently phrased. It is to the effect that, "In all criminal prosecutions the accused . . . shall enjoy the right to be confronted with the witnesses against him. . . ." The terminology varies with different state constitutions. No distinction based on this variance seems to be drawn.
4 This note supplements Coates, Limitations on Investigating Officers, 15 N. C. L. Rev. 229, 242 (1937). A critical analysis of the rules of evidence and procedure is here impossible. However, those of particular interest in their effect on confrontation will be noted.
6 In re West, 212 N. C. 189, 193 S. E. 134 (1937); In re Stiers, 204 N. C. 48, 167 S. E. 382 (1932); In re Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).
8 In re West, supra, states that, "It is not after the manner of our courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guarantees or to revoke his license without due process of law." This statement is understood to indicate that the rules applicable to civil actions will be enforced.
and to punish for contempt are not restricted by this constitutional provision. Cases within the jurisdiction of the juvenile courts are not considered to be criminal in nature, and they too may be conducted without recognizing this provision. But the defendant must be accorded the right of confrontation in proceedings before administrative agencies involving criminal sanctions.

The constitutional right of confrontation was designed to prevent the conviction of defendants in criminal cases by the use of ex parte affidavits and extrajudicial testimony. Therefore, confrontation is


8 Contempt proceedings are sui generis. If the contempt is direct summary punishment may be inflicted. N. C. Gen. Stat. §§5-5 (1943); State v. Little, 175 N. C. 743, 94 S. E. 680 (1918); In re Brown, 168 N. C. 417, 84 S. E. 690 (1915); Ex parte McCown, 139 N. C. 95, 51 S. E. 957 (1905).

If the contempt is indirect the court makes findings of fact based on testimony or affidavits. In re Adams, 218 N. C. 379, 11 S. E. 2d 163 (1940); In re Walker, 82 N. C. 95 (1880).

Where acts are punishable as for contempt findings of fact are supported by affidavits. Safie Manufacturing Co. v. Arnold, 228 N. C. 375, 45 S. E. 2d 577; In re Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

Where the act is an indirect contempt or is punishable as for contempt it is apparently in the court's discretion to take evidence by affidavit or by testimony at the hearing on the order to show cause. The cases cited do not hold that the contemnor may not present testimony at the hearing.

9 N. C. Gen. Stat. §§110-21, 24 (1943); State v. Burnett, 179 N. C. 735, 102 S. E. 711 (1920); In re Watson, 157 N. C. 340, 72 S. E. 1049 (1911). The jurisdictional age limit of the juvenile court is 16 years, unless the child commits a felony punishable by more than 10 years imprisonment, in which case the age limit is 14 years. N. C. Gen. Stat. 110-29 (1943); State v. Smith, 213 N. C. 299, 195 S. E. 819 (1938).


11 Helvering v. Mitchell, supra at 402, states that "Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions (by administrative agencies), those rules and guaranties do not apply . . . furthermore, the defendant has no constitutional right to be confronted with the witnesses against him . . . ". The inference, of course, is that if the agency is enforcing a criminal sanction confrontation must be preserved (italics supplied).

12 Snyder v. Massachusetts, 291 U.S. 97 (1934); Mattox v. United States, 156 U.S. 237 (1894) (The Mattox Case is an excellent example of the manner in which rules of evidence may be shaped to defeat justice. The majority held, first, that the death of a witness was sufficient ground for admitting his testimony given at
regarded as a constitutional embodiment of the common law rule that the accused is entitled to an opportunity to cross-examine the witnesses against him. This, in effect, preserves principally the defendant's right to have the common law hearsay rule of evidence enforced. A derivative, though not insignificant, benefit accruing from the enforcement of the hearsay rule is that witnesses are required to testify in the presence of the jury and the defendant. The jury is thus enabled to form a critical estimate of the witness' credibility as it is affected by his deportment and demeanor.

Since the common law hearsay rule was not absolute, but subject to exceptions, defendant's constitutional right to an opportunity to cross-examine is also subject to exceptions. Among the exceptions recognized in North Carolina in criminal cases are: Testimony at former trial, dying declarations, reputation, pedigree, official statements.

a prior trial, and, second, that defendant was precluded from impeaching the dead witness at the second trial by his statements made after the first trial, on the ground that a proper foundation could not be laid. The latter holding exhibits more interest in protecting the honor of a deceased witness than in giving a live defendant a fair trial. This view cannot be too strongly condemned.)

