UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 42 | Number 4 Article 5

6-1-1964

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Criminal Law—The Right of the State to Appeal in Criminal Cases

I. Introduction

The arguments against allowing a governmental authority to appeal in criminal cases are founded on historical experience. The early kings of England defined criminality and persecuted those who opposed them.[1] They ordered the lords, barons, or others owing allegiance to them to sound the "hue and cry" and arrest these criminals in their name.[2] The prosecution of the criminal proceeded under the watchful eye and guidance of the Crown in courts subject to its influence.[3]

Two great abuses arose from this system of law enforcement. The King, having the authority to make the laws and determine which individuals were criminals, often failed to make that determination on the basis of social benefit or welfare. He could name as criminals those subjects who were objectionable to him personally and ignore social considerations. The other great danger in this scheme was the possibility of repeated attempts by the Crown to gain a conviction of the accused for his alleged offense irrespective of his actual guilt or innocence. This process of multiple trials is modernly recognized by the name "double jeopardy." The basis of double jeopardy is the possibility that the accused, found innocent by his peers, could have the facts of his case redetermined on the request of the State.[4]

These early abuses led, in part, to the signing of the Magna Carta[5] which established that the government was below the law

---

[1] Poole, Domesday Book to Magna Carta 385-87 (1951).

[2] Plucknett, A Concise History of the Common Law 378 (2d ed. 1936); Poole, *op. cit. supra* note 1, at 10, 392 (1951); Pound & Plucknett, History and System of the Common Law 55-61 (3d ed. 1927).

[3] Plucknett, *op. cit. supra* note 2, at 82-86.

[4] Double jeopardy means the defendant is twice put in danger of conviction for the same offense. State v. Watson, 209 N.C. 229, 183 S.E. 286 (1935). This could occur in several ways. An accused could be tried repeatedly for the same offense in the trial courts. He could be convicted, pay his penalty, and then be retried. Or he could be tried in a lower court and carried to appellate courts by the Crown until he was convicted. The rule of double jeopardy prohibits a second punishment for a single offense as well as a second trial even if the defendant has never received punishment. Kepner v. United States, 195 U.S. 100 (1904).

[5] Poole, *op. cit. supra* note 1, at 477. The Magna Carta was signed at

and not above it. Thus, the rule developed that the Crown could not, on its own motion, appeal criminal cases to a higher court.[6] This restriction was absolute and barred appeals regardless of questions of double jeopardy. The idea that no person shall be twice put in jeopardy for the same offense was carried over to the colonies and remains a sacred principle in American criminal law. It is expressed in our various constitutions[7] and is recognized in every court.[8]

The dangers of persecution that existed under the kings are still present to some degree under our representative form of government. The state retains both the power to enact the law and the authority to enforce it, but due to improvements, both organizational and social, these dangers are not imminent. Organizationally, these improvements are found in the governmental doctrine of separation of powers. No longer does a single authority legislate criminal codes, pursue the criminal and prosecute him at will. Social advances also play a large part in reducing harrassment of individuals. The right to vote and better educational and communicative facilities have made the more enlightened wishes of the people known to government officials. Consequently many jurisdictions have seen fit to allow the State to appeal in those criminal cases where questions of double jeopardy do not arise.

No appeal involving only *questions of law* could amount to double jeopardy. If the doctrine is interpreted as a bar to the right of the State to appeal in *all* criminal prosecutions, some obviously guilty individuals might be released to plague society. These releases would occur not because there was a possibility of double jeopardy but because the State could not appeal its legal questions. Logic demands that the law be correctly applied in criminal cases.

Runnymede in 1215 and reissued three times in the following three centuries. *Id.* at 477-78.

[6] "At common law, the state cannot appeal.... [W]hether an appeal or writ of error will be at the instance of the state under the constitutional provision as to double jeopardy would seem to depend on the construction given to the provision by the court.... [T]he constitutional provisions differ in different states. Some provide that no one shall be twice put in jeopardy for the same offense; others that no one shall be twice put in jeopardy of life or limb.... [M]ost courts hold these phrases to be synonymous, and to prohibit a second trial for any offense." CLARK, CRIMINAL PROCEDURE 453 (2d ed. 1918).

[7] U.S. CONST. amend. V; N.C. CONST. art. I, § 17.

[8] As North Carolina has stated the rule, "No man shall be twice vexed for the same offense." State v. West, 71 N.C. 263, 264 (1874). See also State v. Credle, 63 N.C. 506 (1869); State v. Taylor, 8 N.C. 462 (1821).

If an appeal by the State is required to get the correct application, such appeal should be allowed. This thinking weighs heavily in some states,[9] less in others.[10] The trend in North Carolina has been to allow a relatively small degree of appellate authority on behalf of the State, limiting it to a few areas and refusing to grant appeal on many questions of law. North Carolina holds dear the feeling that the expansion of appellate powers of the State is action in an area where its ancestors feared to tread and that it should avoid such action.[11]

Early case law on the right of the State to appeal in North Carolina was inconsistent. At first, there was an absolute right on the part of the State to appeal.[12] However, this power was eliminated in the early case of *State v. Jones*[13] which held that the State had absolutely no power of appeal. This strict rule remained in effect for fifty years, from 1809 until 1859,[14] at which time the supreme court again reversed its opinion and granted a very limited appellate power to the State.[15] During the ensuing years the court developed

[9] *E.g.*, CONN. GEN. STAT. § 54-96 (1958). This section authorizes motions for new trials after acquittal. State v. Carabetta, 106 Conn. 114, 137 Atl. 394 (1927); State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894). CONN. GEN. STAT. § 54-96 (1958) is phrased as follows: "Appeals from the rulings and decisions of the superior court or of the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

[10] *E.g.*, TEXAS CONST. art. 5, § 26 which allows no state appeal in criminal cases.

[11] See State v. Savery, 126 N.C. 1083, 36 S.E. 22 (1900) where the court adopted as its own the following words: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion.... In coming to this conclusion, we are aware that its effect may possibly be to turn lose a bad man upon society, but it is better in the administration of law [that] there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which, in times of civil commotion that may occur in the history of every country, would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges to crush the liberties of the citizen." *Id.* at 1090-91, 36 S.E. at 25.

[12] State v. McLelland, 1 N.C. 632 (1804); State v. Haddock, 3 N.C. 162 (1802).

[13] 5 N.C. 257 (1809).

[14] Between 1809 and 1859 two recorded cases were decided concerning the State's authority: State v. Taylor, 8 N.C. 462 (1821), which denied the State's appeal and State v. Moore, 29 N.C. 228 (1847), which was deemed a mistrial by the court and returned for venire de novo.

[15] See State v. Barnes, 52 N.C. 20 (1859).

the scope of that power through comprehensive case law[16] until, by 1883, it had grown to encompass appeals by the State on most questions of law which were apparent on the face of the record. Not all questions of law could be appealed, but only those arising from special verdicts,[17] verdicts upon demurrer of the defendant,[18] upon motions to quash,[19] and upon arrest of judgment.[20]

II. Statutory Right of Appeal by the State

In 1883, prompted either by its own conscience or by the growth of the courts' power in determining the State's right to appeal, the Assembly enacted a statute which codified the right.[21] This codification halted the growth of the power and put its control in the hands of the legislature. This legislative control is exemplified by the fact that the statute has remained almost unchanged since 1883. Amendments have been made,[22] but the resemblance between the 1883 case law and the present codification is evident:[23]

[16] In 1869 it was decided the State had a "very small" right of appeal. State v. Credle, 63 N.C. 506 (1869). In State v. Bailey, 65 N.C. 426, 427 (1871), it was stated that neither the State nor the defendant could appeal from interlocutory judgments *except* in capital cases and serious misdemeanors. Later came the statement that no appeal was allowed where a general verdict of not guilty had been entered. State v. Freeman, 66 N.C. 647 (1872); State v. Phillips, 66 N.C. 646 (1872). Those errors of law apparent on the face of the record were considered appealable. State v. Bobbitt, 70 N.C. 81 (1874). In State v. West, 71 N.C. 263 (1874), the defendant had been released because the trial judge ordered a verdict of not guilty to be entered on the defendant's plea of former acquittal. The solicitor appealed and the supreme court found that such a verdict was a general verdict, and they could not accept the appeal unless it had been on a special verdict.

[17] State v. Powell, 86 N.C. 640 (1882); State v. Moore, 84 N.C. 724 (1881); State v. Padgett, 82 N.C. 544 (1880); State v. Lane, 78 N.C. 547 (1878).

[18] State v. Powell, 86 N.C. 640 (1882); State v. Moore, 84 N.C. 724 (1881); State v. Swepson, 82 N.C. 541 (1880); State v. Lane, 78 N.C. 547 (1878).

[19] See note 18 *supra.*

[20] See note 18 *supra.*

[21] N.C. Consol. Stats. § 4649 (1919); Revisal of 1905 § 3276; Code of 1883, § 1237. The attempt seems to have been made to write the 1883 case law into statutory form.

[22] N.C. Sess. Laws 1945, ch. 701, which added N.C. Gen. Stat. § 15-179(5), (6) (1953).

[23] The original enactment N.C. Code of 1883, § 1237 read: "Appeal by State; in what cases recognized. An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant.

(1) Upon a special verdict;

(2) Upon a demurrer;

§ 15-179. *When State may Appeal.*—An appeal to the Supreme Court or Superior Court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.
5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
6. Upon declaring a statute unconstitutional.[24]

In these situations the State cannot alter facts to secure a conviction. On appeal from a sustained demurrer or motion to quash, the case never has gone to trial on its merits; therefore, no facts have been recorded. On special verdicts and arrests of judgment the facts are decided by a jury and cannot be reviewed. Such appeals as these include only questions of law.[25] For this reason North Carolina has, by section 15-179, expanded certain rights of the State in an effort to secure judicial advantages.

A study of the cases interpreting the statute reveals that there is some degree of uncertainty in both definition and application of the statutory language. This uncertainty frequently results in errors which might have been avoided if more specific provisions had been formulated. In an attempt to clarify much of the confusion caused by the absence of legislative definitions, the following interpretations of the various subsections are offered along with discussions of the important cases.

A. The Special Verdict

A special verdict[26] is one in which the jury finds all the facts of the case and refers the decision of the cause upon those facts to the court.[27] It is a verdict of guilty or not guilty since the facts found

(3) Upon a motion to quash;
(4) Upon arrest of judgment."

[24] N.C. GEN. STAT. § 15-179 (1953).

[25] N.C. GEN. STAT. § 15-179(5), is expressly limited to questions of law. Section 15-179(6), would evade factual questions since the constitutionality of a statute is implicitly a question of law.

[26] N.C. GEN. STAT. § 15-179(1) (1953), allows appeal by the State upon a special verdict in favor of the defendant.

[27] See Mumford v. Wardwell, 73 U.S. 423 (1867). However, a special verdict differs from findings in answer to interrogatories. A finding on interrogatories need not cover all material issues and *accompanies* a general verdict. A special verdict must cover all facts and is given *in place of* a general verdict. State v. Hanner, 143 N.C. 632, 57 S.E. 154 (1907).

by the jury "do or do not constitute in the law the offenses charged."[28] A judgment on a special verdict, since it involves only matters of law, is open to review at the instigation of either the defendant *or* the State.

The special verdict has several advantages in criminal cases. It simplifies the charge which the judge must give to the jury since there is no need to relate the law to the facts and it partially eliminates the element of sentiment in jury decisions.[29] It presumes the correct application of the law to the facts because this is done by the judge. By allowing the State to appeal the defendant cannot be said to be in double jeopardy. The facts are found, recorded, and cannot be altered. Only the application of the law by the judge may be examined.

A special verdict is open to review by a higher court, but when the judge sets aside a verdict, as may be done, he cannot on his own motion enter a general verdict of guilty or not guilty. In *State v. Moore*[30] the defendant was indicted for larceny of two barrels of turpentine. After the presentation of the evidence the jury was asked to return a special verdict. Instead it answered with two interrogatories of its own: If the court found turpentine to be the subject matter of larceny and if the court found the defendant did steal two barrels, then it, the jury, found the defendant guilty. The judge entered a verdict of not guilty and the State appealed upon the questions raised in the "special verdict." The appellate court refused to answer the questions on the ground that the jury verdict had been set aside, the judge replacing it with his own. The verdict was not given by the jury and therefore it was a nullity.

In *Moore* the court allowed the appeal for the purpose of recognizing the error of law which the trial judge had committed. The judge had made his own determination as to the proof of the allegation of larceny of two barrels of turpentine. This determination caused the "verdict" to be of a different nature from the findings of the jury. The judge's verdict was general and therefore

[28] State v. Moore, *29* N.C. *228, 230* (1847).

[29] It was once necessary that the judge, upon considering the finding of fact by the jury, instruct them as to his application of the law and require that the jury itself render the actual verdict upon his instructions. This is no longer a necessity, even though it is still acceptable. It is now sufficient if the trial judge simply hears the facts found by the jury and orders his judgment entered on the record. For an excellent note on this and related subjects see 13 N.C.L. REV. 321 (1935).

[30] 29 N.C. 228 (1847).

prohibited consideration of the legal questions on appeal by the State. The court, however, realized that it was bound to act on the appeal in some manner. It held that in such cases as these a mistrial is to be declared and a *venire de novo* ordered in the court below.[31]

If the jury simply neglects to decide determinative facts and the judge renders a special verdict in the proper form, the verdict is ineffective, but the appeal is allowed on the question of law decided by the judge. In *State v. Gulledge*[32] the defendant was found guilty on "special verdict." The trial judge, on his own motion, ruled the defendant not guilty. The State appealed on the theory that there had been a special verdict. It was found that the facts determined by the jury were insufficient to adjudicate either innocence or guilt. Even though there could not have been a binding verdict if the judge had let the jury decision stand, the court held that the special verdict would support an appeal by the State.[33]

Under section 15-179 the State may appeal *to* the superior court from the various lower courts. Thus, the question arises whether lower courts can render special verdicts. If the statute establishing the lower court so specifies, special verdicts can be rendered.[34] In those courts where such authority is not granted in the establishing act the power to issue special verdicts is undetermined.[35] If the lower court had the authority to sit with a jury in criminal pro-

[31] 29 N.C. at 231.

[32] 207 N.C. 374, 177 S.E. 128 (1934).

[33] This is not to say that where a judge sits without a jury he may call his verdict a "special verdict" and thereby grant the State an appeal. Such a verdict as this would be nothing more than an acquittal on a general verdict. State v. Nichols, 215 N.C. 80, 200 S.E. 926 (1938). See also State v. Mitchell, 225 N.C. 42, 33 S.E.2d 134 (1945), where the trial judge, upon hearing the facts as determined by the jury, decided the applicable statute was unconstitutional and ordered a "special verdict" on that ground. The solicitor appealed on the theory that there had been a special verdict. The appeal was not allowed on the ground that the constitutionality was a matter which the judge could decide at any time; therefore, the verdict was not based on the jury's findings, and no special verdict was given.

[34] State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899); State v. Bost, 125 N.C. 707, 34 S.E. 650 (1899).

[35] The supreme court announced its own uncertainty in State v. Everett, 244 N.C. 596, 94 S.E.2d 576 (1956), when it said: "Before the 1945 amendment... the State had no right of appeal to the Superior Court from the judgment of an inferior court of competent jurisdiction given for the defendant upon a special verdict.... The 1945 amendment implies that there may be circumstances under which the State has such right of appeal. *Quaere*: Unless the statute under which a recorder's court is established so provides, may *the judge* of such court return a *special* verdict?" [Dismissed on other grounds.] *Id.* at 597, 94 S.E.2d at 577.

ceedings, the implication is that there could be a special verdict rendered. This implication is raised by both the history of special verdicts in this State[36] and the language of section 15-179 itself which in no way limits the use of the special verdict. On the other hand, if the inferior court is forbidden to use the jury, the judge could not render a special verdict, and if he attempted to do so, the judgment would be construed as a general verdict.[37]

B. The Demurrer

Subsection 15-179(2) contemplates a common law demurrer to the indictment.[38] Such a demurrer admits the facts as stated in the indictment but attacks their legal effect.[39] Consequently, it presents only questions of law which are appealable by the State.[40] On demurrer facts are never presented to the jury for consideration. Any evidence taken on the demurrer is considered by the judge and goes to the question of the validity of the trial *to be had*, not to the guilt or innocence of the defendant.[41]

The State may appeal the sustaining of a demurrer, but the defendant may not appeal if the demurrer is overruled. This is because sustaining such a demurrer amounts to a final judgment, whereas if the demurrer of the defendant is overruled, it is in the form of an interlocutory judgment which cannot be appealed.[42] The defendant, however, may hold his exception, but he must proceed with the trial.

There is a possibility of confusion as to the breadth of the appellate power given under subsection 15-179(2). Section 15-173 apparently provides for a motion called a "demurrer to the evidence,"[43] but this motion could not be within the purview of subsection 15-179(2). Historically, the State has never appealed after a

[36] Notice the use of the special verdict in Ahoskie v. Moye, 200 N.C. 11, 156 S.E. 130 (1930); State v. Crawford, 198 N.C. 522, 152 S.E. 504 (1930); State v. Corpening, 191 N.C. 751, 133 S.E. 14 (1926).

[37] See note 33 *supra*.

[38] See note 44 *infra* and accompanying text.

[39] State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925).

[40] See State v. Harris, 106 N.C. 682, 11 S.E. 377 (1890).

[41] State v. McDowell, 84 N.C. 798 (1881).

[42] See State v. Blades, 209 N.C. 56, 182 S.E. 714 (1935); State v. Harris, 106 N.C. 682, 11 S.E. 377 (1890); State v. McDowell, 84 N.C. 798 (1881); State v. Fishblate, 83 N.C. 654 (1880); State v. Bailey, 65 N.C. 426 (1871).

[43] N.C. GEN. STAT. § 15-173 (1953) is entitled "Demurrer to the Evidence" and provides, in part: "the defendant may move to dismiss the action, or for judgment as in the case of nonsuit."

demurrer to the evidence,[44] but there is a more valid reason. Section 15-173 when originally enacted in 1913 was captioned by the Assembly as "an act to provide for judgment of nonsuit in criminal actions."[45] The misnomer of "demurrer to the evidence" was inserted as a title to the section by the publisher in 1919 in the consolidated statutes.[46] When minor amendments were made in 1951 the Assembly again referred to the amendment as one to amend the section relating to motions to dismiss or judgments of nonsuit in criminal actions.[47] The subtitle "demurrer to the evidence" which had been entered by the publisher was merely carried over by the legislature, obviously without realizing that it was perpetrating a previous editorial error. The section itself makes no mention of a demurrer to the evidence, but mentions only motions to dismiss and nonsuits.[48] It is evident that the legislature did not mean to grant, by section 15-173, any form of demurrer which would be within the authority granted in section 15-179(2).

Demurrers to the indictment usually attack the allegations on the theory that they do not state facts sufficient to constitute a criminal offense, and most of the reported cases in North Carolina were appealed from demurrers sustained on that ground.[49] However, it is entirely possible that an indictment may be defective for other reasons. In *State v. Harris*[50] the defendant had demurred on the ground that there were "several counts charging distinct offenses, but of the same grade and punishable alike."[51] This was apparently

[44] The only cases which have been appealed under N.C. GEN. STAT. § 15-179(2) are State v. Truitt, 239 N.C. 590, 80 S.E.2d 637 (1954); State v. Stewart, 239 N.C. 589, 80 S.E.2d 636 (1954); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State v. Parker, 209 N.C. 32, 182 S.E. 723 (1935); State v. Morris, 208 N.C. 44, 179 S.E. 19 (1935); State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925); State v. Harris, 106 N.C. 682, 11 S.E. 377 (1890). These cases have all been appealed on common law demurrers which were sustained. There has never been an appeal under N.C. GEN. STAT. § 15-179(2) on a "demurrer to the evidence" mentioned in the caption to N.C. GEN. STAT. § 15-173 (1953).