The North Carolina Supreme Court has excluded hearsay evidence in a number of criminal cases without reference to defendant's right of confrontation. See State v. Kluttz, 206 N. C. 726, 175 S. E. 81 (1934).

The North Carolina view that hearsay may be admitted for the purpose of corroboration lessens the scope of the constitutional protection. See STANSBURY, NORTH CAROLINA EVIDENCE §§51, 52, and 79.

The State's contentions may be stated in the trial judge's charge to the jury in such a manner as to infringe upon defendant's right to confrontation. See State v. Love, 187 N. C. 32, 121 S. E. 20 (1923).

The question as to whether the admission in evidence of a witness' "past recollection recorded" infringes on the right of confrontation has not been decided in North Carolina. Kinsey v. State, 49 Ariz. 201, 65 P. 2d 1141 (1937) holds that the admission of such evidence does not impair the right to cross-examine since the witness may be impeached, and his ability to observe attacked. The witness has already admitted that he has no present recollection of the facts.


and certificates, entries in the regular course of business, res gestae, verbal acts, statements of mental and physical condition, statements of intent, and spontaneous exclamations. Further, the attitude generally prevails that the constitutional provision did not solidify the common law exceptions, but that other exceptions might be developed. This view, of course, should not be followed to the point of extinguishing the rule by the exceptions. Inherent limitations imposed by the intent of the provision should be recognized.

Defendant is entitled by confrontation to present such defense as he may have by producing evidence in his own behalf, as distinguished forgotten cross-examination by State. Held: Proper to exclude evidence offered. All must be offered or none will be admitted.)

17 State v. Debnam, 222 N. C. 266, 22 S. E. 2d 562 (1942); State v. Puett, 210 N. C. 633, 188 S. E. 75 (1936); State v. Wallace, 203 N. C. 284, 165 S. E. 716 (1932) (This exception applies only to prosecutions for homicide.).


19 State v. Trippe, 222 N. C. 600, 24 S. E. 2d 340 (1943); State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); STANSBURY, NORTH CAROLINA EVIDENCE §149 (1946).


22 State v. Carraway, 181 N. C. 561, 107 S. E. 142 (1921); State v. Davis, 177 N. C. 573, 98 S. E. 785 (1919); STANSBURY, NORTH CAROLINA EVIDENCE §158 (1946).

23 State v. Davis, supra note 22; State v. Worthington, 64 N. C. 594 (1870); State v. Huntley, 25 N. C. 418 (1843); STANSBURY, NORTH CAROLINA EVIDENCE §159 (1946).


26 State v. Dills, 204 N. C. 33, 167 S. E. 459 (1932); State v. McCourty, 128 N. C. 594, 38 S. E. 883 (1901); STANSBURY, NORTH CAROLINA EVIDENCE §164 (1946).

27 Snyder v. Massachusetts, 291 U. S. 97, 107 (1934); State v. Dowdy, 145 N. C. 432, 436, 58 S. E. 1002, 1004 (1907); 5 WIGMORE, EVIDENCE §1397 (3rd ed. 1940). Contra: Salinger v. United States, 272 U. S. 542, 548 (1926) ("The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.")

N. C. Gen. Stat. §14-206 (1943) is an example of legislative creation of exceptions to the hearsay rule. State v. Barrett, 138 N. C. 630, 50 S. E. 506 (1905) discusses the power of the Legislature to create new rules of evidence.

28 Wigmore's principles of exceptions to the hearsay rule, "necessity" and "circumstantial probability of trustworthiness," might here be adopted to secure conformance to the purposes of the constitutional provision. 5 WIGMORE, EVIDENCE §§1420-1422 (3rd ed. 1940).

from, and in addition to, the right to test any testimony produced on behalf of the State by cross-examination. Indeed, a literal interpretation of the constitutional phraseology would seem to emphasize defendant’s right to bring in his own evidence for the purposes of contradicting the testimony produced by the State and establishing affirmative defenses rather than his right to test incriminating testimony.\(^{30}\) Two of the earlier North Carolina cases, while not denying that confrontation preserved defendant’s right to cross-examine State’s witnesses, took this view.\(^{31}\) The shift in emphasis from presenting the defense to cross-examination comes with later cases. However, it should not be supposed that confrontation exempts the defendant from the application of the usual rules of evidence in presenting his defense. The blade has two edges. The State is also entitled to test defendant’s witnesses by cross-examination.\(^{32}\)

Not only does defendant’s right to confront witnesses require that the hearsay rule be enforced, but it also requires that defendant be allowed a reasonable time, as determined by the facts of the particular case, to prepare his defense.\(^{33}\) This question is generally raised by a motion for continuance. Ordinarily the action taken on such motion rests in the sound discretion of the trial judge, and will not be reversed in the absence of abuse of discretion.\(^{34}\) But when it is claimed that a constitutional right has been denied by refusal to grant a continuance the question presented is one of law and is reviewable on appeal.\(^{35}\) Confrontation, in this respect, duplicates the constitutional right to counsel,\(^{36}\) but the protection thus afforded is not merely cumulative since the right to an opportunity to prepare his defense is preserved whether

\(^{30}\) N. C. Consr., Art. I, §11 (1868) ("... with other testimony ...").

\(^{31}\) State v. Tlghman, 33 N. C. 513 (1850); State v. Sparrow, 7 N. C. 487 (1819).

\(^{32}\) State v. English, 201 N. C. 295, 159 S. E. 318 (1931), Note, 10 N. C. L. Rev. 84 (1931) (Confession by third party excluded.); State v. Collins, 189 N. C. 15, 126 S. E. 98 (1924) (Statement by third party of defendant’s willingness to surrender excluded.); State v. Levy, 187 N. C. 381, 122 S. E. 386 (1924) (Evidence given at former trial excluded because witness unable to remember State’s cross-examination.); State v. Beverly, 88 N. C. 632 (1883) (Evidence of conviction of third party for same crime excluded.).


This subject has previously been discussed in respect to the right to counsel. Note, 27 N. C. L. Rev. 544 (1949). What was there said will not be reiterated here.


the accused employs counsel, the court assigns him counsel, or whether he conducts his own defense.\(^\text{37}\)

Additional protection is derived from confrontation in its assurance to defendant that he may not be tried and convicted in absentia.\(^\text{38}\) This assurance that he may be present extends to the selection of the jury,\(^\text{39}\) the reception of evidence,\(^\text{40}\) the argument of counsel,\(^\text{41}\) the charge to the jury,\(^\text{42}\) the reception of the verdict,\(^\text{43}\) and the imposition of sentence,\(^\text{44}\) but not to the return of the indictment in open court,\(^\text{45}\) the argument on motions for a new trial and similar motions,\(^\text{46}\) or the hearing on appeal in the Supreme Court.\(^\text{47}\) In cases involving capital felonies the presence of the accused is required at every step of the actual trial and cannot be waived, either personally or by counsel.\(^\text{48}\) In trials for felonies less


\(^{38}\) State v. O'Neal, 197 N. C. 548, 149 S. E. 860 (1929); State v. Hartfield, 188 N. C. 357, 124 S. E. 629 (1924); State v. Freeze, 170 N. C. 710, 86 S. E. 1000 (1915); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 S. E. 404, 2 S. E. 185 (1887); State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643 (1881); State v. Blackwelder, 61 N. C. 38 (1886); State v. Craton, 28 N. C. 378, 131 S. E. 539 (1926).

\(^{39}\) State v. Dry, 152 N. C. 813, 67 S. E. 1000 (1910).

\(^{40}\) While there are no North Carolina cases directly in point, the solicitude of the Court in protecting the accused's right to be present at other stages of the trial warrants the inference that a jury view would constitute taking evidence and that defendant would have the right to be present. See State v. Paylor, 121 N. C. 533, 27 S. E. 997 (1897); Cf. State v. Stewart, 189 N. C. 340, 127 S. E. 260 (1925).

\(^{41}\) 6 Wigmore, EVIDENCE §1803 (3rd ed. 1940) takes a contrary view to the effect that a jury view does not constitute taking evidence.

\(^{42}\) State v. Pierce, 123 N. C. 743, 31 S. E. 847 (1898); State v. Paylor, 89 N. C. 539 (1883).


In capital cases the trial judge cannot delegate to the clerk the duty to receive the verdict in the judge's absence. See State v. Bazemore, 193 N. C. 366, 137 S. E. 172 (1927).

\(^{45}\) State v. Brooks, 211 N. C. 702, 191 S. E. 749 (1937); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887).