[45] N.C. Sess. Laws 1913, ch. 73.

[46] N.C. CONSOL. STATS. § 4643 (1919).

[47] N.C. Sess. Laws 1951, ch. 1086.

[48] See N.C. GEN. STAT. § 15-173 (1953).

[49] See State v. Truitt, 239 N.C. 590, 80 S.E.2d 637 (1954); State v. Stewart, 239 N.C. 589, 80 S.E.2d 636 (1954); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); State v. Parker, 209 N.C. 32, 182 S.E. 723 (1935); State v. Morris, 208 N.C. 44, 179 S.E. 19 (1935); State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925).

[50] 106 N.C. 682, 11 S.E. 377 (1890).

[51] 106 N.C. at 687, 11 S.E. at 378.

a demurrer for misjoinder of criminal offenses even though the facts alleged constituted the various crimes. The court held the demurrer valid and allowed the State to appeal under subsection 15-179(2).

The trial judge may use his discretion in considering a demurrer, but upon granting it he must leave the parties in their present situation. When a judge sustains a demurrer and returns a "verdict of not guilty" thereon, the State may appeal upon a showing that the "verdict" was, in fact, based on demurrer.[52] Thus, if the State can procure another indictment, it has the right to do so.

C. The Motion to Quash

At common law the motion to quash was allowed against any indictment insufficient on its face,[53] whether the insufficiency was material or *de minimus* in form.[54] In North Carolina the use of the quashal is more restricted. There have been statutory modifications which limit the right of the defendant to make a motion to quash so that no quashal is allowed if "sufficient matter appears in the indictment to enable the court to proceed to judgment."[55] Also eliminated is the requirement of legal words of art such as "with force of arms" and "against the form of the statute."[56]

Most jurisdictions allow the motion to quash only where the insufficiency is apparent on the face of the indictment.[57] North Carolina, however, allows the defendant to make motions in those cases where "relevant facts exist *dehors* the record" and can be proven.[58] It has been said that the trial court is allowed on its own motion to require a quashal in those cases where it is apparent the court has no authority.[59]

---

[52] See State v. Parker, 209 N.C. 32, 182 S.E. 732 (1935), where the defendant was the father of an illegitimate child born before the bastardy act was passed. He was tried under the act. He demurred and the judge held him not guilty. The State appealed. The court, on appeal, reversed the trial judge even though "this could not be done upon a demurrer." *Id.* at 33, 182 S.E. at 733.

[53] CLARK, CRIMINAL PROCEDURE 416-21 (1918).

[54] People v. Cooper, 366 Ill. 113, 7 N.E.2d 882 (1937).

[55] See N.C. GEN. STAT. § 15-153 (1953).

[56] See N.C. GEN. STAT. § 15-155 (1953).

[57] See Clark, *op. cit. supra* note 53, at 416-21 (1918).

[58] State v. Bowman, 145 N.C. 452, 455, 59 S.E. 74, 76 (1907): "While it is held in many jurisdictions that a motion to quash can only be made for matter apparent in the record . . . it is otherwise with us. And a plea of the kind interposed here has been sanctioned as a proper method, in motions to quash, by which the relevant facts exist *dehors* the record should be made to appear."

[59] The court explained the duties of the lower courts in State v. Miller,

The motion to quash is, in form, a motion and not a plea and it should be allowed for all material errors surrounding the proceedings. Some of the reasons for which indictments have been quashed in North Carolina and which have supported appeal by the State are: unconstitutionality of the statute on which the indictment was drawn[60] and "no evidence" on which the grand jury could find an indictment.[61]

There have been several cases that have taxed the court's ability to define quashal for the purpose of the State's appeal, due to the fact that North Carolina allows facts *dehors* the record in such cases.[62] The "dehors rule," since it allows an introduction of facts, seems to produce difficulty in deciding when double jeopardy is involved in quashal decisions. In *State v. Bowman*[63] the State appealed a judgment for the defendant which had been granted on a plea of statutory immunity. The defendant contended that the State had no right to appeal under the immunity statute. The court answered that for "the purpose of the appeal," the defendant's plea should be considered as a motion to quash and brought within the provisions of subsection 15-179(3).[64] The court reached a different result, however, in *State v. Wilson*[65] where the prisoner pleaded that the indictment was issued for an offense for which he had previously been tried. The trial judge allowed the "motion to quash" and

100 N.C. 543, 5 S.E. 925 (1888), where it said: "Generally and ordinarily, a motion to quash the indictment made by the defendant, should not be allowed, if made after the plea of not guilty, but such motion, on the part of the State, may be allowed at any time before the defendant has been actually tried upon the indictment. It seems, however, that the court has authority, to be exercised in its discretion, to allow the motion to be made by the defendant after his plea of not guilty, and there are cases in which such motion should be allowed at any time, as when it appears from the indictment that the court has no jurisdiction. This objection may, be taken by mere suggestion, or by motion, or the Court may *ex mero motu*, take notice of it. Neither consent nor waiver can give jurisdiction, and the court will not proceed when it appears from the record that it has no authority." *Id.* at 545, 5 S.E. at 926.

[60] See State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951), where the statute authorizing a fine for violation of parking meters was contested, but no decision was made on the validity of the act since the action was brought in the superior court which did not have jurisdiction. See also State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

[61] State v. Barnes, 52 N.C. 20 (1859).

[62] *E.g.*, State v. Wilson, 234 N.C. 552, 67 S.E.2d 748 (1951); State v. Bowman, 145 N.C. 452, 59 S.E. 74 (1907).

[63] 145 N.C. 452, 59 S.E. 74 (1907).

[64] 145 N.C. at 455, 59 S.E. at 75.

[65] 234 N.C. 552, 67 S.E.2d 748 (1951).

released the prisoner. The State appealed. The supreme court refused to hear the appeal on the ground that this was not a granting of a motion to quash but was a plea of *autrefois acquit*.

There is a legal distinction between the defenses used in *Bowman* and *Wilson*. The accused is claiming prior jeopardy if his defense rests on *autrefois acquit*, while a plea of immunity supports no such allegation. However, the differentiation of these defenses for the purpose of subsection 15-179(3) is not convincing. In both *Bowman* and *Wilson* the court allowed evidence *dehors* the record. These "outside" facts do not go to the merits of the defendant's case and cannot raise the issue of jeopardy. They deal with the validity of the proposed trial. Both motions attempt to avoid the entire trial, not the allegations in the indictment.[66] If the plea of prior acquittal is denied on appeal, then it becomes a legal conclusion that a continuation of the present proceedings would not constitute *double* jeopardy. A review of the plea of immunity would involve the legal construction of the immunity statute and not extraneous facts. Consequently, both these defenses, pleaded in bar to the entire proceedings or in abatement of the indictment on extraneous facts, should be included under motions to quash.[67]

The court has, on occasion, shown leniency in its consideration of quashals. In the case of *State v. Wilkes*[68] the defendant was tried for parking meter violations. He made a motion to quash on the ground that the statute was unconstitutional. The motion was sustained. On appeal by the State, the court avoided the question of the statute's constitutionality and held instead that the trial court had lacked jurisdiction to hear the case. Consequently, the quashal was allowed to stand even though the question of jurisdiction had not been raised by the defendant's motion in the trial court. Thus, while the State may appeal the granting of the motion and have its contentions sustained, it may nevertheless lose the case if another ground can be found on which the quashal could have been based. The effect is that the State must not only prepare an appellate brief on the specific grounds used in the lower court, but on any grounds which should have been pleaded by the defendant.

[66] State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958).
[67] State v. Paramore, 146 N.C. 604, 60 S.E. 502 (1908).
[68] 233 N.C. 645, 65 S.E.2d 129 (1951).

D. The Arrest of Judgment

A motion in arrest of judgment is one made after verdict to prevent entry of judgment.[69] It is based upon an insufficiency in the indictment or a fatal defect appearing on the face of the record.[70] Oddly, North Carolina allows facts *dehors* the record to promote quashals,[71] but does not allow them when a motion in arrest of judgment is made.[72] It is true that in the case of quashals the insufficiency of the indictment to support a verdict is recognized either before or during the trial, while in motions to arrest this insufficiency is noted after a verdict has been rendered; however, this distinction does not seem meaningful, and the legal effect of both is the same.[73]

The constitutionality of a criminal statute may be questioned by several methods during a trial. The demurrer,[74] the motion to quash,[75] and the motion to arrest judgment[76] are all available for this purpose. It may be desirable, however, for a trial judge to postpone decisions on constitutional issues until all the evidence has been presented and the jury has returned a verdict. If the jury finds the defendant guilty and the judge allows a motion to arrest because of the constitutional question and is reversed on appeal, there would be no need for a new trial.

The case of *State v. McCollum*[77] poses an interesting problem in the use of the motion to arrest. The defendant was convicted of manslaughter and was ordered to pay the mother of his victim the sum of six dollars per week for five years. The mother passed away within a year, and the defendant petitioned the court to be relieved

[69] Appeal was allowed in State v. Hall, 183 N.C. 806, 112 S.E. 431 (1922), though the court noted the following insufficiency: "It was not correct to charge the jury that both parties could not be guilty of manslaughter, and the jury having convicted both, it was in the power of the court to have set aside the verdict as to Haney, but it did not do so. On the contrary, the record states that he arrested the judgment upon the verdict as to Haney as a matter of law and the State, under the statute, had the right to appeal. C.S., 4649(4) provides that the State may appeal 'where judgment is given for the defendant upon arrest of judgment.'" *Id.* at 813, 112 S.E. at 435.

[70] State v. McCollum, 216 N.C. 737, 739, 6 S.E.2d 503, 504 (1940).

[71] See Part II, C, *supra.*

[72] State v. Walker, 87 N.C. 541 (1882).

[73] Both are based on the premise that the judgment cannot lie because of some legal defect. It ought to be unimportant whether these defects are apparent on the record or *dehors* the record.

[74] State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948).

[75] State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951).

[76] State v. Hall, 183 N.C. 806, 112 S.E. 431 (1922).

[77] 216 N.C. 737, 6 S.E.2d 503 (1940).

of further payments, whereupon the victim's father asked to have them continued. The judge authorized the discontinuance of further payments and the State appealed on the basis that there had been an "arrest of judgment" since the payments were halted. The supreme court denied the State's appeal on the ground that this was not an arrest of judgment of "ordinary legal significance,"[78] and that therefore the appeal could not lie under subsection 15-179(4). In refusing the appeal of the State, the court failed to mention any right of the father to appeal. Although the father was not asking review he should have such a right in these cases.[79] The intervention of the father should be construed to change the character of the criminal action to that of a civil suit for enforcement of a money judgment and such controversies are appealable by the intervenor.[80]

E. The Motion for a New Trial on Newly Discovered Evidence—The Constitutionality of a Statute

Subsections 15-179(5) and (6) were enacted in 1945[81] to overrule two cases which had been decided by the North Carolina Supreme Court, and it is necessary to examine the holding and effect of the individual decisions in order to determine their intended scope.

Prior to 1945 neither the defendant nor the State could appeal from the ruling of the judge on a motion to grant a new trial on the ground of newly discovered evidence.[82] This determination by the judge was considered to involve no matter of law or legal inference.[83] It was reasoned that the State had obtained its conviction and that if the defendant wanted to reopen the issues, it was within the

[78] 216 N.C. at 739, 6 S.E.2d at 504.

[79] The court at one point infers such a right when it distinguishes the State's argument by stating: "The cases cited by appellant [State] are not in point. In *S. v. Beatty*, 66 N.C., 648, a bastardy case under the law then in force, the appeal was taken by the relator; and in *S. v. Parsons*, 115 N.C., 730, 20 S.E., 511, another bastardy case, the prosecutrix appealed." 216 N.C. at 739, 6 S.E.2d at 504.

[80] Decisions from all civil suits between private parties are appealable since double jeopardy does not apply to civil actions. State v. Watson, 209 N.C. 229, 231, 183 S.E. 286, 287 (1936).

[81] N.C. Sess. Laws 1945, ch. 701.

[82] State v. Moore, 202 N.C. 841, 163 S.E. 700 (1932); State v. Griffin, 202 N.C. 517, 163 S.E. 457 (1932); State v. Cox, 202 N.C. 378, 162 S.E. 907 (1932).

[83] *Griffin* and *Cox* both held that the granting or denial of a motion for new trial on new evidence was in the trial judge's discretion. *Griffin* went further and said that the reason such action was not appealable was because it involved no matter of law or legal inference. 202 N.C. at 518, 163 S.E. at 457.

judge's discretion to let him do so.[84] The judge's order allowing the motion, when made in a criminal action, is conclusive on the State.[85] The epitomy of this logic was brought out in *State v. Todd*.[86] The defendant had been convicted of murder and asked for a new trial to consider newly discovered evidence. The judge allowed the motion and the State appealed[87] on the question of whether the evidence which defendant presented was within the legal definition of "newly discovered evidence."[88] The court in refusing to consider the appeal said issues of this type were within the "and no other" part of section 15-179 and thereby prohibited.[89]

State v. Todd precipitated the enactment of subsection 15-179(5)[90] which allows appeal by the State on a motion for a new trial by the defendant. There is little need to refuse the State such a right in these cases. The questions presented on motions for new trial on new evidence do not of themselves involve double jeopardy. The questions on such motion go only to the character of the "new evidence." The holding in *Todd* refusing the appeal subjected the State to the rigors of a new trial when there were valid *legal* questions concerning the validity of the new evidence. The court missed the opportunity to clarify legal issues which might have reduced future litigation.

On the motions for new trial it is the defendant, not the solicitor, who is asking for another trial on the merits of his new evidence.

[84] State v. Griffin, 202 N.C. 517, 518, 163 S.E. 457 (1932).
[85] State v. Cox, 202 N.C. 378, 380, 162 S.E. 907, 909 (1932).
[86] 224 N.C. 776, 32 S.E.2d 313 (1944).
[87] The State also sought certiorari. In refusing to consider the case the court refused to grant certiorari in its supervisory capacity. Note that certiorari is implicitly limited to those cases where the State could have appealed, but the right of appeal has been lost in some way.
[88] In State v. Casey, 201 N.C. 620, 161 S.E. 81 (1931), the court outlined the prerequisites to the granting of new trials on newly discovered evidence. It was held that it must appear: "1. That the witness or witnesses will give the newly discovered evidence.... 2. That such newly discovered evidence is probably true.... 3. That it is competent, material and relevant.... 4. That due diligence was used and proper means were employed to procure the testimony at trial.... 5. That the newly discovered evidence is not merely cumulative.... 6. That it does not tend only to contradict a former witness or to impeach or discredit him.... 7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Id.* at 624-25, 161 S.E. at 83-84.
It was also stated in *Casey* that new trials on newly discovered evidence could only be granted in the superior court and never in the supreme court in criminal cases. *Id.* at 625, 161 S.E. at 84.
[89] State v. Todd, 224 N.C. 776, 777, 32 S.E.2d 313 (1944).
[90] N.C. GEN. STAT. § 15-179(5) (1953).

If the defendant has valid evidence it would be logical to grant his motion; however, if such evidence is legally invalid it could do him no harm to have the State appeal on that issue prior to the proposed new trial.

The right of appeal from judgments declaring a statute unconstitutional has a different history. Defendants had always had the power to contest the validity of statutes in many ways. Statutes had been tested by demurrer, quashals and arrests of judgment.[91] All of these methods were in use prior to 1945, and an appeal by the State was allowed in every case.[92] But in 1945 a constitutional question was presented in the case of *State v. Mitchell*.[93] The defendant was indicted for practicing palmistry. His defense was the invalidity of the act under which he was being tried. The jury returned a "special verdict" holding the defendant not guilty because the statute was prohibited by the constitution.[94] The State appealed the verdict on the theory that it was returned on the special verdict. The supreme court, however, found the verdict was based, not on the facts found, but on the judge's conclusion that the statute was invalid. The court reasoned that the judge could rule on statutory validity at any time during the trial; therefore, the special verdict, as such, was without effect.[95] With the statutory ground for appeal, the special verdict, eliminated the court held that there was nothing on which the State could support its appeal, and it was dismissed.

The *Mitchell* case was apparently the first decision which refused appeal by the State where a statute had been declared invalid.[96] This prompted the legislature to enact subsection 15-179(6)[97] granting appeal in all such cases. Appeals on statutory validity are now al-

[91] See notes 74, 75, 76 *supra*.

[92] *E.g.*, Ahoskie v. Moye, 200 N.C. 11, 156 S.E. 130 (1930); State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927); State v. Corpening, 191 N.C. 751, 133 S.E. 14 (1926); State v. Jones, 191 N.C. 371, 131 S.E. 734 (1926).

[93] 225 N.C. 42, 33 S.E.2d 134 (1945).

[94] N.C. CONST. art. II, § 29.

[95] 225 N.C. at 42, 33 S.E.2d at 134-35.

[96] The decision of the court in *Mitchell* was faulty in that it went only halfway. The court correctly recognized that the judge had ruled on his own motion to determine the validity of the act. The court, however, failed to recognize that this motion must have had some nature of its own, even though made by the judge. It must have had some substantive basis such as an arrest of judgment (as apparently used in *Mitchell*) or quashal. Testing constitutionality is only the object of the motion, it is not in itself a motion. Using this logic the court could have brought the State's right to appeal within N.C. GEN. STAT. § 15-179, as it then stood.

[97] N.C. GEN. STAT. § 15-179(6) (1953).

lowed indirectly under most subsections of section 15-179[98] and specifically by subsection 15-179(6). The problem of appellate authority present in *Todd* is no longer a consideration.[99]

III. CERTIORARI

The North Carolina Constitution grants the supreme court the "power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts."[100] The power to use remedial writs, such as the writ of certiorari, in any type of lower court action has presented problems as it applies to the State's power to appeal. If certiorari can be used by the State when it does not have a right of appeal, its use would be in derogation of section 15-179. If the use of a writ of certiorari is allowed only where the State has lost its appellate power it could be regarded as detrimental to the defendant. Yet, the authority for the use of the writ is stated in the constitution and it must have some accepted application.

This conflict was realized early in our judicial history. In *State v. Swepson*[101] the trial judge refused to amend the record to show that the State had not waived the appearance of the defendant at trial. The State asked for a writ of certiorari to have the record amended. The North Carolina Supreme Court granted a writ[102] on the theory that it was within the supervisory powers of the court to amend the record when the trial judge had abused his discretion. However, the court recognized the possibility that the State might avoid statutory limitations if the writ was available without limitation and in order to narrow its use the court laid down basic guidelines.[103] The supreme court reserved the right to issue *any* remedial writs in exercising its supervisory power, but limited itself in granting certiorari to the State in the following language: "[T]he right [of appeal] in the case of the State is . . . restricted . . . to errors of law on the face of judgments adverse to the State, on demurrer to the indictment, or on motion to quash or in arrest, or on a special

[98] See State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951); State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948).

[99] *But see* State v. Wilkes, 233 N. C. 645, 65 S.E.2d 129 (1951).

[100] N.C. CONST. art. IV, § 8.

[101] 83 N.C. 584 (1880).

[102] In *Swepson* the court granted a writ of error, but took the opportunity to outline the limits within which a writ of certiorari could be granted.

[103] 83 N.C. at 586.

verdict.... And in case of appeal lost without laches... the State in the instances aforesaid, may have a writ of *certiorari*... as a substitute for an appeal."[104] Thus, the State can obtain certiorari only in those cases in which it has previously had a right of appeal and has lost that right without laches.

There was no indication in *Swepson* that writs of certiorari could only be granted where the error was apparent on the face of the record. Indeed, in that case, the error complained of was that certain information had been omitted from the record. But in *State v. Todd*,[105] it is stated that the error must appear on the trial record in order to be corrected by the court on certiorari.