\(^{48}\) State v. Dalton, 185 N. C. 606, 115 S. E. 881 (1923); State v. DeVane, 166 N. C. 281, 81 S. E. 293 (1914); State v. Moses, 149 N. C. 581, 63 S. E. 68 (1908); State v. Jacobs, 107 N. C. 772, 11 S. E. 962 (1890).

When the defendant becomes a fugitive pending appeal the Supreme Court may, in its discretion, hear the appeal, dismiss the appeal on motion by the State, or continue the case from term to term.

\(^{49}\) State v. Matthews, 191 N. C. 378, 131 S. E. 743 (1926); State v. Dry, 152 N. C. 812, 67 S. E. 1000 (1910); State v. Blackwelder, 61 N. C. 38 (1866). But cf. State v. Hardee, 192 N. C. 533, 135 S. E. 345 (1926) (Verdict of "murder in the second degree" cured any error. Rule is to be applied only when verdict is "guilty of murder in the first degree."). And State v. Trull, 169 N. C. 363, 85 S. E. 133 (1915) (Defendant under influence of opiates during trial of capital offense.).
than capital the right can be waived by defendant personally. In misdemeanor cases the right to be present may be waived personally or by counsel. Notwithstanding the rules as to waiver, no valid sentence imposing corporal punishment may be rendered in the absence of the accused.

Actual physical presence, alone, is insufficient. Confrontation demands mental, as well as physical, presence. The most frequent causes of mental absence are insanity, deafness, and inability to understand the English language. A defendant who is insane at the time of the trial may not be tried. Deafness and inability to understand English, however, do not prevent a trial of accused, consistently with his right of confrontation, if adequate steps are taken to assure his mental presence. It would seem preferable, when it appears to the trial court that such action is necessary, to require the court to furnish such means of communication as is needed to enable defendant to understand the proceedings, in the absence of a prior express waiver. Analytically, the rules of waiver applicable to mental presence should conform to those applicable to physical presence. But since physical presence is a material, tangible fact, and in many cases mental presence is not, greater

49 State v. Freeze, 170 N. C. 710, 86 S. E. 1000 (1915); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887). State v. Freeze supra, and State v. Cherry supra, state the rule to the effect that counsel, in less than capital felony cases, cannot waive accused's right to be present "unless expressly authorized thereto."

50 State v. Matthews, supra note 48 and State v. Dry, supra note 48, state the rule to the effect that only defendant may waive the right. Accord, State v. Pierce, 123 N. C. 745, 31 S. E. 847 (1898) (By implication).


52 State v. Brooks, 211 N. C. 702, 191 S. E. 749 (1937); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Paylor, 89 N. C. 539 (1883). Cf. State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887) (Defendant fled as the jury was returning to court with the verdict. The verdict was received but no sentence imposed. Several months later defendant was arrested and sentenced to corporal punishment under the original verdict. Held: Affirmed.).


54 State v. Vann, 84 N. C. 722 (1881); State v. Harris, 53 N. C. 136 (1860); Ashley v. Pescor, 147 F. 2d 318 (8th Cir. 1945); Howie v. State, 121 Miss. 197, 83 So. 158 (1919). See People v. Perry, 14 Cal. 2d 387, —, 94 P. 2d 559, 564 (1939).

55 The cases cited in note 52 supra decide this point by implication. Such a course has been adopted in the Superior Court and approved by the North Carolina Supreme Court. See State v. Early, 211 N. C. 189, 189 S. E. 668 (1936).

Evidence received through an interpreter is not hearsay. State v. Hamilton, 42 La. App. 1204, 8 So. 304 (1890).

56 Contra: Gonzalez v. People, 109 F. 2d 215 (3rd Cir. 1940) (Waived by failure to insist on right to interpreter).
care should be exercised to determine whether an intelligent waiver of the right to be mentally present has been made. To dispel doubt, the waiver required should be express and before the jury has been selected.

It not infrequently occurs that a conflict arises between the right of confrontation and the various privileges of witnesses. The issue in such case is whether the right to confront is paramount or is subject to such privileges. In the North Carolina case of *State v. Perry* a conflict arose between confrontation and the constitutional right to refuse to give self-incriminating testimony. It was held reversible error to refuse to strike the direct testimony after the witness claimed the privilege, on the ground that the right to confront is a right to inquire freely and fully into any relevant subject matter. A defendant claiming a constitutional right should not be prejudiced by half-truths. This decision is sound, and the principle should be applied regardless of the nature of the privilege claimed and regardless of the status of the witness, whether he is a co-defendant, is to be separately tried, or is otherwise disinterested.