The use of the writ of certiorari is well established in North Carolina. However, a change would be in order to put the law into perspective. The language of the constitution grants the court a complete power to issue *any* remedial writ in its supervisory capacity.[106] The court, on its own motion, as seen from the above discussion, has undertaken to limit the use of this power. Nevertheless, the power of the court to grant unlimited review through the use of supervisory writs remains and can only be irrevocably limited by an amendment.[107]

IV. The General Verdict

A general verdict may be rendered by a judge or a jury, upon consideration of the facts and law presented at trial.[108] When the accused has been tried and acquitted on a general verdict the result is final and conclusive, and no appeal is allowed the State.[109] These findings are not appealable because the verdict declares that the facts essential to establish the defendant's guilt were not proven on the merits of the evidence. An appeal on a general verdict would necessarily put before the appellate court questions of fact. If the court

[104] *Ibid.*

[105] 224 N.C. 776, 777, 32 S.E.2d 313, 314 (1944).

[106] N.C. Const. art. IV, § 10.

[107] An amendment would not be necessary for the supreme court to grant review in those cases where the error does not appear on the record. Under the power to issue *any* supervisory writs, the court could review errors on as well as *dehors* the record. See N.C. Const. art. IV, § 10.

[108] Some jurisdictions have held that only a jury can render a general verdict. See Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924). But North Carolina has held that a judge sitting without a jury can render only a general verdict. State v. Nichols, 215 N.C. 80, 200 S.E.2d 926 (1939). In comparison, a special verdict rests on a finding by the jury of facts only. See note 27 *supra*.

[109] *E.g.*, State v. Powell, 86 N.C. 640 (1882).

were allowed to review general verdicts, it would have the ability to redetermine factual issues. This would put the accused in double jeopardy.

If there has not been a general verdict, there may be a right of appeal under section 15-179.[110] In order to bar the appeal it must be determined that there has in fact been a general verdict and that the verdict constituted an acquittal. The verdict, to be general, should be given by a body which has considered the issues of both law and fact. The acquittal which is rendered must be a finding of not guilty and must rest on the merits.[111]

The rule that the State cannot appeal from general verdicts has been stated in many North Carolina decisions.[112] The leading case is *State v. Savery*[113] which involved issues dealing with a "general verdict" on a warrant charging a misdemeanor. In *Savery* the jury was impaneled and the first witness sworn. This witness was the prosecutor who testified that even though the warrant did not contain an affidavit, he was the witness who was mentioned therein. On realizing the warrant contained no affidavit the defendant moved for a "verdict of not guilty." The State asked that the case be heard on its merits or that the warrant be dismissed with leave to the State to retry the defendant. The judge denied the State's objection and instructed the jury to return a verdict of not guilty for the defendant. From this verdict the State appealed.

On appeal the majority were of the opinion that a general verdict had been entered and there could be no appeal. Their opinion turned on three essential issues. First, the court found that the rule of

[110] The statute is a restrictive statute. This created an innocuous situation in the early days of its enactment. The supreme court had said that since the statute granted an appeal only to that court, the State could only appeal from a lower court to the superior courts in those circumstances in which it was specifically provided by the act creating the lower courts. State v. Bost, 125 N.C. 707, 34 S.E. 650 (1899). The act establishing the eastern district courts allowed appeal to the superior courts but such power was inadvertently omitted from the act creating the western district courts. State v. Mallette, 125 N.C. 718, 34 S.E. 651 (1899). This oddity was later removed by adding the words "or Superior court" to the statute thereby bringing almost all State appeals within the statute. See State v. Savery, 126 N.C. 1083, 36 S.E. 22 (1900).

[111] An acquittal in fact can never be rendered except upon the jury verdict of not guilty. Acquittals in law are those which occur by operation of law. State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

[112] *E.g.*, State v. Moore, 84 N.C. 724 (1881); State v. Lane, 78 N.C. 547 (1878); State v. Taylor, 8 N.C. 462 (1821).

[113] 126 N.C. 1083, 36 S.E. 22 (1900).

double jeopardy might apply in cases other than capital felonies.[114] Second, if double jeopardy was in issue, the impaneling of the jury constituted primary jeopardy and any review would violate defendant's constitutional rights.[115] Finally the court found that if double jeopardy was not an issue there was no authority for setting aside a general verdict of not guilty.

Two justices dissented.[116] Their reasoning avoided the issues presented by the majority. Justice Montgomery, writing for the dissent, surmised that there had not been a general verdict but rather a quashal.[117] He recognized that an acquittal, to be final and conclusive, must be had on a trial upon the merits of the case.[118] Since the State had requested that the merits be presented and this request had been refused because the warrant was not supported by an affidavit, the action of the judge was in legal effect a quashal. Appeals from quashals are allowed under subsection three of section 15-179.

The effect of the *Savery* decision is to allow the trial judge to deny an appeal to the State by the simple use of terminology. By making a ruling on the validity of an indictment and by calling that ruling a general verdict the State is foreclosed from its appellate power. In *Savery* the judge's attention was called to the indictment not by defense counsel's motion to quash or to arrest judgment, but by evidence submitted on trial by the prosecuting witness. Regardless of how the court became aware of the defective warrant the legal effect of striking down that warrant should not be altered.

V. Exceptions to N.C. Gen. Stat. § 15-179

There are several holdings which are of importance in a consideration of section 15-179. Some of these rightly come under the heading of "exceptions" because of their peculiar effect; others are merely inconsistencies. An understanding of these cases, however, aids in defining the area within which section 15-179 has effect.

---

[114] 126 N.C. at 1086, 36 S.E. at 23.
[115] 126 N.C. at 1086-87, 36 S.E. at 23.
[116] 126 N.C. at 1091, 36 S.E. at 25.
[117] 126 N.C. at 1092-93, 36 S.E. at 25.
[118] The conclusions of the dissent in *Savery* present the more accurate view of the facts. The trial judge refused to hear evidence on the premise that the indictment would not support a finding by the jury. It is difficult to see how such a warrant could support a "general verdict of acquittal." If the jury cannot return a verdict on the warrant and evidence, it cannot reasonably be instructed to return a valid judicial "verdict" on the warrant alone.

The authority of section 15-179 has been challenged in a series of decisions which defy explanation.[119] In these cases the court has recognized that there was no right of appeal on behalf of the State. Then it has proceeded, either on its own motion or on request of counsel, to discuss the issues involved and to make judicial decisions which affect the rights of the accused.[120] In these cases the possibility of double jeopardy is a live issue, and the court has allowed the defendant to be retried without deciding it. To continue this practice in the shadow of a statute[121] which expressly prohibits such activities is to circumvent the statute and give judicial sanction to double jeopardy.

There are other cases which give the statute an effect in contrast to some interpretations.[122] The constitution provides that in a justice's court "the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew."[123] This language appears to give both the State and the accused the power to appeal, but the court has held that only the accused may appeal.[124] Though obviously limiting the language of the constitution, the decisions are based on sound reasoning. If the State appeals from an adverse verdict on the facts and has the matter heard de novo, it is putting the accused in double jeopardy. However, the clause should not be construed in a manner which limits all

[119] See State v. Burnett, 173 N.C. 750, 91 S.E. 597 (1917); State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908); State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899); State v. Hinson, 123 N.C. 755, 31 S.E. 854 (1898); State v. Lane, 78 N.C. 547 (1878).

[120] *E.g.*, State v. Burnett, 173 N.C. 750, 91 S.E. 597 (1917), where the court determined that there was no right of appeal but proceeded to answer the question presented since it was important to the due administration of law in the county courts and it was specially requested by counsel. The question in cases of this sort is: What dispositions and actions can be taken with regard to the decision on the "unappealable issue"? See State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908), where the court stated: "The real difficulty present in the case here is whether the State had the right to appeal. We think not. The statute now regulates this matter.... While, therefore, error appears in the proceedings below, we cannot reverse the action of the court, as we have no jurisdiction, by reason of the statute, to do so, but we have considered the merits of the case to some extent, as they were fully discussed before us and we were asked do so." *Id.* at 564, 63 S.E. at 171.

[121] The statute referred to is N.C. GEN. STAT. § 15-179 (1953).

[122] *E.g.*, State v. Powell, 86 N.C. 640 (1882).

[123] N.C. CONST. art. IV, § 27.

[124] See State v. Powell, 86 N.C. 640 (1882), which nullifies the constitutional argument but goes on to say when part of a criminal judgment is personal to the prosecuting witness and taxes him with costs, he may appeal since the proceeding assumes the character of a civil controversy.

appeals by the State, but only those which would prejudice the defendant. An appeal on questions of law should be allowed. The clear language of the constitution should prevail over the statute which allows appeal in certain cases "and no other."[125]

Other decisions have influenced the interpretation of the statute as it applies to "criminal" actions.[126] Double jeopardy applies only in the criminal courts.[127] Therefore, only actions brought under criminal statutes are controlled by section 15-179. However, civil statutes are also within the purview of section 15-179 if they prescribe criminal punishments.[128] In such cases *neither* the State, if it is a party, nor a plaintiff who is a private citizen may appeal an adverse decision. It was held that to allow such appeal would constitute double jeopardy.[129]

VI. Conclusion

The rights of the citizen and the State are actually two sides of the same coin. The citizen has the right not to be persecuted or convicted if he is not guilty of a criminal offense against the State. The State has the right and duty to convict and punish those individuals who are guilty of criminal offenses. The major consideration is the balancing of these rights on an equitable basis so that the rights of the State and its citizens may be preserved. As was pointed out earlier, various approaches have been taken in this balancing

[125] N.C. Gen. Stat. § 15-179 (1953) provides: "An appeal... may be taken by the State in the following cases, and no other...."

[126] *E.g.*, State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896); State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896). See State v. Cox, 215 N.C. 458, 2 S.E.2d 370, *aff'd* 216 N.C. 424, 5 S.E.2d 125 (1939), where the defendant was tried in the county court for illegal possession of gambling devices, he was found guilty and served notice of appeal. The judge said that he would change the judgment if the defendant would withdraw his appeal to the superior court; this the defendant did. The superior court judge then said that either the State or the defendant could appeal after the lower court granted a *nolo contendere*. The State appealed. The supreme court held that the superior court judge could not enlarge the right of the State to appeal.

[127] State v. Watson, 209 N.C. 229, 183 S.E. 286 (1936).

[128] State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896). The defendant was charged under the bastardy act which required that a fine be assessed. The defendant was found not guilty and the mother appealed. The court held that to allow the appeal would be to put the defendant in "double jeopardy." *Id.* at 1216, 24 S.E. at 663. Thus the civil offense was converted via the fine provision to a criminal offense. *But see* State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896), where facts were the same but the lower court had exceeded its jurisdiction in hearing the case and the appeal was allowed to both the State and the prosecutrix.

[129] See State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896).

process.[130] Some jurisdictions have emphasized the citizen's right to protection while others have given a free rein to the State to appeal criminal cases.[131] Many jurisdictions have derogated the common law and have allowed some appeal by the State.[132] Just where that appellate power should cease has been another question.

Perhaps the best approach to the problem is to allow appeals by the State on all questions of law.[133] The law is the basis of our society. It should contemplate its own best interest by providing appeals which would help to clarify and protect it. If questions of law are neglected when it could be to no one's harm to have them answered, society as a whole is put at a disadvantage. Not only may guilty individuals escape punishment but the citizenry must ride a crest of consequential errors promulgated in the court system.

Appeals by the State on questions of law would by definition exclude appeals from general verdicts. It would eliminate the necessity for distinctions between special verdicts, demurrers, constitutional questions and quashals. The courts could deal with legal problems and avoid the formal distinctions. Such a practice would pay dividends in efficient appellate procedure, definitive answers to legal questions, and swifter and surer justice for all.

ARNOLD T. WOOD

Constitutional Law—Cruel and Unusual—Capital Punishment

The Supreme Court of the United States recently denied certiorari to consider whether the eighth amendment prohibition against cruel and unusual punishment[1] prohibits the imposition of the death penalty on a convicted rapist.[2] However, Justice Goldberg, joined by Justices Douglas and Brennan, dissented and favored granting

[130] See notes 9-10 *supra* and accompanying text.

[131] *Ibid.* Various states have adopted differing approaches between the extremes of no appellate power in the State and unlimited appellate power. *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958), allowing appeals by the State only when statutes are declared unconstitutional.

[132] *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958); CONN. GEN. STAT. § 54-96 (1958); N.C. GEN. STAT. § 15-179 (1953).

[133] Our own court has questioned such an omission from N.C. GEN. STAT. § 15-179. See State v. Todd, 224 N.C. 776, 32 S.E.2d 313 (1944); State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899).

[1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[2] Rudolph v. Alabama, 32 U.S.L. WEEK 3154 (U.S. Oct. 22, 1963).

certiorari to consider whether capital punishment for rape was (1) violative of the evolving standard of decency that marks the progress of society, (2) punishment disproportionate to the offense, (3) unnecessary cruelty since the aims of punishment may be achieved by a less severe penalty than death.[3] The dissenting opinion supported its reasons for raising these questions on various surveys and figures showing the decline and ineffectiveness of the death penalty as punishment for rape. The importance of the dissent lies in the possibility that the Supreme Court might take judicial notice of such criteria and consider the question of whether the death penalty, in light of such notice, might be considered cruel and unusual punishment, not merely for rape, but for all crime.

The latent ambiguities in the term "cruel and unusual" have made it difficult for the courts to define its exact meaning.[4] The clause originated in the Magna Carta[5] and was included in the English Bill of Rights of 1688[6] as a result of the atrocious conduct of the Stuarts.[7] It worked its way through several of the early American state constitutions into the Federal Bill of Rights adopted in 1791.[8] The early cases interpreted the sanction against cruel and unusual punishment as placing a fixed standard on the inhuman methods of punishment, prohibiting only those physical brutalities and tortures which existed when it was adopted, such as burnings, brandings, and disembowelings.[9] However, in 1909 the Court in

[3] *Ibid.*

[4] "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878).

[5] 9 Hen. 3, c.14 (1225).

[6] 1 W. & M., c.2, I, § 10 (1689).

[7] "[Cruel and unusual punishment] ... is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the ironboot, the stretching of limbs and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the Declaration of Rights, adopted by Parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the Bill of Rights of 1688." O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (dissenting opinion). See Notes, 41 N.C.L. REV. 244, 245 (1963); 4 VAND. L. REV. 680, 682 (1951).

[8] BEDAU, THE DEATH PENALTY IN AMERICA 16 (1964). [Hereinafter cited as BEDAU.]

[9] O'Neil v. Vermont, 144 U.S. 324 (1892); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878). See also Weems v. United States, 217 U.S. 349, 382 (1909) (dissenting opinion). This early view restricted the legislature from prescribing inhuman methods of punishment

Weems v. United States[10] rejected the contention that the framers intended merely "to register a fear of the forms of abuse that went out of practice with the Stuarts" and stated that "the clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[11] Thus the concept of cruel and unusual is no longer a static restriction against early English barbarities in the modes of punishment, but rather increases in its meaning as the "evolving standards of decency that mark the progress of a maturing society"[12] increase. This reinterpretation has expanded the eighth amendment in meaning, scope and application.[13]

Although reluctant at first,[14] the Court seems to have definitely decided that the eighth amendment is incorporated into the fourteenth amendment by the due process clause and is applicable to the states.[15] While the Court recognizes the power of the legislature to prescribe the severity of punishment,[16] it has declared that a punish-

but gave them full power to define the severity of punishment. See Note, 36 N.Y.U.L. REV. 846, 847 (1961).

[10] 217 U.S. 349 (1909).

[11] *Id.* at 373. Justice McKenna went on further to state that "legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'" *Ibid.*

[12] Trop v. Dulles, 356 U.S. 86, 101 (1957).

[13] See Note, 36 N.Y.U.L. REV. 846 (1961).

[14] The early decisions stated that the eighth amendment was only a limitation on the federal government and did not apply to the states. *In re* Kemmler, 136 U.S. 436 (1890); O'Neil v. Vermont, 144 U.S. 324 (1892). However, confusion began in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), when the Court assumed but did not decide that the eighth amendment applied to the states. It continued in Johnson v. Dye, 175 F.2d 250 (3rd. Cir.), *rev'd per curiam on other grounds*, 338 U.S. 864 (1949), leading one distinguished writer to the conclusion that, "while a categorical statement that the Fourteenth Amendment prohibits cruel and unusual punishment by a state has yet to be made by the Supreme Court, any judgment to the contrary would be so shocking that its possibility appears negligible." Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 277 (1950).

[15] Robinson v. California, 370 U.S. 660 (1962).

[16] "We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the rights to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such a case

ment disproportionate to the offense may be cruel and unusual in the same manner as inhuman methods of punishment.[17] Cruel and unusual punishment is no longer limited merely to physical cruelties but includes mental cruelty as well.[18] When the purpose of a statute is deemed to place a cruel punishment on those who violate it, the Court may declare it unconstitutional.[19] Thus it can readily be seen that expansion of the definition of the eighth amendment has broadened the area in which the judiciary can limit the legislature's power to inflict punishment. When a punishment violates the standard set by society, it is the duty of the court to declare it unconstitutional.[20] However, in order for the court to apply such an elusive test as the evolving standards of decency that mark a civilized society, judicial notice must be taken of the facts which are indicative of a punishment's acceptance and necessity in that society. The question arises whether the death penalty can now survive, or whether society has evolved to that stage in civilization where it is cruel and unusual.

The history of the death penalty found its origin in the Biblical admonition that "Whoso sheddeth man's blood, by man shall his blood be shed."[21] However, as time went on, capital punishment failed to be so restricted. Between the fifteenth and nineteenth centuries in England, the crimes punishable by death increased from fifty to two hundred and thirty-three, which included "crimes of every description against the state, against the person, against property, [and] against the public peace. . . ."[22] The earliest codification of capital crimes in the United States, "The Capitall Laws of New England," was enacted in the Massachusetts Bay Colony in

not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked." Weems v. United States, 217 U.S. 349, 378 (1909).

[17] Weems v. United States, 217 U.S. 349 (1909) (hard and painful labor as punishment for falsifying public documents). In reaching his decision Justice McKenna urged that a less severe punishment would suffice since "the state suffers nothing and loses no power. The purpose of punishment is fullfilled, crime is repressed by penalties of just, not tormenting severity, its repetition is prevented and hope is given for the reformation of the criminal." *Id.* at 381.

[18] Trop v. Dulles, 356 U.S. 86 (1957). In declaring that denationalization was cruel and unusual, Chief Justice Warren took judicial notice of the fact that the civilized nations of the world were in virtual unanimity that statelessness is not to be imposed as punishment for crime. *Id.* at 102-03.

[19] Robinson v. California, 370 U.S. 660, 668 (1962) (concurring opinion of Justice Douglas). See Note, 41 N.C.L. REV. 244 (1963).

[20] See note 16 *supra.*

[21] *Genesis* 9:6.

[22] BEDAU 2.

1636 and listed thirteen offenses punishable by death.[23] Although the use of capital punishment in the United States today has progressed over that of nineteenth century England, the effect of such progress has been more evident in the methods used in administering the death penalty than in the number of crimes punishable by it.[24]

However, the decline of the death penalty in the United States cannot be recognized by reviewing the number of statutes that prescribe it,[25] or the number of jurisdictions that retain it.[26] It is more significant to note that in the actual disposition of capital cases, the number of persons executed has been dropping steadily, while the number of persons awaiting execution has been increasing. Whereas the number of persons executed in England between 1805 and 1812 was two to three thousand,[27] the number executed in the United States between 1955 and 1962 was approximately four hundred and fifty.[28] During the past decade, it is estimated that only one out of every ten persons convicted of first degree murder was executed.[29]

[23] *Id.* at 5. Among those included were: idolatry, witchcraft, blasphemy, sodomy, buggery, adultry, and manstealing.

[24] "Probably few Americans have any idea just how many crimes still carry a death penalty—anywhere from thirty-three to sixty-seven, depending on how they are classified and counted. They range from the familiar ones such as murder, kidnapping, rape, and treason, to such crimes as desecrating a grave (Georgia), attempting to set fire to a prison (Arkansas), and sexual intercourse with a girl under eighteen, so called 'statutory rape' (Nevada and Texas)." *Id.* at 32-33. There are four crimes punishable by death in North Carolina: arson, N.C. GEN. STAT. § 14-58 (1953); burglary, N.C. GEN. STAT. § 14-52 (1953); murder, N.C. GEN. STAT. § 14-17 (1953); rape, N.C. GEN. STAT. § 14-21 (1953).

[25] "According to the *National Prison Statistics* there are only seven capital crimes for which the death sentence has been carried out since 1930: murder, rape, armed robbery, kidnapping, espionage, burglary, and assault by a life term prisoner. Thus, when one speaks about the volume of capital crimes in the United States, one refers for all practices to the volume of these seven crimes." BEDAU 57.

[26] The United States is made up of fifty-four jurisdictions—the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the federal government under both civil and military law. Of these fifty-four jurisdictions, only six have totally abolished capital punishment—Alaska, Hawaii, Maine, Minnesota, Puerto Rico, and Wisconsin. Three other states have abolished it for all but certain crimes: Michigan (treason); Rhode Island (murder by a life term convict); North Dakota (murder by a life term convict serving a life term for murder). Ten states have abolished the death penalty and then restored it. See BEDAU 12.

[27] *Id.* at 2.

[28] *Id.* at 110-11. Since 1909 in North Carolina, there have been 275 executions for murder, 68 for rape, 11 for burglary, and 1 for arson—murder. Letter from the North Carolina Parole Board, to Floyd McKissick, February 10, 1964, on file in the North Carolina Law Library.

[29] BEDAU 36.

In 1962, out of three hundred and seventy-two people sentenced to death, forty-seven were executed, fifty-eight were disposed of by other means,[30] and two hundred and sixty-seven were awaiting execution at the year's end.[31] This reluctance of the courts to carry out the death penalty leads one to the conclusion that capital punishment in the United States today is "an anachronism, a vestigial survivor of an earlier era when the possibilities of an incarcerative and rehabilitative penology were hardly imagined."[32]

However, the judiciary does not seem to hold as high a regard for human life in construing cruel and unusual punishment, as it does in actually disposing of the death penalty. Thus far, cruel and unusual "implies that there be something inhuman and barbarous, something more than the mere extinguishment of life."[33] The Supreme Court has made the distinction that "punishments are cruel when they involve torture, or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution."[34] According to this view, while death itself is not cruel and unusual, the methods of inflicting it may be, if they add unnecessary pain.[35] Thus, burning at the stake, crucifixion, breaking at the wheel, or the like are cruel and unusual methods,[36] while hanging,[37] electrocution,[38] lethal gas,[39] and shooting[40] are humane and progressive means to administer death. Other cases offer the suggestion that as all punishment is in a sense cruel, the cruelty inherent in the death penalty is sanctioned by the Constitu-

[30] Twenty-seven received commutations, 4 were transported to a mental hospital, while the other 27 received either reversals of judgments, vacated sentences or grants for new trials. *Id.* at 108.

[31] *Id.* at 106.

[32] *Id.* at 31.

[33] *In re* Kemmler, 136 U.S. 436, 447 (1890).

[34] *Ibid.*

[35] *In re* Storti, 178 Mass. 549, 60 N.E. 210 (1901).

[36] *In re* Kemmler, 136 U.S. 436, 446 (1890).

[37] State v. Burris, 194 Iowa 628, 190 N.W. 38 (1922); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914).

[38] *In re* Storti, 178 Mass. 549, 60 N.E. 210 (1901); State v. Tomasi, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908); People *ex rel.* Kemmler v. Durston, 119 N.Y. 569, 24 N.E. 6, *application for writ of error denied sub nom., in re* Kemmler, 136 U.S. 436 (1890); Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921).

[39] Hernandez v. State, 43 Ariz. 424, 32 P.2d 18 (1934); People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911, *cert. denied*, 346 U.S. 827 (1953); State v. Gee Jon, 46 Nev. 418, 211 Pac. 676 (1923).

[40] Wilkerson v. Utah, 99 U.S. 130 (1878).

tion since it is necessary for the protection of society.[41] Although it is conceded that the death penalty could be disproportionate to the offense, the courts have failed to strike down capital statutes for lower felonies,[42] and in one case for a misdemeanor,[43] usually under the logic that such statutes do not shock the conscience of the community.[44] Except for a recent dictum to the contrary,[45] it is obvious that the death penalty has been held constitutional under a narrow and static interpretation of the eighth amendment. By applying the "lingering death" rule, the courts are foreclosing the possibility that death, as a mode of punishment, might become cruel and unusual,[46] which in itself is contradictory to the evolving standard test accepted by the contemporary judiciary. If the standards of society have changed so that the death penalty is no longer acceptable to its ideas of decency, then it seems capital punishment ought to be struck down by judicial action.

Since the Supreme Court must view cruel and unusual punishment in the light of an evolving standard, it is necessary for it to take judicial notice of data relevant in determining that standard.[47]

[41] Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); State v. Tomasi, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908).

[42] United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952) (conspiring to espionage); *Ex parte* Wells, 35 Cal. 2d 889, 221 P.2d 947 (1950) (assault by a person serving a life term); People v. Tanner, 3 Cal. 2d 279, 44 P.2d 324 (1935) (kidnapping); People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74 (1910) (assault with a deadly weapon by a person serving a life term); Gibson v. Commonwealth, 204 Ky. 748, 265 S.W. 339 (1924) (burglary); Walker v. State, 186 Md. 440, 47 A.2d 47 (1946) (attempted rape); Territory v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1901) (assault upon a train with intent to commit robbery); Ellis v. State, 54 Okla. Crim. 295, 19 P.2d 972 (1933) (robbery with firearms); Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921) (attempted rape).

[43] Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914) (assault with intent to commit rape).

[44] See, *e.g.*, United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

[45] "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment —and they are forceful—the death penalty has been employed throughout our history and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." Trop v. Dulles, 356 U.S. 86, 99 (1957).

[46] In Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), the court followed the lingering death test and held that re-executing a man after an electrical power failure in the first execution did not subject him either to a lingering death or to unnecessary cruelty.

[47] The Supreme Court has taken judicial notice of such data in declaring other punishments cruel and unusual. Robinson v. California, 370 U.S. 660 (1962) (punishment imposed for being a dope addict); Trop v. Dulles, 356 U.S. 86 (1957) (denationalization).

Recent surveys conducted at home and abroad seem to reject the contention that the death penalty is still "widely accepted"[48] and warrant the Supreme Court's recognition. Although many foreign countries retain capital punishment, a very substantial number of civilized countries have abolished it.[49] Surveys of the United States tend to question the acceptance of death as a punishment. According to one estimate there was a seventeen per cent decline between 1953-1960 in the number of people favoring the death penalty for the crime of murder.[50] More specialized interviews with prison wardens[51] and policemen[52] demonstrate divided opinions on the efficacy of capital punishment. As already mentioned, the declining number of executions per year compared with the increasing volume of capital offenses[53] indicates the judiciary's disfavor with the death penalty. There is also authority that a severe penalty can come within the eighth amendment prohibition against unnecessary cruelty if the purposes of punishment—rehabilitation, isolation, and deterrence—can be achieved by a less severe punishment.[54] Undoubtedly,

[48] See note 45 *supra.*

[49] "The death penalty is found in Australia, except in Queensland; in Africa; and in Asia, except in Israel, Ceylon (temporary moratorium), and the Indian provinces of Travancore and Nepal. It is in Europe and the Americas that the cleavage of opinion is found. The countries of Eastern Europe and the Balkans have retained it, but in Western Europe it has been abolished in all nations except in Spain, France, the United Kingdom and the Irish Republic. In Latin America, it has been abolished in Argentina, Brazil, Colombia, Ecuador, Venezuela, Uruguay, Costa Rica, the Dominican Republic, Panama, and Mexico (federal law and all but eight of the states). In North America, Canada has retained it." SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE 1 (1959).

[50] BEDAU 240.

[51] In one survey, 89% of the wardens interviewed did not regard capital punishment as deterrent to murder. Thomas, *Attitudes of Wardens Toward the Death Penalty,* in BEDAU 244.

[52] Campion, *Attitudes of State Police toward the Death Penalty,* in *id.* at 252.

[53] A comparison of the volume of crimes with the number of executions for that crime in 1962 shows that there were 8,400 murders and only 41 executions; 16,310 rapes and only 4 executions; 139,600 assaults, 95,260 robberies, 892,800 burglaries with only 2 executions for crimes other than murder or rape. See BEDAU 65, Table 1; 110-11. In North Carolina there were 5,786 convictions for burglary in Superior Court between 1960-61. [1960-1962] N.C. ATT'Y GEN. BIENNIAL REP. 214-15. Yet since 1909, there have only been 11 executions for burglary. Letter from the North Carolina Parole Board to Floyd McKissick, February 10, 1964, on file in the North Carolina Law Library.

[54] Robinson v. California, 370 U.S. 660, 668 (1962) (concurring opinion of Douglas); Trop v. Dulles, 356 U.S. 86, 104 (1957) (concurring opinion of Black and Douglas); Weems v. United States, 217 U.S. 349 (1909).

the deterrent factor is the basic purpose in retaining the death penalty.[55] Thus, if capital punishment does not in fact deter, it could be unnecessarily cruel. Yet, the death penalty remains unquestioned by the Supreme Court in spite of exhaustive studies by sociologists and criminologists which led one of them to the conclusion: "[T]he death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes. It has failed as a deterrent."[56] Comparisons made of those states that have abolished the death penalty and those that retain it, refute the contentions that homicide rates increase without the death penalty,[57] that capital punishment is necessary for the protection of the police,[58] or that executions actually serve as a deterrent to future crimes.[59] Thus, such surveys and statistics illustrate that there is a doubt whether capital punishment per se is acceptable or necessary in present-day society; however, it should also be noted that these surveys are, for the most part, directed toward the total abolition of capital punishment, leaving the constitutionality of death as a punishment for rape, burglary, and arson in even more uncertainty.

As the eighth amendment derives its meaning from the changing standards of society, the death penalty can not be condoned under a standard set by ancient penal theories. If capital punishment for various, if not all crimes, is constitutional, the courts must consider it according to contemporary society, and ratify it in view of the standards of contemporary society. It is hoped that Justice Goldberg's dissent in the principal case indicates that, in future capital cases the Supreme Court will apply the evolving standards test and take judicial notice of those facts illustrative of a changed society.

JOSEPH DONALD WALSH, JR.

[55] Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); State v. Tomasi, 75 N.J.L. 739, 69 Atl. 214 (Ct. Err. & App. 1908); People *ex rel.* Kemmler v. Durston, 119 N.Y. 569, 24 N.E. 6 (1890).

[56] Sellin, *Death and Imprisonment as Deterrents to Murder*, in BEDAU 284.

[57] *Id.* at 274.

[58] A 1950 survey of 82 cities in states abolishing capital punishment, with a population total of 2,804,757, and 182 cities in states that have retained it with a population total of 7,147,216, showed that the rate per 100,000 of fatal attacks on the police was 1.2 for the abolition cities and 1.3 for the retentionist cities. Sellin, *Does the Death Penalty Protect the Municipal Police*, in BEDAU 291-92.

[59] Savitz, *The Deterrent Effect of Capital Punishment in Philadalphia*, in *id.* at 315; Graves, *The Deterrent Effect of Capital Punishment in California*, in *id.* at 322.

Constitutional Law—Self-Incrimination—Possibility of Subjecting Witness to Punitive Damages

In *Allred v. Graves*,[1] the plaintiff, seeking compensatory and punitive damages, alleged in her complaint that the nine defendants, pursuant to a preconcerted conspiracy, came to her home where they unlawfully and maliciously assaulted her and several members of her family and shot into the automobiles and house of the plaintiff. The defendants, in their answer, denied the assault on the plaintiff or on anyone else. The plaintiff thereupon applied for an adverse examination of the defendants,[2] which the clerk ordered.[3] On the day set for the examination the defendants appeared, and through counsel moved to dismiss the order of examination on the grounds that the plaintiff was seeking punitive damages; that should punitive damages be awarded by the jury, the defendants' liberty could be affected; and that consequently the order of examination would be the equivalent of compelling the defendants to give evidence against themselves which would be violative of the federal and state constitution.[4]

In a hearing on the motion before the Judge of the Superior Court, the parties stipulated that all the defendants had already been tried for all criminal charges arising out of the occurrences. The judge held that article I, section 11 of the Constitution of North Carolina[5] applied only to criminal actions, and that the defendant would have to answer questions at the adverse examination.[6] The defendants appealed from this order.

On appeal, the North Carolina Supreme Court held that the trial judge was correct in refusing to dismiss the order for examination;[7] however, the court held that the defendants may *not* be compelled to answer questions at the examination the answers to which

[1] 261 N.C. 31, 134 S.E.2d 186 (1964).
[2] N.C. GEN. STAT. § 1-568.11(a) (1953); N.C. GEN. STAT. § 1-568.11(b) (Supp. 1963).
[3] N.C. GEN. STAT. § 1-568.11(c) (1953).
[4] 261 N.C. at 33, 134 S.E.2d at 188.
[5] N.C. CONST. art. I, § 11: "In all criminal prosecutions, every person charged with crime has the right to ... not be compelled to give self-incriminating evidence."
[6] 261 N.C. at 33, 134 S.E.2d at 189.
[7] *Id.* at 39, 134 S.E.2d at 193: The court held that a motion to dismiss the order of examination *entirely* was not proper, but that the order should be modified so that the defendants should not be compelled to answer specific questions which might tend to incriminate them.

will necessarily tend to subject them to punitive damages or body execution.[8]

The result is that North Carolina no longer applies the privilege against self-incrimination solely to criminal actions, but also applies the privilege to civil actions in which punitive damages are sought, an award of which might subject the defendant to body execution. In reaching this result, the court reasoned that it is well-accepted law that a witness should not, in any proceeding, be compelled to give testimony that will tend to incriminate him or subject him to fines, penalties, or forfeitures;[9] that this constitutional guaranty should be liberally construed;[10] that punitive damages are *penal* in nature, and not compensatory;[11] and that, therefore, the defendants should not be required to subject themselves to a penalty through self-incrimination.[12]

The Supreme Court of the United States, in *Counselman v. Hitchcock*,[13] held that the privilege against self-incrimination was not confined only to criminal cases against the one invoking the privilege. The Court held that broadly construing the Constitutional privilege, no person should be compelled *in any criminal case* to be a witness against himself, that an investigation before a grand jury was a criminal proceeding, and, therefore, the witness before such jury was entitled to invoke the privilege.[14] Further, the Court said, in dictum: "The object was to insure that a person should not be compelled, when acting as a witness *in any investigation*, to give testimony which might tend to show that he himself had committed a crime."[15]

The next major deviation from the ancient doctrine that the privilege pertained solely to criminal proceedings came in *McCarthy v. Arndstein*,[16] decided in 1924. In that case, the Supreme Court squarely held that the privilege applied in all proceedings, both civil and criminal.[17]

---

[8] *Id.* at 38, 134 S.E.2d at 192.
[9] *Id.* at 34, 134 S.E.2d at 189.
[10] *Ibid.*
[11] *Id.* at 36, 134 S.E.2d at 190.
[12] *Id.* at 38, 134 S.E.2d at 192.
[13] 142 U.S. 547 (1892).
[14] 142 U.S. at 562.
[15] *Ibid.* (Emphasis added.)
[16] 266 U.S. 34 (1924).
[17] "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to

Since *Counselman* and *Arndstein*, it has been held that the privilege against self-incrimination may be exercised by a witness in any proceeding.[18] Thus in all kinds of examinations before a court,[19] in grand jury investigations,[20] in legislative or quasi-legislative investigations,[21] in administrative investigations,[22] and other type proceedings, the privilege had been held applicable. The conclusion necessarily follows that no longer is there any problem as to the *kind* of proceedings or investigations in which the privilege may be invoked.

With this conclusion in mind, let us examine the type of facts that are protected from disclosure. Wigmore says that: "The facts protected from disclosure are distinctly facts involving a criminal liability or its *equivalent*. Hence facts involving a *civil* liability are entirely without the scope of the privilege."[23] Exactly what the "equivalent" of criminal liability is has often eluded the courts.

Facts that might tend to subject the witness to infamy and public disgrace are not protected by the privilege.[24] In *Ullmann v. United States*,[25] the Supreme Court upheld the constitutionality of the Federal Immunity Act of 1954 which authorized compelled testimony of witnesses in cases which involved the national security and granted immunity from prosecution, penalty, or forfeiture arising out of the testimony they were compelled to give. In *Ullmann*, the petitioner had claimed that disclosure would disable him im-

civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 40.

[18] See generally 8 WIGMORE, EVIDENCE §2252 (1961) [hereinafter cited as WIGMORE]; 98 C.J.S. *Witnesses* § 433 (1957).

[19] *E.g.*, Brown v. United States, 356 U.S. 148 (1958) (denaturalization proceeding in a district court); United States v. Field, 193 F.2d 92 (2d Cir. 1951) (upon forfeiture of bail; examination by district of trustees of bail fund; privilege held waived); Wood v. United States, 128 F.2d 265, 270-72 (D.C. Cir. 1942) (preliminary hearing before committing magistrate); Owen v. Fisher, 189 Misc. 69, 66 N.Y.S.2d 856 (Sup. Ct. 1947) (pretrial examination of defendant).

[20] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[21] Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

[22] Smith v. United States, 337 U.S. 137 (1949) (before an OPA examiner); Graham v. United States, 99 F.2d 746 (9th Cir. 1938) (examination by immigration officers).

[23] 8 WIGMORE § 2254 at 331. (Emphasis added.) This section was cited by the North Carolina court in *Allred*. 261 N.C. at 34, 134 S.E.2d at 189.

[24] Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).

[25] 350 U.S. 422 (1956).

measurably—viz., loss of his job, expulsion from labor unions, passport eligibility, and general public disgrace.[26] However, the majority, in rejecting these contentions, reiterated the rule enunciated in *Brown v. Walker*,[27] that the immunity need only protect the witness from exposure to a *criminal* charge; if he is sufficiently protected from criminal prosecution, he may not invoke the privilege.[28]

The vigorous dissent in *Ullmann* agreed with the petitioner. The dissenting justices, Douglas and Black, contended that forfeiture of rights of citizenship should be protected to the same degree as property rights, and that the compelled testimony in question would undoubtedly deprive the petitioner of some of his valuable rights of citizenship.[29] They further concluded that "the Fifth Amendment was designed to protect the accused against infamy as well as against prosecution."[30]

Allred did not involve the claim that the facts sought to be disclosed might subject the defendants to infamy and public disgrace. The dissent in *Ullmann*, however, does serve to show a liberal departure from the old rules requiring a strict interpretation of the privilege against self-incrimination. If such a view were to prevail, it would not require that the facts tend to subject the witness to a *criminal* liability, but only that such facts would deprive the witness of his various rights of citizenship.

As previously stated, the privilege against self-incrimination is ordinarily available only where a possible criminal prosecution may result from the testimony.[31] But the concept of "criminal prosecution" has been extended to include penalties and forfeitures which are of a *penal* nature, and most jurisdictions have enacted this extension of the privilege as a statutory or constitutional provision.[32]

---

[26] *Id.* at 430.