The importance of *State v. Perry* lies in its limitation of prior decisions to the effect that co-defendants are competent and compellable to testify, though they may not be required to incriminate themselves. The result of this case is that witnesses, including co-defendants, may be required to testify by the State, but if a privilege is claimed by a witness on cross-examination defendant is entitled as of right to have the direct examination stricken.

As is true with various other protective devices, defendant may waive his right to confrontation “By express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.” This observation is subject to the qualification previously noted of the requirement of defendant’s presence at a trial for a capital offense.

67 It is not intended here to intimate that no duty devolves upon counsel to call the court's attention to accused's physical or mental defects. Of course, when accused has no counsel the burden should be on the court to protect his rights in this respect.
68 210 N. C. 796, 188 S. E. 639 (1936).
69 State v. Condry, 80 N. C. 418 (1858) (Attorney-client privilege disallowed).
71 But defendant may not insist that a co-defendant testify in his behalf if the co-defendant claims a privilege against self-incrimination. *State v. Medley,* 178 N. C. 710, 100 S. E. 591 (1919). This view likewise preserves both constitutional rights.
72 Cf. *State v. Weaver,* 93 N. C. 595 (1885) (“It was not good ground of exception that the court told the co-defendant witness ‘That he need not answer any question which tended to criminate himself.’”)
The recent North Carolina case of State v. Gibson64 retreats from the commendable position taken by State v. Farrell66 in regard to constitutional rights and revives the doctrine of prejudicial error. Though State v. Gibson involved the constitutional right to counsel the application of the doctrine to confrontation may be deduced since the two rights are closely interwoven. The clearest statement of the doctrine is to be found in State v. Beal66 wherein it is said that, "The foundation for the application (for) a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued. . . . Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical." Obviously, the question of prejudice cannot arise unless a denial of a right has been assumed without deciding, conceded, or proved, hence such denial itself is only a theoretical injury. Two criticisms may be made in regard to this doctrine. The first is that, logically, the doctrine would sanction a star-chamber proceeding if defendant were in fact guilty. In this aspect the doctrine is a negation of the concept that the Declaration of Rights guarantees to every man a fair and just trial. The denial of a fair trial should, of itself, be sufficient prejudice. The second criticism is that an erroneous proceeding deprives defendant of his presumption of innocence, which loss, under the doctrine as stated, is not an actual, but merely theoretical injury.67 The justification most frequently advanced for the application of this doctrine is the public interest in certain and prompt punishment of criminals. The public interest is not a stable compass when compared with the Declaration of Rights. Further, the Court seems to overlook the fact that the public has a counterbalancing interest in securing to the accused his constitutional rights and that it was the purpose of the Declaration of Rights to secure to the individual rights as against the public.

The approach of State v. Farrell68 is to be preferred. There the view is taken that, "Whether his defense before a jury after full preparation would have availed him is for the present purpose immaterial. The law provides one mode of trial and it is the same for the innocent and for the guilty." The distinction between the approach of State v.

64 229 N. C. 497, 50 S. E. 2d 520 (1948).
66 223 N. C. 361, 26 S. E. 2d 322 (1943).
67 This criticism of the doctrine has previously been made. Note, 27 N. C. L. Rev. 544 (1949).
Gibson and that of State v. Farrell lies in the purposes for which the facts in the record are analyzed. In State v. Gibson the purpose is to determine whether defendant has been prejudiced. The purpose in State v. Farrell is to determine whether error has been committed. The one focuses attention on the injury suffered, the other on the nature of the constitutional provision in question. "You were not denied the right" is a better answer to a claim of right than "You fail to show us that the denial injured you."

Despite frequent and vigorous dissents, the United States Supreme Court has uniformly refused to hold that the due process clause of the 14th Amendment of the Federal Constitution incorporates the Bill of Rights as restraints on state action. Instead, the due process clause is interpreted to impose federal prohibition on state deprivation of only those rights which may be considered of "... The very essence of a scheme of ordered liberty," or as "... Principle(s) of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." It has not been squarely held that confrontation is essential to due process, but dicta in Snyder v. Massachusetts indicate that, insofar as it assures an adequate opportunity to be heard and the presence of the prisoner at the trial, it is considered fundamental. To the extent that confrontation duplicates the right to counsel, this protection may also be inferred from the decisions in the right to counsel cases.