[27] 161 U.S. 591, 605-06 (1896).

[28] 350 U.S. at 430-31.

[29] 350 U.S. at 442-43.

[30] 350 U.S. at 450. Wigmore suggests that the dissenters in both *Ullmann* and *Brown* overlooked the fact that historically there is a difference in the privilege against disclosing facts involving infamy and the privilege against self-incrimination. 8 WIGMORE § 2254. See Smith v. United States, 337 U.S. 137 (1949) (pointing out the distinction). Although the privilege against disclosing infamous facts has largely dissipated, several states have preserved it by statute; see, *e.g.*, ALASKA COMP. LAWS ANN. § 58-6-12 (1948); CAL. CIV. PROC. CODE § 2065 (1955); GA. CODE § 38-1205 (1935); S.C. CODE § 9-214 (1962). See also MCCORMICK, EVIDENCE § 128 (1954).

[31] See Ullmann v. United States, 350 U.S. 422, 430-31 (1956); McCarthy v. Arndstein, 266 U.S. 34 (1924).

[32] See 8 WIGMORE §§ 2256-57.

The words "penalty" and "forfeiture" have frequently been used indiscriminately by the courts; for this reason, a shorthand definition of each might be kept in mind during the remainder of this note. A forfeiture may be said to be a loss resulting from the breach of a stipulation imposed by the parties,[33] while a penalty, on the other hand, flows from the breach of a duty imposed by law.[34]

The North Carolina court, in *Allred*, considered the possibility of having to pay punitive damages a *penalty*, and thereby extended the privilege against self-incrimination to the defendants.[35] The court said: "When the penalty lies in the payment of money, the Courts are in conflict."[36] At this point, the court quoted a footnote from Wigmore[37] which does in fact show that there has been a conflict where a statute prescribes a *fixed sum* or a multiple of actual loss for some act of the defendant. There has been no case, and surely no "conflict," holding or rejecting the contention that a possibility of punitive damages warrants the extension of the privilege against self-incrimination to the witness. In fact, the text to which the above-mentioned footnote applies expressly says that if the "penalty" is by way of punitive damages, it is still a *civil* liability and in no way a *criminal* penalty.[38]

The United States Supreme Court has extended the concept of "criminal prosecution" to include penalties and forfeitures only twice: in both cases the penalty or forfeiture was applied directly as a punishment for a crime, viz., the forfeiture of imported goods for failure to pay the applicable tariff,[39] and a civil penalty imposed for the illegal importation of aliens.[40] In both these cases, the *nature* rather than the *form* of the action was controlling. The penalty or forfeiture applied in each case was essentially punishment for the violation of the applicable law.[41]

---

[33] See Chauncey v. Tahourden, 2 Atk. 392, 26 Eng. Rep. 637 (Ch. 1742).

[34] See, *e.g.*, Huntington v. Attrill, 146 U.S. 657, 668 (1892).

[35] 261 N.C. at 38, 134 S.E.2d at 192.

[36] *Id.* at 36, 134 S.E.2d at 190.

[37] 8 WIGMORE § 2257 at 337 n.3.

[38] "When the penalty lies in the *payment of money*, it seems clear that a mere unregulated increase of compensation under the name of exemplary damages is still a civil liability in essence, and therefore the same consequence ought to follow when by statute a fixed sum, or multiple based on actual loss, is prescribed." 8 WIGMORE § 2257 at 337. The cases cited by Wigmore as authority for this statement show merely a conflict as far as the type of statutes mentioned, and do not even mention exemplary damages.

[39] Boyd v. United States, 116 U.S. 616 (1886).

[40] Lees v. United States, 150 U.S. 476 (1893).

[41] Boyd v. United States, 116 U.S. 616 (1886). "If an indictment had

In all the cases that have followed the line of reasoning laid down in the two above-mentioned cases, therefore, the nature of the proceeding—that is, criminal—is the controlling factor, not the form. For example, in early actions for treble damages under the Emergency Price Control Act it was held that the privilege applied for the reason that the statutory damages were not merely remedial, but penal.[42] Later opinions of the circuit courts would impliedly overrule the earlier decisions of several district courts on this point, holding the privilege inapplicable.[43]

Following the same reasoning, the privilege has been allowed in courts of chancery under bills of discovery and under statutory interrogatories to a party.[44] *Wilson v. Union Tool Co.*[45] was an

been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. *The information, though technically a civil proceeding, is in substance and effect a criminal one....* As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of a quasi-criminal nature, we think that they are within the reason of criminal proceedings for... that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." *Id.* at 634. (Emphasis added.)

[42] Bowles v. Trowbridge, 60 F. Supp. 48, 50 (N.D. Cal. 1945). See also City of Philadelphia v. Cline, 158 Pa. Super. 179, 44 A.2d 610 (1945) (action under municipal ordinance to recover penalties for failure to file tax returns; privilege applies); Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397 (1892) (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" $1000 for each act; privilege applies). The *Trowbridge* case was also decided on another ground. The defendant had not yet been tried for the criminal aspect of his act. Therefore, he could not be required to give evidence that could be later used against him. 60 F. Supp. at 50. This was the entire basis of the decision in Porter v. Heend, 6 F.R.D. 588 (N.D. Ill. 1947). The court in *Porter* said in a suit for treble damages under the Emergency Price Control Act that it need not even consider whether the damages were remedial or penal, because the defendant would not be required to answer anyway.

[43] Crary v. Porter, 157 F.2d 410 (8th Cir. 1946). "In addition, mere increased or multiple damages, whether they be for exemplary or other public-interest purposes, whose allowance is dependent upon the recovery of actual damages, have never been regarded as constituting a criminal penalty." *Id.* at 414. See also Kessler v. Fleming, 163 F.2d 464. (9th Cir. 1947) (action under Emergency Price Control Act for treble damages; might be considered a "penalty," but it is only remedial and not a substitute for criminal prosecution); Amato v. Porter, 157 F.2d 719 (10th Cir. 1946).

[44] Speidel Co. v. N. Barstow Co., 232 Fed. 617 (D.R.I. 1916).

[45] 275 Fed. 624 (S.D. Cal. 1921).

action brought for treble damages for patent infringement; in denying discovery, a California district court followed the rule of equity which denies discovery if the answer solicited would tend to subject the party to a penalty, forfeiture or criminal process.[46] However, the same court, two years later in *Perkins Oil Well Cementing Co. v. Owen*,[47] completely reversed itself, though not expressly overruling *Union Tool*. *Perkins* held that the statute allowing treble damages was remedial; that the action was to redress a private aggrievance; that the defendant would not, by any disclosure, make himself liable to prosecution for any public offense. Therefore, no constitutional right would be invaded by compelling him to answer the interrogatories.[48] Another court in the same circuit was again faced with the question in *Schlage Lock Co. v. Pratt-Rymer Co.*[49] It acknowledged the inconsistency of the two previous cases, *Union Tool* and *Perkins*, and adopted the rule of the latter.

Another line of cases cited as authority for the *Allred* decision would not seem to be applicable at all.[50] In all four of these cases, a Mississippi immunity statute was held to protect the defendants from any prosecution, penalties, or forfeitures arising out of the illegal sale of liquor. It is submitted that the Mississippi court was not concerned with whether or not the penalties came within the concept of "criminal prosecution" for the reason that it found that the clear import of the immunity statute was to protect the witnesses from *any* penalty arising from the facts testified to, be it penal *or* remedial.[51]

Where the punishment imposed is not penal, but remedial, there was no holding prior to *Ullmann* by the Supreme Court as to whether the privilege was applicable. The Court had considered the concept of "remedial forfeiture" only once, in *United States v. Hess*,[52] and then in terms of double jeopardy, not of self-incrimination. In that case, the recovery, for the violation of a public housing act after the imposition of criminal sanctions, of double damages plus

[46] *Id.* at 629-30.
[47] 293 Fed. 759 (S.D. Cal. 1923).
[48] 293 Fed. at 761.
[49] 46 F.2d 703 (N.D. Cal. 1931).
[50] Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918 (1956); Zambroni v. State, 217 Miss. 418, 64 So. 2d 335 (1953); Serio v. Gully, 189 Miss. 558, 198 So. 307 (1940); Malouf v. Gully, 187 Miss. 331, 192 So. 2 (1939).
[51] Bailey v. Muse, 227 Miss. 51, 56-57, 85 So. 2d 918, 922-23 (1956), brings this point out very clearly.
[52] 317 U.S. 537 (1943).

a penalty was held not to violate the constitutional guaranty against double jeopardy. The Court ruled that the double damages and the penalty were imposed merely to compensate the government for the damage done by the violations of the act, *i.e.*, the penalties were remedial, not penal.

From the above discussion, it may be seen that the only cases which hold the privilege against self-incrimination applicable where the witness may be subject to "penalties" by way of payment of money are those in which the courts feel that the "penalty" is not remedial, but criminally penal; ones where the damages sought are imposed as a criminal penalty or substitute therefore, and not where they are intended to compensate private aggrievances. Admittedly, punitive damages are "penal," as the court in *Allred* stresses;[53] also it is true that the defendants might become subject to body execution upon failure to pay the judgment for such damages. It is submitted, however, that the damages are not penal within the concept of "criminal prosecution," even though the defendants, in furtherance of their civil liability, might be jailed by means of body execution, and that the court erred by overlooking the distinction between merely "penal" damages which are in essence merely a further *civil* liability, and "penal" damages which come within the concept of "criminal prosecution," to which the privilege against self-incrimination extends only.

ARCH K. SCHOCH IV

Constitutional Law—Was it Intended That the Fourteenth Amendment Incorporate the Bill of Rights?

The Supreme Court in 1833 established the principle that the Bill of Rights did not apply to the states.[1] Following the Civil War the fourteenth amendment, with its "privileges or immunities" and "due process" clauses, cast doubt on this principle and raised the possibility of applying the Bill of Rights to the states by incorporating them into the amendment.[2]

[53] 261 N.C. at 35, 134 S.E.2d at 190.

[1] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[2] U.S. CONST. amend. XIV, § 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

The Court early held in the *Slaughter House Cases*[3] that the "privileges or immunities" clause prevented the states from abridging those privileges or immunities that a person holds due to his United States citizenship, but not those privileges or immunities he might hold due to state citizenship. Thus, the decision in effect nullified the importance of this clause for purposes of incorporation.[4]

The "due process" clause, however, has not been construed so strictly. Instead, it has been utilized many times, particularly recently, to make certain parts of the Bill of Rights applicable to the states.[5] The majority position of the Court has achieved this result by a selective process of incorporating into the fourteenth amendment only those parts of the Bill of Rights the violation of which would also violate "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[6] Under this process, the Court has clearly incorporated freedom of religion,[7] of speech,[8] of press,[9] and of assembly;[10] protection from unreasonable searches and seizures;[11] requirements of just compensation for property;[12] assistance of counsel;[13] protection from cruel and unusual punishments;[14] and the privilege against self-incrimination.[14a]

A minority position, led by Justice Black, contends that any act in violation of the Bill of Rights also violates the fourteenth amendment.[15] Justice Black bases this conclusion on his belief that the framers of the fourteenth amendment intended that the Bill of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] 83 U.S. (16 Wall.) 36 (1873).

[4] CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 187 (10th ed. 1948).

[5] *E.g.*, Gideon v. Wainright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[6] *In re* Kemmler, 136 U.S. 436, 448 (1890). This basic idea was earlier stated in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

[7] Everson v. Board of Educ., 330 U.S. 1 (1947).

[8] Gitlow v. New York, 268 U.S. 652 (1925).

[9] Near v. Minnesota, 283 U.S. 697 (1931).

[10] De Jonge v. Oregon, 299 U.S. 353 (1937).

[11] Mapp v. Ohio, 367 U.S. 643 (1961).

[12] Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[13] Gideon v. Wainright, 372 U.S. 335 (1963).

[14] Robinson v. California, 370 U.S. 660 (1962).

[14a] Malloy v. Hogan, 32 U.S.L. WEEK 4507 (U.S. June 15, 1964).

[15] Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion). Dissenting with Justice Black were Justices Douglas, Murphy, and Rutledge.

Rights be applicable to the states.[16] Legal scholars differ on this question of intent.[17] The purposes of this note are, first, to study the events pertinent to the passage of the amendment in order to determine the intent behind its passage, and, second, to discuss the influence which this intent should have on present Supreme Court decisions.

When the new Congress convened after the Civil War, the Constitution had been construed so as to give little protection against state action.[18] *Barron v. Baltimore*[19] had limited the effect of the Bill of Rights to the federal government, and the *Dred Scott*[20] decision had eliminated any possibility of the "privileges and immunities" clause of article IV, section 2 being used to protect the Negro. Since these decisions gave the Negro little protection against the "Black Codes"[21] passed by many southern states, the new Con-

[16] Justice Black states: "My study of the historical events that culminated in the Fourteenth Amendment... persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states." *Id.* at 71.

[17] Favoring the intent-to-incorporate theory are: FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908) [hereinafter cited as FLACK]; GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898). Opposing this theory are: Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) [hereinafter cited as Fairman]; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

Many writers contend that the fourteenth amendment was intended to greatly expand the federal power, but they make no mention of a specific intent to incorporate the Bill of Rights. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES (1912); CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (10th ed. 1948); 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926); Royal, *The Fourteenth Amendment: The Slaughter House Cases*, 4 So. L. REV. 558 (1879).

[18] Prior to the Civil War three decisions had severly limited federal control over state action. First, in Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), Justice Washington adopted a limited construction of the original "privileges and immunities" clause in article IV, section 2, so that each state was required to give only the fundamental rights to citizens of other states. Next, in 1833, the Court in the landmark case of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), held that the Bill of Rights did not apply to the states. Finally, in Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), the Court again limited the scope of the "privileges and immunities" clause of article IV, section 2, so that what coverage remained after *Corfield* did not apply to protect the Negro.

[19] *Supra* note 18.

[20] Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[21] For a general comparison of these laws see Message of the President of the United States to the House of Representatives, *Freedmen*, H.R. Doc. No. 118, 39th Cong., 1st Sess. (1886).

gress immediately sought to pass remedial legislation.[22]

The Civil Rights Act of 1866[23] was the first product. Although it finally passed the Act over President Johnson's veto,[24] Congress itself was uncertain of its constitutional power to pass such a measure.[25] Thus, in order to assure constitutionality, the 39th Congress began work on a constitutional amendment.[26] The job of drafting what was to become the fourteenth amendment was given to the Joint Committee on Reconstruction. The first proposal from the Committee was drafted by Representative Bingham;[27] and, like the Civil Rights Act, the apparent purpose was to protect the Negro from discrimination by the southern states.[28] Up to this time there had been no proposals, bills or discussion which could possibly be construed as an attempt or desire to apply the Bill of Rights to the states via the new amendment. Before this first draft was permanently pigeonholed, however, it gave rise to some ambiguous discussion.

On February 26, 1866, Representative Bingham, in an opening speech to the House, outlined his conception of the problem:[29] although every word of the proposed amendment was already in the Constitution, Congress had heretofore lacked the power of enforcement.[30] He further declared that if Congress had previously had this power and had been able to exercise it, there would have been

[22] HICKS & MOWRY, A SHORT HISTORY OF AMERICAN DEMOCRACY 339 (2d ed. 1956).

[23] Ch. 31, 14 Stat. 27 (1866). This bill provided that persons born in the United States under United States jurisdiction were citizens of the United States, and without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property, and to the equal benefit of all laws for security of person and property, as was enjoyed by white citizens.

In his opening speech to the Senate, Senator Trumbull clearly expressed that the purpose of the Act was to prevent discrimination in civil rights on account of race and to give all persons equal protection of the laws. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1865-1866).

[24] *Id.* at 1809.

[25] *Id.* at 1151.

[26] *Id.* at 2459.

[27] *Id.* at 806.

[28] This proposal provided: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property." *Ibid.*

[29] *Id.* at 1033.

[30] *Id.* at 1034. The proposed amendment was nothing more than a reiteration of article IV, section 2, and the fifth amendment. See note 28 *supra.*

no rebellion.[31] Bingham then concluded that the purpose of the new amendment was to give Congress power to enforce "this immortal bill of rights" upon the states.[32] Use of this phrase has given rise to conflicting interpretations as to what was intended by "bill of rights."[33]

After Bingham's opening speech to the House, there were no more references to the "bill of rights" until his closing speech, where he stated that the purpose of the proposed amendment was to arm Congress with the power to enforce the Bill of Rights against the states.[34] He then stated:

> Gentlemen, admit the force of the provisions in the bill of rights, that the citizens of the United States shall be entitled to all the privileges and immunities of citizens of the United States in the several States, and that no person shall be deprived of life, liberty, or property without due process of law....[35]

Shortly after Representative Bingham's closing speech, consideration of this draft was permanently pigeonholed.[36] However, the Joint Committee on Reconstruction immediately framed a new draft which was to become, after the Senate's definition of

---

[31] CONG. GLOBE, *op. cit. supra* note 23, at 1034.

[32] In part, Bingham's words were: "And, sir, it is equally clear by every construction of the Constitution,... that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States." *Ibid.*

[33] Fairman contends that "this immortal bill of rights" is to Bingham a "fine literary phrase not referring precisely to the first eight amendments." He argues that Bingham was referring to "the privileges or immunities" of article IV, section 2, and to the right of life, liberty, and property of the fifth amendment. He reasons further that if Bingham had intended to include the first eight amendments, this would have been inconsistent with his statement that had Congress had and exercised this power there would have been no rebellion, for enforcement of the first amendment would not have prevented secession. Fairman 44. On the other hand, Flack interprets Bingham's language more literally, contending that "it meant nothing less than the conferring upon Congress the power to enforce, in every State of the Union, the Bill of Rights, as found in the first eight Amendments." FLACK 57.

[34] CONG. GLOBE, *op. cit. supra* note 23, at 1088.

[35] *Id.* at 1089. Fairman again believes that Bingham did not mean "the first eight amendments" when he used the phrase "bill of rights," contending that, in this statement, Bingham made it clear from the context that he was referring to the fundamental freedoms of the "due process" and "privileges or immunities" clause. Fairman 34. Flack does not analyze the speech in detail but simply says that Bingham stated that the purpose of the amendment was to give Congress power to enforce the Bill of Rights. FLACK 59.

[36] CONG. GLOBE, *op. cit. supra* note 23, at 1095.

a citizen was added,[37] the final version of the fourteenth amendment. Thaddeus Stevens introduced this new draft into the House on May 8, 1866,[38] stating that he felt the purpose of the amendment was to give Congress power to correct the unjust legislation of the states.[39] He further expressed his belief that equal protection, designed to cure the evil of discrimination, was the dominant purpose of section 1.[40] Stevens reasoned that while the Civil Rights Bill secured the same protection, an amendment would prevent repeal of the protection by a simple majority of Congress.[41]

During the last day of the House debate, Representative Bingham added his reasons for giving Congress power to enforce the Constitution against the states,[42] stating: "Contrary to the express letter of your Constitution, cruel and unusual punishments have been inflicted under state laws within the Union upon your citizens . . . ."[43]

After passage of the amendment in the House,[44] Senator Howard introduced the proposal into the Senate.[45] His introductory speech furnishes the strongest evidence that Congress intended to incorporate the Bill of Rights into the fourteenth amendment. In defining the privileges and immunities to be covered by the amendment, Senator Howard quoted from *Corfield v. Coryell*,[46] which had defined them as being those privileges and immunities which are in their nature fundamental.[47] In furtherance of this definition, he stated: "To these privileges and immunities . . . should be added the

[37] *Id.* at 2897.
[38] *Id.* at 2459.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.* Fairman utilizes Representative Stevens' speech to substantiate the position that no incorporation was intended, noting that over and over in the discussion, the correlation between section 1 and the Civil Rights Act is mentioned, and that since no one intended for the Civil Rights Act to incorporate the Bill of Rights, no one intended that the amendment do so. Fairman 44.
[42] *Id.* at 2542.
[43] *Ibid.* Flack relies on Bingham's reference to "cruel and unusual punishments" as further evidence that the Bill of Rights was intended to be incorporated. FLACK 79-80. Fairman answers this by contending that Bingham was only arguing in favor of a selective incorporation process by means of the "due process" clause. Fairman 53.
[44] CONG. GLOBE, *op. cit. supra* note 23, at 2545. This was done only after three days debate, the vote being 128 for and 37 against. *Ibid.*
[45] *Id.* at 2765.
[46] 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
[47] *Id.* at 551-52.

personal rights guaranteed and secured by the first eight amendments to the Constitution . . . ."[48] Senator Howard then proceeded to read each of the first eight amendments,[49] stating that there was no power in the Constitution for Congress to enforce them, and that the purpose of the proposed amendment was to give Congress such power.[50]

After passage by the Senate,[51] the amendment was submitted to the states on June 16, 1866,[52] and was adopted two years later.[53] There was practically no discussion in the state legislatures of the conflict that the first eight amendments might have with their present state laws.[54] To this there was one notable exception. In the Massachusetts House the proposed amendment received an unfavorable report from its Committee on Federal Relations.[55] The Committee considered section 1 of the fourteenth amendment to be surplusage, stating that it did not see where this section differed from article IV,

[48] CONG. GLOBE, *op. cit. supra* note 23, at 2765.

[49] *Ibid.*

[50] *Id.* at 2766. Flack points out that Howard's interpretation of the amendment was not questioned by anyone, and that since no member of the Committee gave a different interpretation or questioned his statement, his interpretation must be accepted as that of the Committee. FLACK 87. The opposing view agrees that what is said by a member for a reporting committee is ordinarily entitled to very special consideration, "but others may, without challenging those views, have supported the measure for quite inconsistent reasons." Fairman 66. It should also be noted in this context that the minority opposed the amendment for the very reasons that Howard gave in support of it. FLACK 87.

Fairman points out the repetition in incorporating the "due process" clause of the fifth amendment and also restating it in the fourteenth. Fairman 58. It would appear that this contention is somewhat irrelevant. It is true that Congress would be repeating itself by including two "due process" clauses, but this does not explain away Howard's belief that the fourteenth amendment included the Bill of Rights.

[51] CONG. GLOBE, *op. cit. supra* note 23, at 3042. This was done on June 8, 1866, the vote being 33 for, 11 against, with 5 absent. *Ibid.*

[52] FLACK 140.

[53] FLACK 191 n.117.

[54] Fairman 82. Professor Fairman points to several of the state laws which would conflict with the fourteenth amendment as evidence that the states did not intend to incorporate. He notes further that several states (Connecticut, Kansas, and Michigan) did not require that a person charged with "a capital or otherwise infamous crime" be indicted by a grand jury as is required by the fifth amendment. Yet, says Fairman, there was no suggestion by their legislatures that their state law conflicted with the fifth amendment.

Fairman also noted that New Hampshire's Constitution made provision for the support and maintenance of Protestant ministers, yet no question of the first amendment's provision for freedom of religion was discussed by the legislature.

[55] H.R. Doc. No. 149, 1, 25 (Mass. 1867).

section 2, and amendments I, II, V, and VIII.[56] During the period in which the question of ratification was before the state legislatures, there were no statements in the newspapers as to whether the first eight amendments were to be applicable to the states.[57]

Less than a year after the states had adopted the fourteenth amendment, the Supreme Court in *Twitchell v. Pennsylvania*[58] refused to consider whether the fifth and sixth amendments applied to the states. Citing *Barron*, Chief Justice Case spoke for an unanimous court in refusing to take jurisdiction by writ of error, stating that application of the fifth and sixth amendments to the states was "no longer a subject of discussion."[59]

Two years later, in 1871, the question arose in the House as to whether the "privileges or immunities" clause of the fourteenth amendment was intended to incorporate the Bill of Rights.[60] During this debate Representative Bingham read each of the first eight amendments and stated that the "privileges or immunities" clause

[56] *Ibid.* Professor Flack states that this Committee report is valuable because it shows that the legislature, in adopting the report, "accepted the statements made in it that the first section was but a reiteration of the guarantees enumerated in the Amendments." FLACK 188.

Professor Fairman points out that the Committee was completely wrong in believing that the Bill of Rights applied to the states, citing *Barron*. Fairman 120. This explanation appears irrelevant for there is no significance in the fact that the Committee was unaware of this decision. What is important is that the Committee thought that the fourteenth amendment included some of the Bill of Rights.

[57] FLACK 153. Flack states that, "it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including jury trial, were secured by it." *Id.* at 153-54.

Professor Fairman points out that it may be equally inferred that these persons suggested a "selective" incorporation of certain freedoms expressed in the Bill of Rights. Fairman 81.

[58] 74 U.S. (7 Wall.) 321 (1869). The petitioner had been sentenced to death for murder. In seeking a writ of error it was contended that he had not been indicted by a grand jury, which was in violation of the fifth amendment, and that he had not been informed of the nature and cause of the accusation, which was in violation of the sixth amendment. The fourteenth amendment now guarantees the protection of the fifth amendment's privilege against self-incrimination. Malloy v. Hogan, 32 U.S.L. WEEK 4507 (U.S. June 15, 1964).

[59] 74 U.S. (7 Wall.) at 325. This case is cited as showing that the fourteenth amendment was not intended to incorporate the Bill of Rights. Fairman 132. Part of what was "no longer a subject of discussion" in *Twitchell* is now. See Malloy v. Hogan, *supra* note 58.

[60] CONG. GLOBE, 42d Cong., 1st Sess. 111-18 (1871). The fact that this question was debated within five years after passage is an indication of the conflicting intentions within Congress.

made them an express prohibition upon every state.[61] It would seem that this speech by Bingham is conclusive evidence that he intended the Bill of Rights to be incorporated.[62]

Reviewing the Congressional debate, the state legislative discussion, and the general public response, it can be seen that the evidence in favor of the intent-to-incorporate theory consists of Representative Bingham's speeches in the House, Senator Howard's introductory speech in the Senate, and the Committee Report in the Massachusetts legislature. On the other hand, the evidence opposed to the intent-to-incorporate theory consists of the total lack of newspaper discussion about incorporation, the lack of discussion in the state legislatures (except Massachusetts), and of the Supreme Court decision in *Twitchell.* Note that the evidence in favor of the intent to incorporate theory is found entirely within the congressional debates, while the evidence opposed is found entirely outside of the debates. Thus, the conclusion follows that Congress intended incorporation, while the states and the general public did not.[63] However, the above conclusion raises the additional problem: how could the states blindly ratify an amendment not knowing its actual intent? The post-Civil War atmosphere, which is difficult for us to comprehend today, supplies the answer. It would appear that the framers desired a strong amendment limiting states' rights and including the Bill of Rights.[64] Yet they saw that sufficient support in Congress did not necessarily mean sufficient support by the states.[65]

[61] After reading the Bill of Rights, one by one, Bingham said, "These eight articles . . . never were a limitation upon the power of the State, until made so by the Fourteenth Amendment. The words of that Amendment 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' are an express prohibition upon every State." *Id.* at 115.

[62] Thus, Professor Fairman's contention that Bingham was using the term "bill of rights" as a fine literary phrase becomes more difficult to accept. See note 33 *supra.*

[63] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 539-41 (1926); Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court,* 46 MICH. L. REV. 869, 904 (1948); Note, *Purpose and Scope of the Fourteenth Amendment,* 21 So. CAL. L. REV. 47, 53 (1947); Note, *The Fourteenth Amendment Challenged,* 36 GEO. L.J. 398, 410 (1948).

[64] COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 10 (1912); FLACK 94; GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 60-61 (1898); *The Fourteenth Amendment Challenged, supra* note 63, at 405; Note, *The Bill of Rights and the Fourteenth Amendment,* 33 IOWA L. REV. 666, 667 (1948).

[65] COLLINS, *op. cit. supra* note 64, at 10; *The Fourteenth Amendment Challenged, supra* note 63, at 405; *The Bill of Rights and the Fourteenth Amendment, supra* note 64, at 667.

Therefore, the framers resorted to broad language that was accepted by the House after only three days of discussion and by the Senate after five days of discussion and that was ratified during the post-Civil War hate-the-South-and-help-the-Negro period.[66] In addition, the attention of the general population and their representatives was focused on punishing the South and finding some way to protect the newly freed Negro from the "Black Codes."[67] This explains why most of the discussion in Congress centered around the effects the new amendment would have on the Negro. Congress and the states no doubt thought that passing the amendment would give Congress power to carry out a program of reconstruction and that use of this power would focus naturally against the southern states.[68] Moreover, ratification was achieved by requiring the southern states to ratify before being re-admitted to the Union.[69]

The conflicting intentions of Congress and of the states raise the constructional problem of whose intent will be given the greater weight.[70] In *Maxwell v. Dow*[71] the Supreme Court stated that in the case of an ambiguous constitutional amendment the Court should not only evaluate Congress's intention but should also look to the ratifying states' intentions. In the case of an ambiguous amendment it would appear that since an amendment has no effect until ratified by the states, it should be given no broader construction than the states intended.[72] Thus, it follows that the fourteenth amendment was not intended to incorporate the Bill of Rights.

But, assuming that the intent-to-incorporate theory might be correct, an additional problem needs clarifying: which particular clause incorporates the Bill of Rights? Either the "privileges or immuni-

[66] COLLINS, *op. cit. supra* note 64, at 10-12; 2 WARREN, *op. cit. supra* note 63, at 539-40; *The Fourteenth Amendment Challenged, supra* note 63, at 405; *The Bill of Rights and the Fourteenth Amendment, supra* note 64, at 667.

[67] COLLINS, *op. cit. supra* note 64, at 9; 2 WARREN, *op. cit. supra* note 63, at 540; Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 645 (1908).

[68] COLLINS, *op. cit. supra* note 64, at 10; FLACK 94.

[69] COLLINS, *op. cit. supra* note 64, at 142; *The Bill of Rights and the Fourteenth Amendment, supra* note 64, at 667.

[70] This problem assumes that "intent" should be considered in interpreting a law. See tenBroek, *Use by The United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 437 (1938), for reasons for rejecting the "intent" theory.

[71] 176 U.S. 581, 602 (1900).

[72] tenBroek, *supra* note 70, at 453; IV Worthington, Letters and Other Writings of James Madison 211 (1884).

ties" clause or the "due process" clause may be relied upon to support the incorporation theory.[73] Three reasons favor incorporation through the "privileges or immunities" clause.

First, all the evidence (the speeches of Bingham and Howard and the Massachusetts Committee Report) in support of the incorporation theory pointed toward incorporation through the "privileges or immunities" clause, not the "due process" clause. Both Howard in his Senate address[74] and the Massachusetts Committee Report[75] stated that the privileges or immunities were those expressed in the first eight amendments. Also, Bingham said in his explanation to the House in 1871 that he intended the "privileges or immunities" clause to include the first eight amendments.[76] No such statements were made about the "due process" clause.

Second, the "due process" clause of the fifth amendment had been recently (1856) and clearly defined in *Murray's Lessee v. Hoboken Land & Improvement Co.*[77] There the Supreme Court held that an act was not due process if it violated "those settled usages and modes of proceeding existing in the common and statute law of England...."[78] This decision supports the natural law construction of the majority of the Court but not the full incorporation theory advocated by Black.

Third, the natural reading of the "privileges or immunities" clause in conjunction with the "citizenship" clause supports the incorporation theory.[79] Thus, incorporation must take place, if at all, through the "privileges or immunities" clause.[80]

Even if the intent-to-incorporate theory is correct, it does not

[73] Justice Black does not take a position on the question. See note 17 *supra*.

[74] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-1866).

[75] H. R. Doc. No. 149, 1, 25 (Mass. 1867).

[76] CONG. GLOBE, *supra* note 60, at 115.

[77] 59 U.S. (18 How.) 272 (1856).

[78] *Id.* at 277.

[79] Justice Black in Adamson v. California, 332 U.S. 76 (1947), agrees with this natural reading and favorably quotes Professor Royal who stated in *The Fourteenth Amendment: The Slaughter-House Cases*, 4 So. L. REV. 558 (1870), "Ninety-nine out of every one hundred educated men, upon reading this section over, would at first say that it forbade a State to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States." *Id.* at 563.

[80] GUTHRIE, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 60-61 (1898); *Purpose and Scope of the Fourteenth Amendment, supra* note 63, at 57; *The Bill of Rights and the Fourteenth Amendment, supra* note 64, at 668.

necessarily follow that the Supreme Court should today incorporate the Bill of Rights. Rather, stare decisis and the social pressures to incorporate should be considered.

The social pressures to incorporate have been held to a minimum by the "due process" clause. In order to insure justice, the Supreme Court has not needed to incorporate the Bill of Rights in its entirety.[81] Instead, the Court, relying on the due process clause, need only find that the state action violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[82]

This selective process has the advantage of not requiring that all of the first eight amendments be applied against the states.[83] Some of the amendments are no longer as necessary as they once were. For example, the second amendment guaranteeing the right to bear arms is not as important today as it once was. Also, the seventh amendment's twenty dollar maximum limit on certain trials without a jury is outdated due to inflation.

Thus, even if it be assumed that the fourteenth amendment was intended to incorporate the Bill of Rights, respect for stare decisis, plus lack of pressure to overrule past decisions are sufficient reasons to reject Justice Black's incorporation theory.[84]

FRANK H. WALKER, JR.

Federal Jurisdiction—Abstention—Right to Return to Federal Courts

The "abstention doctrine" is the name given to the principles applied by the federal courts when they refuse to decide a case over which they properly have jurisdiction,[1] and leave the plaintiff with the necessity of presenting part,[2] or all,[3] of the questions in the

[81] Green, *supra* note 63, at 906; Comment, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 287 (1949); *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 675.

[82] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[83] Green, *supra* note 89, at 906.

[84] *Purpose and Scope of the Fourteenth Amendment*, *supra* note 89, at 47; *A Study in Constitutional Technique*, *supra* note 106, at 268; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 90.

[1] Abstention is a decision on the merits, one which comes after the question of jurisdiction. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1963) (per curiam) (implicit), 42 N.C.L. REV. 236 (1963).

[2] *E.g.*, Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[3] *E.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

case to a state tribunal in order to get an adjudication of his rights.[4] The power to decline to exercise jurisdiction was originally found in the discretion of the chancellor sitting in equity,[5] but recently there have been indications that general policy considerations of comity will allow abstention in suits at law, at least where a vital interest of a state is involved.[6] Although the doctrine is applied in many situations,[7] the cases fall into two categories for the purposes of this note: (1) those in which the federal action is merely stayed until the state courts have had an opportunity to state authoritatively what the state law is,[8] and (2) those in which the federal action is dismissed,[9] thus ending such a case's contact with the federal courts until it comes to the Supreme Court from the state courts by appeal or certiorari. In order to understand why a case is disposed of in one or the other of these ways, it is first necessary to understand the considerations that impel abstention in each class of cases.

[4] Up-to-date general discussions of the abstention doctrine are found in: WRIGHT, FEDERAL COURTS § 52 (1963) [hereinafter cited as WRIGHT]; Note, 59 COLUM. L. REV. 749 (1959); Note, 108 U. PA. L. REV. 226 (1959).

[5] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

[6] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (eminent domain proceeding removed to federal court on basis of diversity). *Cf.* Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) (inter-sovereign certification).

[7] "[I]t is more precise to refer to 'abstention doctrines' since there are at least four distinguishable lines of cases, involving different factual situations, involving different procedural consequences, different support in the decisions of the Supreme Court, and different arguments for and against their validity." WRIGHT 169. Two of Professor Wright's "four distinguishable lines of cases" are not directly taken up here as they are only collateral to the purposes of this note. One of these involves abstention solely in order to "leave to the states the resolution of unsettled questions of state law." *Id.* at 175. It had generally been thought that unsettled state law alone was not sufficient reason for a federal court to abstain. Meredith v. Winter Haven, 320 U.S. 228 (1943). The Fifth Circuit Court of Appeals, however, following what it thought to be the general trend of the cases, recently held that it was proper for a federal court to abstain in private diversity cases solely because the state law was unsettled and difficult to ascertain. United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied*, 32 U.S.L. WEEK 3400 (U.S. May 18, 1964) (No. 958). The denial of certiorari by the Supreme Court, with only Justice Douglas dissenting, leaves the state of the law in this area in confusion.

The other "distinguishable line of cases" involves abstention in order "to ease the congestion of the federal court docket." WRIGHT 176-77. Cases supporting abstention for this purpose are: P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). *Contra*, Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 835 (9th Cir. 1963).

[8] See the cases cited in note 2 *supra.*

[9] See the cases cited in note 3 *supra.*

Lurking behind all abstention cases are considerations of comity between dual sovereigns, and a desire to avoid an unnecessary disruption by federal courts of state policies as expressed in state statutes, case law, and administrative action.[10] In the abstention cases in which an order of dismissal is appropriate, these are the primary considerations. Here, the federal courts completely defer to the state tribunal because it is felt that "a state tribunal is a more appropriate one for resolving the [whole] controversy."[11] The state tribunal is usually declared to be more appropriate "in order to avoid needless conflict with the administration by a state of its own affairs."[12] Thus, a federal court will not usually entertain either a suit challenging state administrative action under a complicated regulatory scheme,[13] a suit for a declaratory judgment against a state tax,[14] a suit to enjoin a state criminal prosecution,[15] or a suit to enjoin the use of illegally obtained evidence in a state court.[16] The plaintiff's federal constitutional claims can be protected through the appeal and certiorari procedures.[17]

A different consideration is most often foremost in the thinking of the courts when it is decided to stay the federal action rather than dismiss. Here, the abstaining federal court is usually seeking to avoid an unnecessary adjudication of federal constitutional ques-

[10] The doctrine has been described as an extention by the courts of the same policies embodied in the federal statutes providing for three-judge district courts in suits seeking injunctions against state statutes and forbidding injunctions against certain types of state action. Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 815-16 (1959); Note, 59 COLUM. L. REV. 749, 749-50 (1959). This conclusion finds support in Justice Frankfurter's comment in the "original" abstention case that "this use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941).

[11] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964) (concurring opinion).

[12] WRIGHT 172.

[13] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (suit to enjoin the enforcement of a state statute which forbade discontinuance of train service without permission of the commission); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (suit to enjoin the execution of a proration order given by a state commission in charge of oil).

[14] Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[15] *E.g.*, Douglas v. City of Jeanette, 319 U.S. 157 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941).

[16] Cleary v. Bolger, 371 U.S. 392 (1963); Pugach v. Dollinger, 365 U.S. 458 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951).

[17] Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943); Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

tions in a suit attacking state action.[18] It is a maxim of federal practice to avoid decisions on constitutional issues if the case can be disposed of on other grounds.[19] In a situation where the state law is uncertain and federal constitutional claims could be mooted, or changed in nature,[20] by construction of the state law, the reasoning of the federal courts is simply this: Any determination by a federal court as to the meaning of a state statute would only be tentative since the state courts have the final word as to the meaning of state law; therefore, the state court should be given an opportunity to have the final word on it before a federal court measures it against the strictures of the constitution.[21] Abstention in this situation, called *Pullman*-type abstention,[22] involves no fundamental decision that the state tribunal is a "more appropriate" one for the suit. This is shown by the fact that abstention is improper when the state law involved is settled,[23] or clearly unconstitutional under any possible construction of it.[24] Thus, the decision to abstain in this situation is not to be made automatically merely because state law is involved[25] but rather is to be made after considering these questions and also weighing any possible factors that call for an immediate decision as opposed to the delay engendered by abstention.[26] As the Supreme

[18] *E.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[19] "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable." Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). *Cf.* Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).