The procedure of the United States Supreme Court in appraising the facts of each case and applying a subjective interpretation of due process thereto has made the task of prognostication a matter of chimerical surmise for the state courts and few objective criteria are perceivable.

A pragmatical approach to constitutional rights, as exemplified by the doctrine of prejudicial error, is not to be desired. In the effort to

---


70 Palko v. Connecticut, at 325, supra note 70.

71 Snyder v. Massachusetts, 291 U.S. 97, 105 (1933).

72 West v. Louisiana, 194 U.S. 258 (1903) (The question was here presented but not decided.).

73 Green, The Bill of Rights, The Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948). (Professor Green thinks this procedure is "... The purest and most absolute form of arbitrary and uncontrolled power, a retreat into the deepest jungle of natural law, from the clearing which the Bill of Rights has created." Id. at 900.)

74 Newman v. State, 148 Tex. Cr. App. 645, 652, 187 S. W. 2d 559, 563 (1945) ("If the Supreme Court would prescribe some formula by which we may be guided, our task would be much easier ... ").
dispense criminal justice the means by which that end is to be achieved are worth considering, as well as the end itself. Procedural due process requires that the rules of evidence be shaped to conform to a sound conception of the protective devices of the Constitution rather than altering the concept to fit the rules. In the event the concept appears outmoded change should be made through the prescribed procedure, constitutional amendment, rather than by legislative or judicial erosion. 77

MARSHALL B. SHERRIN, JR.

Federal Jurisdiction—Interpleader Act—Diversity Requirements—Co-Citizenship of Claimants

The Federal Interpleader Act1 provides that the district courts of the United States shall have original jurisdiction of bills of interpleader and bills in the nature of interpleader2 if "(i) Two or more adverse

77 However no objection can be made to judicial or legislative prescription of the minima of protection secured by constitutional rights. Chapter 112 N. C. Sess. L. (1949) is to be commended as a step in the right direction. The Legislature might well consider statutory authority for the State to take and use depositions in criminal cases, preserving accused's right to cross-examine deponent when the deposition is taken.

128 U. S. C. §41 (26) (1936). Chafee, The Federal Interpleader Act of 1936, 45 YALE L. J. 963, 1161 (1936). There has been a slight change in the wording of the diversity requirement by 28 U. S. C. §1335 (1948). It now reads: "(i) Two or more adverse claimants, of diverse citizenship as defined in 1332 of this title. . . ." The Reviser's Notes to §1335 do not indicate that any change in the requirement was meant to be effected by this change in phraseology and the substituted language does not seem to require a change therein.

Interpleader was a remedy which developed in the equity courts. It would lie only if—(1) The same debt, duty or thing was claimed by all parties against whom relief was demanded; (2) All adverse titles or claims were dependent upon or derived from a common source; (3) The person seeking the relief did not have or claim any interest in the subject matter; (4) The person seeking the relief was a stakeholder, standing perfectly indifferent between the claimants. Later, a plaintiff was permitted to bring a bill in the nature of interpleader, though he claimed an interest in the subject-matter, did not admit all of the defendants' claims or the defendants claimed different amounts (and hence strict interpleader would not lie) if there was some basis for equitable jurisdiction other than double liability or vexation. Both bills of interpleader and bills in the nature of interpleader can be obtained under 28 U. S. C. §1332 (1948), as any other civil action and are subject to the limitations therein (i.e. the sum in controversy must exceed $3,000, exclusive of interest and costs; process may be served only within the territorial limits of the state in which the district court is held; there must be diversity between plaintiff stakeholder and defendant claimants; the only proper venue is the judicial district in which all the plaintiffs or all the defendants reside). The Interpleader Act (supra note 1) also permits bills of interpleader and bills in the nature of interpleader but the relief is thereby made more accessible by: (1) making the crucial diversity of citizenship that among the adverse claimants; (2) reducing jurisdictional amount to $500; (3) allowing process to run throughout the United States; (4) making the district where one or more of the claimants resides or reside a proper venue; (5) allowing the suit to be entertained though the titles or claims of the adverse claimants do not have a common origin, or are not identical but adverse to and independent of each other. 2 MOORE'S FEDERAL PRACTICE §§22.02, 22.03 (1938). See Chafee, Modernising Interpleader, 30 YALE L. J. 804 (1921).