[20] AFL v. Watson, 327 U.S. 582, 596-98 (1946).

[21] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941). The federal courts have jurisdiction to decide ancilliary questions of state law in federal question litigation. Siler v. Louisville & N.R.R., 213 U.S. 175 (1909). This type of abstention, then, is a decision not to exercise jurisdiction over the ancilliary questions. WRIGHT 170.

[22] So called from the name of the first case in which this technique was employed, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[23] City of Chicago v. Atchison, T. & S. F. Ry., 357 U.S. 77 (1958); Public Utilities Comm'n v. United States, 355 U.S. 534 (1958).

[24] Turner v. City of Memphis, 369 U.S. 350 (1962) (statute requiring segregation).

[25] It is error to automatically abstain. NAACP v. Bennett, 360 U.S. 471 (1959) (per curiam).

[26] Ordinarily, the fact that the delay caused by abstention will injure the plaintiff's interests has not been considered by the courts in determining whether or not they will abstain. However, there are recent indications that such will no longer be the case, at least in civil rights litigation. In Griffin v. County School Bd., 32 U.S.L. WEEK 4413 (U.S. May 25, 1964), the

Court has said, "this principle does not... involve the abdication of federal jurisdiction, but only the postponement of its exercise...."[27] Therefore, a stay of the federal action is all that is required in order to carry out the purposes of this *Pullman*-type abstention, and it is error to dismiss such a case.[28] The plaintiff is entitled to an adjudication of his constitutional objections in the federal court once the state court has settled, or had an opportunity to settle,[29] the state law in question.

Under *Pullman*-type abstention as originally contemplated, it would seem that the plaintiff who has been sent back to the state

Virginia school-closing case, the Supreme Court reversed a circuit court decision to abstain and proceeded to the merits of the case. The Court noted that the issues had been passed upon by the state courts, but added: "[Q]uite independently of this, we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits.... There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights.... We accordingly reverse...." *Id.* at 4415-16.

A similar point was made by the Court a week later in *Baggett v. Bullit*, 32 U.S.L. WEEK 4425 (U.S. June 1, 1964). A three-judge district court abstained in an action which sought declaratory and injunctive relief against a Washington statute requiring an oath of allegiance from all teachers on the grounds that the statute was void for vagueness. The Washington Court had never been called upon to construe the statute. On appeal, the Supreme Court reversed the district court's dismissal of the action and proceeded to the merits of the case. One of the reasons the Court gave for refusing to abstain was that abstention would delay an "ultimate adjudication on the merits for an undue length of time,... a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *Id.* at 4430. The main reason for the refusal to abstain, however, was the very vagueness of the statute itself. The question before the Court was not whether the statute applied, but rather was one as to what the statute required the plaintiff teachers to do upon taking the oath. The Court noted that previous cases in which abstention was held proper all involved "a choice between one or several alternative meanings of a state statute." *Id.* In *Baggett*, however, the statute was "not open to one or a few interpretations, but to an indefinite number" and the Court found it "difficult to see how an abstract construction... in a declaratory judgment action could eliminate the vagueness from these terms" of the statute. *Id.* The Court then added, in strong and positive language, that "it is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." *Id.* The decision is sound, for if the result were otherwise, the right to a federal court adjudication of the constitutional objection of vagueness to state statutes would be seriously impaired.

[27] Harrison v. NAACP, 360 U.S. 167, 177 (1959).

[28] Doud v. Hodge, 350 U.S. 485 (1956).

[29] Besides leaving the case open so that the federal constitutional issues may be litigated in the federal court after the state law is settled, a stay leaves the federal court in a position to decide the state issues if anything should prevent getting a decision by the state courts within a reasonable time.

courts for an adjudication of the state law questions would have to present only his state law claims to those courts. However, in *Government & Civic Employees Organizing Comm. v. Windsor*,[30] the Supreme Court held that a plaintiff who returned to an abstaining federal court was not entitled to an adjudication of his federal constitutional objections there because he had not "presented" his federal claims to the state court so as to enable it to construe the state statute involved "in light of the constitutional objections."[31] This decision, combined with holdings that the plaintiff in such an abstention case can "elect" to litigate all his claims, state and federal, in a state court and then seek review in the Supreme Court,[32] laid the basis for a dangerous procedural trap. The Supreme Court gave no guidelines as to what the plaintiff was required to do in order to "present" his constitutional objections to the state courts. Neither did it indicate what, short of seeking review in the Supreme Court,[33] would constitute an "election" on the part of the plaintiff to litigate his constitutional objections in the state courts. If the plaintiff litigated his federal claims in the state courts, normal rules of res judicata would bar him from relitigating them in a federal court.[34] The question became one of how to "present" the constitutional objections to the state court without "electing" to litigate them there. The answers to this question were given in a recent Supreme Court decision.

In *England v. Louisiana State Bd. of Medical Examiners*,[35] plaintiff chiropractors sought a declaration that the educational requirements of the Louisiana Medical Practice Act were unconstitutional as applied to them, and also sought an injunction against the act's enforcement as to them. A federal three-judge court abstained *sua sponte*,[36] staying the proceedings in the federal court until the courts of Louisiana had an opportunity to construe the statute and make a determination of the state law issue of whether the act applied to chiropractors. In the state court, plaintiffs briefed and argued their fourteenth amendment objections to the applica-

[30] 353 U.S. 364 (1957).
[31] *Id.* at 366.
[32] NAACP v. Button, 371 U.S. 415 (1963); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
[33] See the cases cited in note 32 *supra*.
[34] Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).
[35] 375 U.S. 411 (1964).
[36] England v. Louisiana State Bd. of Medical Examiners, 180 F. Supp. 121 (E.D. La. 1960).

tion of the act to chiropractors in the belief that the *Windsor* decision required them to do so. In this way, the constitutional objections were "presented" to the state court. An intermediate appellate court held that the act applied to chiropractors and that so applied, it did not violate the fourteenth amendment.[37] The Louisiana Supreme Court refused to review this decision.[38] The plaintiffs then returned to the federal district court and again sought an injunction and a declaration that the act, now construed by the state court to apply to them, violated the fourteenth amendment. The district court dismissed,[39] saying that the litigation of the constitutional objections in the state court barred the plaintiffs from raising them again in the federal court. On appeal, the Supreme Court reversed the dismissal. The Court shed some light on this area by saying that the willing litigation of their constitutional claims in a state proceeding, as here, would normally bar a relitigation of them in the federal courts. The Court, however, was unwilling to apply the rule announced in the case to these plaintiffs who had only done what they thought, with some reason,[40] *Windsor* required.[40a]

[37] England v. Louisiana State Bd. of Medical Examiners, 126 So. 2d 51 (La. App. 1st Cir. 1960).

[38] England v. Louisiana State Bd. of Medical Examiners, Docket No. 45,509, Louisiana Sup. Ct., Feb. 15, 1961.

[39] England v. Louisiana State Bd. of Medical Examiners, 194 F. Supp. 521 (E.D. La. 1961).

[40] The Court expressly noted that *Windsor* had been interpreted by others, including the district court here involved, as requiring such a submission of federal claims to the state courts. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 420 (1964). Further, the Court noted the misleading quality of the abstention order which had directed the "appellants to obtain a state court determination not of the state question alone but of 'the issues here presented'...." *Id.* at 422 n.14.

[40a] The fact that the rule set out by the court was not applied to the facts in the case, but was announced to operate *prospectively* as to all later cases is an interesting aspect of this case. The decision cannot be called a "prospective overruling decision" because it overrules nothing. The decision in *Windsor* is not changed. It is said to require nothing more or less than it ever did. What the case does say is that the plaintiff here was laboring under a reasonable misapprehension as to what *Windsor* required. See note 40 *supra*. The Court seems to be formulating a rule that where willfulness is required in order to give an act significance and the law by which willfulness is to be measured is in a confused state, any rule of law, given by the Court in such a situation which sets forth an objective standard against which to measure whether the act was willful or not, will be applied prospectively. This is because the party charged with willfulness cannot be said to have that subjective state of mind unless there is an objective standard given by law to measure his acts. Thus, in *England*, the plaintiff was required to have *willingly* litigated his claims in the state courts before the right to return to federal court was waived. If what *Windsor* required was un-

The opinion clarified the meaning of *Windsor* and gave to litigants in abstention cases the much-needed guidelines for preserving the right to return to the federal courts. The basic proposition underlying the reasoning of the Court in this area is that a party who has "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims"[41] should not be unwillingly deprived of his right to have that court decide those constitutional issues on the basis of its own findings of fact.[42] The abstention doctrine does not alter this proposition; "its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."[43] From these principles, it necessarily follows that *Windsor* does not require the federal claims to be litigated in the state courts, and the Court so stated. Furthermore, complying with *Windsor* by "presenting" his federal claims to the state courts "will not support a conclusion . . . that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court."[44]

It is obvious now that the presentation of the federal constitutional claims to the state courts as contemplated by *Windsor* involves nothing more than drawing the state court's attention to those claims. The Court in *England*, however, recognized that the litigant in a *Pullman*-type case faces a great temptation to argue the constitutional issues. This temptation results from what might be called the "coercive" effect of arguing such claims. That is, if the litigant is

clear, as it was, then he cannot be said to have willingly litigated when such was done only to comply with what he thought *Windsor* required.

A somewhat similar view was held by three judges in the Court's opinion in a recent prosecution for willful evasion of taxes. James v. United States, 366 U.S. 213 (1961). The petitioner failed to pay income taxes on funds which he had embezzled. He was convicted of willfully attempting to evade the federal income tax. A previous decision had held such funds not to be taxable income. Commissioner v. Wilcox, 327 U.S. 404 (1946). In *James*, the Court overruled this previous decision and held such funds to be taxable. The conviction was reversed and the case dismissed with three justices agreeing in the opinion of the Court that the element of willfulness could not be found when the former decision had held such income to be nontaxable. The other three votes for dismissal came from justices who thought the former decision had been decided correctly. For a full discussion of this case, see Note, 71 YALE L.J. 907 (1962).

[41] 375 U.S. at 415.

[42] The Court stressed the importance of the right to a record constructed by the federal courts. *Id.* at 416-17.

[43] *Id.* at 415-16.

[44] *Id.* at 420.

able to convince a state court that a statute is unconstitutional if applied to him, the court, in close cases, might be more likely to construe it to not apply to him.[45] In contemplation of such a situation, perhaps, the *England* decision states that the litigant may remove all doubts as to his intentions by making an explicit reservation preserving his right to return to the district court "in all events."[46] This is accomplished by putting into the state record a statement that "he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions."[47] Thus, when he explicitly makes the reservation, it appears the litigant will always have the right to return to district court. A reservation of this type is not necessary to preserve the right to return to the district court,[48] but the litigant in such an abstention case is running a risk

[45] *Id.* at 420-21.
[46] *Id.* at 421-22.
[47] *Id.* at 421.
[48] *Id.* at 421. The *England* decision probably precludes the approach taken in the case of *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). There, a Negro plaintiff challenged the constitutionality of North Carolina voting laws in a federal court. The three-judge district court abstained because the state law was unsettled and the nature of the constitutional question was uncertain. Lassiter v. Taylor, 152 F. Supp. 295 (E.D.N.C. 1957). The plaintiff then went to the state tribunals and elected to litigate in those tribunals the constitutionality on its face of a voting requirements statute. The plaintiff did not, however, raise the issue of whether the law was being applied in a discriminatory manner. The Supreme Court affirmed the state court holding that the statute was constitutional on its face, but indicated that the plaintiff could go back to the federal court to litigate the discriminatory application issue. 360 U.S. at 50. This decision actually goes further than the scheme of state courts deciding state issues and federal courts deciding federal issues as envisioned and provided for in the *England* decision. It allows the piecemeal litigation of the federal issues in a case. This result is inconsistent with the rule of res judicata normally applied in the federal courts. Where the parties and the subject matter are the same in a second suit as they were in a prior suit, a judgment on the merits in the prior suit is usually res judicata in the second "not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." Grubb v. Public Util. Comm'n, 281 U.S. 470, 479 (1930). The inconsistency is perhaps justifiable because the findings of fact made by a federal court are much more important on issues of discriminatory application than they are on the issue of on-the-face constitutionality. See Note, 108 U. PA. L. REV. 226, 237-38 (1959). Allowing the litigant to have the more abstract question of constitutionality on the face decided in the state courts without giving up the right to have the discrimination issue tried in federal court would remove to a certain extent the objection to abstention based on time consumed. It would give the litigant a chance to perhaps get a quicker decision securing his rights and yet leave him in a position to take advantage of

of being found to have willingly waived that right if he does try to "coerce" the state court into construing the statute to be inapplicable to him by arguing the constitutional claims.[49]

The *England* decision is praiseworthy because it clears up the procedural haze which has obscured the object of abstention by a federal court in a *Pullman*-type situation—which is to get an authoritative determination of state law issues—and because it shows that abstention is not entirely an abdication of federal jurisdiction. But the case also points up some serious objections to abstention in general. Most obvious is the expense involved in taking a case to the highest court of a state in order to qualify the litigant to have his federal claims heard in a federal court. Needless to say, this factor alone is enough to convince many litigants they should "elect" to have their federal claims heard in the state courts rather than in the federal courts where the Constitution and Congress have placed jurisdiction. The time involved in qualifying the party to litigate his federal constitutional question in the federal courts is also an objection.[50] It too helps the litigant to "elect" to have the state courts decide his constitutional claims. Compounding these objections is the fact that abstention in *Pullman*-type cases is no longer a discretionary maneuver to avoid ticklish problems, but rather is applied as an iron-clad rule. As Justice Frankfurter said, "where the issue . . . involved the scope of a previously uninterpreted state statute where, if applicable, was of questionable constitutionality, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the

---

the neutrality of the federal courts on the issue of discrimination if the attack on its face failed. However, it is doubtful whether *Lassiter* has survived *England* because *England* speaks in terms of giving up the right to return to the federal courts by willingly litigating constitutional issues in the state courts. "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419 (1964).

[49] The same result should be achieved in diversity cases where the federal court abstains merely because a difficult question of state law is involved. See cases cited notes 6 & 7 *supra*. The litigant should be allowed to return to the federal court for the trial of the case after the state law has been settled by means of a declaratory judgment. In this way, the litigant would receive the protection of the federal courts against local prejudice which diversity is designed to guard against.

[50] See the discussion by Professor Wright of the five-year litigation in the *Windsor* case which ended without a decision on the merits. Wright, *supra* note 10, at 817-18.

submission of the state law question to state determination."[51] This indiscriminate use of the abstention technique and the consequent time and expense involved in getting back into federal court assuredly amount to a partial abdication of federal jurisdiction.[52] The use of the federal courts in these situations is effectively removed from those who do not have the time or the money for such a long, expensive effort. The abstention doctrine is so entrenched today that it is doubtful that any changes will be made in its application despite the objectionable features mentioned here. The lawyer, however, should keep these possible results in mind and let them be his guideposts in deciding whether or not to carry his case to the federal courts.

ROBERT B. LONG, JR.

Real Property—Implied Warranties in New Housing

In a recent Colorado case,[1] the purchaser of a house brought suit against the vendor-builder for loss suffered as a result of the defective condition of the house. Prior to the purchase of the then incompleted house, plaintiff inspected the property and noted that caissons were being constructed for the foundation of the adjoining house. Upon inquiry about soil conditions, defendant assured plaintiff that similar precautions had already been taken in the construction of his house. After accepting the deed and entering into possession, plaintiff-vendee discovered that the foundation was inadequate for the type of soil involved. The Supreme Court of Colorado held the builder liable for breach of a implied warranty of fitness for habitation.[2]

[51] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).

[52] "Delay which the *Pullman* doctrine sponsors, keeps the *status quo* entrenched and renders 'a defendant's judgment' even in the face of constitutional requirements.... [L]itigants seeking the protection of the federal courts for assertion of their civil rights will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy here, at least in many cases, an illusory one." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 436-37 (1964) (concurring opinion).

[1] Glisan v. Smolenske, — Colo. —, 387 P.2d 260 (1963). The defendant-vendor was held liable for breach of an implied warranty of fitness for habitability when cracks began appearing in the surfaces of the house.

[2] The principal case involved a contract to purchase a house then in the process of construction; however, although the court allowed recovery

In the past and to a large extent today, the purchaser of a house that proves unsuitable for habitation[3] finds his effort to redress the wrong blocked by the common law doctrine of *caveat emptor*.[4] Although this doctrine has for all practical purposes disappeared from the law of sales involving chattels,[5] a purchaser of real property who fails or is unable to obtain an express warranty of fitness in the deed is faced with "the almost universal rule the country over . . . that in the sale of . . . [real property] there is no implied warranty on the part of the vendor of fitness, condition or quality."[6]

Realizing that the objective of the vendee in purchasing the house is to live in it, and recognizing that the essence of the contract is that the house should be fit for habitation, some courts have allowed recovery on the basis of implied warranty despite the strictures of *caveat emptor*.[7] In liberalizing the traditional doctrine, however, these courts have restricted implied warranties to cases where the contract was for the construction of a house or for the purchase of a house in the process of construction.[8] Conversely, the doctrine of *caveat emptor* is applied where the contract involves the purchase

on the basis of an implied warranty, their reasons for doing so leaves some doubt as to possible future applications. The court emphasized and seemed to accord a great deal of weight to the fact that the contract, by its provisions, set out an express warranty of workmanship, *i.e., "house to be completed in workmanlike manner."* — Colo. at —, 387 P.2d at 261. This leaves open the question of whether it would hold the same way in the absence of such a contract.

[3] Although a few courts distinguish an implied warranty of "fitness" from one of "habitability" when a sale of chattels is involved, for the purpose of this note they are used interchangeably as applied to real property. Both refer to whether or not the dwelling is reasonably fit for occupancy as a dwelling.

[4] See generally 4 WILLISTON, CONTRACTS § 926, (rev. ed. 1936).

[5] See UNIFORM SALES ACT §§ 13-16; UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

[6] Coutrakon v. Adams, 39 Ill. App. 2d 290, 300, 188 N.E.2d 780, 785 (1963). In the absence of express warranties in the deed, or of fraud or concealment, a builder who sells a completed house is thereafter not liable to the purchaser for damages resulting from latent defects. Gilbert Constr. Co. v. Gross, 212 Md. 402, 129 A.2d 518 (1957); Levy v. C. Young Constr. Co., 46 N.J. Super 293, 134 A.2d 717 (App. Div. 1957); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175 (1955); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

[7] Glisan v. Smolenske, — Colo. —, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Laurel Realty Co. v. Himelfarb, 191 Md. 462, 62 A.2d 263 (1948); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Banks v. City of Ardmore, 188 Okla. 611, 112 P.2d 372 (1941).

[8] *E.g.*, Gilbert Constr. Co. v. Gross, 212 Md. 402, 129 A.2d 518 (1957); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

of a fully completed structure, whether "new" or secondhand.[9] The courts reason that the vendee of an incomplete structure is unable to inspect it and therefore must rely entirely upon the vendor-builder's representations, whereas the vendee of a fully completed structure has an opportunity to inspect the premises himself and thus need not rely upon the vendor's representations.[10]

When a court desires to allow recovery but is reluctant to overrule the well established principle of *caveat emptor*,[11] the major obstacle to recovery under a warranty theory is that the provisions of the antecedent contract are ordinarily merged in the deed upon its acceptance and thereby constitute prima facie the final and entire obligation of the parties.[12] The doctrine of merger is supported on the theory that had the parties intended to provide warranties, the deed would or should have provided written stipulations to that effect.[13] If it appears that the deed purported to cover the subject-matter of the contract, although possibly inconsistent with it, merger should occur. This follows because, as a rule, the acceptance of a deed is prima facie an execution of the antecedent contract.[14] The

[9] *E.g.*, Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175 (1955).

[10] That the ability to inspect a fully completed or a secondhand house is at best a somewhat dubious distinction is shown by the following cases, which allowed recovery despite the fact that various contracts for purchase contained recitals of inspection and nonreliance on representations. Rothstein v. Janss Inv. Corp., 45 Cal. App. 2d 64, 113 P.2d 465 (1941); Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960); Wolford v. Freeman, 150 Neb. 537, 35 N.W.2d 98 (1948). The reasoning of these cases was that the ability to inspect gave the vendee no more assurance than failure to inspect would, because normally a vendee is unable to discover such defects as insufficient foundations, leaking roofs, or defective material at the time the contract was entered into.

[11] For a discussion of the doctrine of *caveat emptor*, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

[12] Ridley v. Moyer, 230 Ala. 517, 161 So. 526 (1935); Duncan v. McAdams, 222 Ark. 143, 257 S.W.2d 568 (1953); Percifield v. Rosa, 122 Colo. 167, 220 P.2d 546 (1950); Gabel v. Simmons, 100 Fla. 526, 129 So. 777 (1930); Levin v. Cook, 186 Md. 535, 47 A.2d 505 (1946); Huffman v. Landes, 163 Va. 652, 177 S.E. 200 (1934); Dunseath v. Hallauer, 41 Wash. 2d 895, 253 P.2d 408 (1953).

[13] This reasoning assumes that the parties intended to do so and that the vendee could afford to pay for the inclusion of such warranties in the deed. Such warranties might well make the cost so prohibitive so as to prevent their inclusion.

[14] In Continental Life Ins. Co. v. Smith, 41 N.M. 82, 64 P.2d 377 (1936), it was stated, "in the absence of fraud, mistake, etc., the following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuance of such contract, to wit: (1) Those that inhere in the very subject-matter

fact that some of the contract provisions were incorporated in the deed, while others were modified or left out, lends even more weight to the existing prima facie case in that the parties dealt with these antecedent agreements selectively.[15]

Some jurisdictions have held that such a merger does not occur.[16] They reason that it was not within the contemplation or intention of the parties that the antecedent contract be entirely merged or superceded.[17] Thus, when the antecedent contract contains provisions relating to quality, fitness or conditions which impose obligations on the vendor collateral to the provisions concerning title, possession, quantity, or emblements, provisions normally found in deeds, so as to indicate that their omission from the deed was not intended as a release of the vendor's obligation, such collateral provisions should not be merged. Since an implied warranty that the house will be reasonably fit for its intended purpose is a part of the antecedent contract by implication of law, it follows that such an implication is "collateral" to the deed and should survive acceptance thereof.[18]

---

of the deed, such as title, possession, emblements . . . ; (2) those carried into the deed and of the same effect; (3) those of which the subject-matter conflicts with the same subject-matter in the deed. In such cases, the deed alone must be looked to in determining the rights of the parties." *Id.* at 88, 64 P.2d at 381. RESTATEMENT, CONTRACTS § 413 (1932) states that "the acceptance of a deed of conveyance of land . . . discharges the contractual duties of the seller to the party so accepting . . ." except such duties as are "collateral" to the main purpose of the contract.

[15] *E.g.*, Duncan v. McAdams, 222 Ark. 143, 257 S.W.2d 568 (1953); Gabel v. Simmons, 100 Fla. 526, 129 So. 777 (1930); Huffman v. Landes, 163 Va. 652, 177 S.E. 200 (1934).

[16] The following promises survived acceptance of the deed as they were held to be "collateral" and not intended by the parties to be merged therein: South Texas Land Co. v. Sorensen, 199 Iowa 699, 202 N.W. 552 (1925) (improvements); Saville v. Chalmers, 76 Iowa 325, 41 N.W. 30 (1888) (warranty of quality of the soil); Edison Realty Co. v. Bauernschub, 191 Md. 451, 62 A.2d 354 (1948) (warranty of description); Levin v. Cook, 186 Md. 535, 47 A.2d 505 (1946) (warranty of fitness of heating plant); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951) (warranty of fitness of freezer plant); Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App.) (warranty of sufficiency of foundation), *rev'd*, 142 Tex. 686, 180 S.W.2d 922 (1944). See note 20 *infra*.

[17] *E.g.*, Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

[18] "[I]f the delivery of the deed is only one of a number of things to be performed under the terms of the contract, the delivery of the deed constitutes part performance, and the other matters to be performed remain obligatory." Glisan v. Smolenske, — Colo. —, 387 P.2d 260, 263 (1963). However, in Robbins v. C. W. Myers Trading Post, Inc., 251 N.C. 663, 111 S.E.2d 884 (1960), the court allowed recovery for breach of contract, thereby avoiding the question of whether or not the provisions of the antecedent contract were merged in the deed. This theory of recovery seems well established in

Two courts have faced this problem of defective housing squarely, refusing to allow the complications of *caveat emptor* and merger to obscure the need for effective relief.[19] In *Loma Vista Dev. Co. v. Johnson*,[20] a case involving a new house completed before the contract to purchase, the court implied a warranty, saying, "by offering the house for sale as a new and complete structure... [the vendor-builder] impliedly warranted that it was properly constructed and of good material...."[21] This case is a notable departure from the normal holding because it extends implied warranty to its logical extreme to include a completed dwelling as well as a dwelling in the process of construction, and it implied the warranty without the aid or effect of any express provisions in the contract.

Because of the difficulty in applying the merger rule,[22] the harshness of *caveat emptor*, and a hesitancy to invoke the apparently limitless theory of implied warranties,[23] some courts have adapted such accepted theories as fraud, mistake or misrepresentation to hold a vendor liable where the vendee has been led to accept a house

North Carolina in that the *Robbins* case cited and followed earlier cases also allowing recovery for breach of contract. See also Childress v. C. W. Myers Trading Post, Inc., 247 N.C. 150, 100 S.E.2d 391 (1957).

[19] Sterbcow v. Peres, 222 La. 850, 64 So. 2d 195 (1953); Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App.), *rev'd*, 142 Tex. 686, 180 S.W.2d 922 (1944). See note 20 *infra*. In *Sterbcow* it was held that an implied warranty was created by all sales unless expressly excluded, or the defect was discoverable by a reasonable inspection. However, in taking a position contrary to the common law view of *caveat emptor*, the court was guided by a statute which permitted "the avoidance of a sale on account of some vice or defect in the thing sold, which renders its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." LA. CIV. CODE ANN. art. 2520 (1952).

[20] 177 S.W.2d 225 (Tex. Civ. App.), *rev'd*, 142 Tex. 686, 180 S.W.2d 922 (1944). Here, the trial court entered judgment for the purchaser. The court of civil appeals remanded because there was no proof of a legal measure of damages, but held that the builder's agent had authority to represent facts in regard to the foundation because the builder "impliedly warranted that it was properly constructed and of good material...." 177 S.W.2d at 227. The supreme court reversed both lower courts, holding that the agent had no authority to represent facts in regard to the foundation. It failed to discuss the implied warranty found by the court of civil appeals.

[21] *Id.* at 227. See note 20 *supra*.

[22] See notes 12-18 *supra* and accompanying text. It is not evident in those cases in North Carolina that allow recovery for breach of contract that the court is circumventing the merger rule, as it is never discussed.

[23] 42 N.C.L. REV. 468 (1964). This note shows to some extent the apparently unlimited applications of the warranty theories by holding a cigarette manufacturer liable for lung cancer.

which varies from the contract stipulations.[24] North Carolina is among these states.[25]

A typical statement of the North Carolina view is as follows: "ordinarily, the maxim of *caveat emptor* applies equally to sales of real and personal property, and will be adhered to where there is no fraud."[26] The fraud necessary for vendor liability may be committed by a suppression of the truth as well as by a false representation or suggestion.[27] The crux of the problem in respect to fraud in housing construction has been the question of how much the

[24] See cases cited in 23 AM. JUR. *Fraud and Deceit* § 169 (1939).

[25] Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960).

[26] Smathers v. Gilmer, 126 N.C. 757, 759, 36 S.E. 153, 154 (1900).

[27] Where liability is based on "suppression of the truth," the rule generally followed is that "where material facts are accessible to the vendor only, and he knows them not to be within the reach of diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser." Brooks v. Ervin Constr. Co., 253 N.C. 214, 217, 116 S.E.2d 454, 457 (1960). Fraud may also be committed by means of deceptive statements or conduct which are intended to create an erroneous impression in another's mind to thereby induce some act or forebearance with reference to property rights to his disadvantage. Mitchell v. Strickland, 207 N.C. 141, 176 S.E. 468 (1934). Thus "half-truths" which are meant to be and are reasonably relied upon fall within this category. Whitehurst v. Life Ins. Co., 149 N.C. 273, 62 S.E. 1067 (1908). When, however, a vendor represents or implies that the house has been constructed according to specifications agreed to by the vendee, North Carolina applies a different test to determine whether or not the representation or implication is such as will allow recovery. Assuming falseness established, in order to recover under this theory the vendee would have to show that: (1) he reasonably relied on the false representation to his detriment; (2) they constituted a material inducement to the contract; and (3) he acted with ordinary prudence. Smathers v. Gilmer, 126 N.C. 757, 36 S.E. 153 (1900). In addition, if the vendee could further prove that the vendor had by some artifice concealed the defect, his case would be materially strengthened. In Walsh v. Hall, 66 N.C. 233 (1872), it was stated that if the defect is patent and the vendee accepts the representation and acts upon it "with his eyes open," the rule of *caveat emptor* applies "unless... [the vendee] has been prevented from making proper inquiry by some artifice or contrivance of the other party." *Id.* at 239. *Accord,* Leonard v. Southern Power Co., 155 N.C. 10, 70 S.E. 1061 (1911). An important factor to be noted is that it is necessary for the vendee to prove that the representations were not merely expressions of commendation, opinion or extravagant statements as to value. Such "puffing" generally does not constitute sufficient fraud so as to impose liability. Frey v. Middle Creek Lumber Co., 144 N.C. 759, 57 S.E. 464 (1907); National Cash Register Co. v. Townsend, 137 N.C. 652, 50 S.E. 306 (1905); Stovall v. Newell, 158 Ore. 206, 75 P.2d 346 (1938). By applying this test to the principal case of Glisan v. Smolenske, — Colo. —, 387 P.2d 260 (1963), where the purchaser discovered the soil condition prior to contracting to purchase the house, North Carolina would deny recovery on the ground that there was no further duty owed the vendee since the necessary elements are not present. See Brown v. Gray, 51 N.C. 103 (1858) (knowledge of the defect by the vendor); Cobb v. Fogalman, 23 N.C. 440 (1841) (lack of knowledge by the vendee).

vendor-builder is required to disclose when making sales. Generally, courts have shown a liberal tendency to require "that full disclosure of all material facts must be made whenever elementary fair conduct demands it."[28] In *Brooks v. Ervin Constr. Co.*,[29] North Carolina's leading case in this area, the evidence showed that the builder had filled a large hole on the lot with trees, stumps, and limbs, then covered the hole over without disclosing the fact. When the plaintiff entered into possession without knowledge of the filled conditions, the house began to settle causing doors to jam and the ceiling to crack. The court found that such evidence made out a case of actionable fraud sufficient to carry the case to the jury since the defect was not apparent to the purchasers and was not within the reach of their diligent attention and observation. The court stated that "where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention... [and] observation of the... [vendee],"[30] the vendor is required to disclose such facts to the vendee.

It has been held, however, that the purchaser's knowledge of the conditions of the property prior to the sale absolves the seller of any liability for concealing the conditions from the purchaser.[31] When such a situation arises, the doctrine of implied warranty for fitness would seem to add a useful theory for the vendee who cannot establish actionable fraud.[32] The vendee in the principal case was faced with such a situation.[33] He had knowledge of the conditions of the soil, but the measures taken to compensate for these conditions were inadequate; thus, the plaintiff's only avenue of relief lay in implied warranty.

Where recovery is based on fraud, mistake or misrepresentation, it is apparent that such distinctions as whether the contract is for the construction of a house, for a house in the process of construc-

[28] PROSSER, TORTS § 87, at 535 (2d ed. 1955).
[29] 253 N.C. 214, 116 S.E.2d 454 (1960).
[30] *Id.* at 217, 116 S.E.2d at 457.
[31] Haddad v. Abel, 186 Cal. App. 2d 292, 8 Cal. Rptr. 774 (1960).
[32] In Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960), where the purchasers were elderly women and the vendor failed to disclose that the property consisted of filled land, the vendor was held liable for fraud. In the principal case, however, because the vendee discovered the soil condition prior to entering into the contract, he would be unable to recover under a fraud theory. Nevertheless, he could recover for breach of an implied warranty of fitness.
[33] Glisan v. Smolenske, — Colo. —, 387 P.2d 260 (1963).

tion, or for a new or secondhand dwelling, are no longer necessary.[34] In view of the large sales volume of houses already completed before the sale and sold as "new" or secondhand dwellings, the theory of implied warranty, unless applied without restriction,[35] does not go far enough to give adequate protection to the vendee. It is submitted that the traditional theories of fraud, mistake or misrepresentation afford a vendee adequate relief, place a more substantial burden on the vendor-builder, and effectively blunt the harshness of the common law doctrine of *caveat emptor*. On the other hand, the principal case indicates that the requirements for actionable fraud remain strict and in many cases difficult to prove. In such a case recent decisions in the area of implied warranties offer a promise of relief for unwary purchasers of defective housing.

Underlying the entire area of implied warranties and the retreat from the harshness of *caveat emptor* as applied to the sale of real property is a revolution in the production of housing analogous to earlier changes in the production of chattels which culminated in the mass production methods we know today.[36] Coinciding with the movement toward mass production of chattels was a change in sales law from *caveat emptor* toward a warranty imposed by reason of the common or implied understanding that the article purchased would be merchantable or of fair average quality where the buyer relied upon the seller for determination of this fact.[37] With the increased industrialization of the building industry, the mass construction of housing and corresponding demand, vendees are turning to the courts for relief similar to that which courts were asked to give when an improved technology first permitted the production of chattels in large quantity.[38] Courts should be frank to admit that the

[34] See notes 6-10 *supra* and accompanying text.

[35] See Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App.), *rev'd*, 142 Tex. 686, 180 S.W.2d 922 (1944). See note 20 *supra*.

[36] See note 11 *supra*.

[37] Because of a cursory inspection or a lack of knowledge of what to inspect, many latent but material defects are not discovered. Nonetheless, whether the defect be found in a chattel or in real property, if a court should find it discoverable by reasonable inspection, recovery will be denied. Stevens v. Milestone, 190 Md. 61, 57 A.2d 292 (1948). See generally 1 WILLISTON, SALES § 207 (rev. ed. 1948).

[38] In Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959), in order to avoid the problem of property warranties and *caveat emptor*, the vendee of a new house contended that the defective heating and air conditioning system that had been installed in the house was personalty and not realty and was therefore governed by sales law. This theory was rejected by the court on

old doctrines and distinctions are simply not adequate to meet the needs of the changing technology of the building industry and the corresponding needs of purchasers. A realistic appraisal will reveal that the doctrine of implied warranty offers a solution to a growing problem.

RICHARD L. BURROWS

Securities Regulation—"Fraud" to Include Nondisclosure

Section 206 of the Investment Advisers Act of 1940 makes it unlawful for an investment adviser, by the use of the mails or facilities of interstate commerce, "(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client...."[1] Section 209(e) of the Act gives the Securities and Exchange Commission the power to bring an action for injunction, and the district courts power to enjoin such activities, when it has been shown that "any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of... [such] provision...."[2]

Because of the general language of the antifraud provision quoted above, it was not known what fraudulent and deceptive activities were prohibited by this act or to what extent the Commission was limited in this area by common law concepts of fraud and deceit,[3] which would include proof of: (1) false representation of a material fact; (2) an intent to induce reliance; (3) actual reliance on the false representation; and (4) damage suffered as a result.[4]

The meaning of the statute was clarified in the recent case of *SEC v. Capital Gains Research Bureau, Inc.*[5] The Commission sought to obtain a preliminary injunction under section 206 to compel an investment advisory service and its president to disclose to

the ground that the system was a fixture and therefore governed by the applicable realty laws.

[1] Investment Advisers Act of 1940, §§ 206(1)-(2), 54 Stat. 852, as amended, 15 U.S.C. §§ 80b-6(1)-(2) (Supp. IV 1963).

[2] Investment Advisers Act of 1940, § 209(e), 54 Stat. 853, as amended, 15 U.S.C. § 80b-9(e) (Supp. IV 1963).

[3] S. REP. No. 1760, 86th Cong., 2d Sess. 8 (1960); H. REP. No. 2179, 86th Cong., 2d Sess. 7 (1960).

[4] 3 Loss, SECURITIES REGULATION 1430 (2d ed. 1961); S. REP. No. 1760, 86th Cong., 2d Sess. 8 (1960).

[5] 375 U.S. 180 (1963).

their clients a practice of buying securities just before advising their purchase, and then selling them at a profit upon the price rise following the recommendation—commonly called "scalping." There was no evidence in the case that "any misstatements or false figures were contained in any of the bulletins," or that "the investment advice was unsound," or that "the defendants were being bribed to tout a stock contrary to their beliefs," or that "these bulletins were a scheme to get rid of worthless stock."[6] Instead, the case was premised wholly upon the fact that shortly before recommending them to their clients, the defendants purchased shares of certain securities; that following publication of the recommendations, there were small rises in the market price of each of the stocks; that the defendants then sold at a profit the shares previously purchased. In one instance the defendants sold short[7] shares of stock before commenting unfavorably about that security, and then covered their short position at a profit upon the resulting drop in market price.

The Second Circuit Court of Appeals ruled that "scalping" without disclosure to clients did not operate as a fraud or deceit upon any client within the meaning of the act, since there was no showing of intent to injure clients or actual injury to them.[8] That is, "fraud" was interpreted strictly, requiring intent to injure and actual injury, both elements of common law fraud.

In reversing, the Supreme Court said that the defendants' activities created a potential conflict of interest, and held that the Commission could get the injunction because "failure to disclose material facts must be deemed fraud or deceit...."[9] The Court reviewed the history of the SEC acts and concluded that Congress passed them with their antifraud provisions because the common law remedies for fraud and deceit were ill-suited to be applied to securities transactions, due to the intangible nature of securities.[10] To effect the remedial purposes of the provisions, the Court said, they should be construed "not technically and restrictively, but flexi-

[6] *Id.* at 185.

[7] "The term 'short sale' means any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of the seller." SEC Rule 3b-3, 17 C.F.R. 240.3b-3 (1949).

[8] SEC v. Capital Gains Research Bureau, Inc., 306 F.2d 606 (2d Cir. 1962) (in banc), *rev'd*, 375 U.S. 180 (1963).

[9] 375 U.S. at 200.

[10] *Id.* at 194-95. See generally Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227 (1933).

bly. . . ."[11] The Court further said that one of the purposes of the acts was "to substitute a philosophy of disclosure for the philosophy of *caveat emptor*" and thus to achieve a high standard of business ethics in the securities industry.[12] As a result of the status created by the SEC acts, the Court reasoned, an investment adviser is a fiduciary and has a duty to disclose material facts to its clients; failure to make such disclosure operates as a fraud upon its clients, whether or not there is intent to injure or actual injury. The Court felt that such disclosure would tend to preserve the climate of fair dealing necessary to maintain public confidence in the securities industry and thus would be beneficial to the economy of the country.

Justice Harlan voiced the lone dissent[12a] maintaining that there was a lack of proof that the defendants' investment advice was not disinterested. It would seem, however, that "scalping" does create interests for an investment adviser which would be in conflict with those of his clients and which might influence his decisions in making recommendations to them. For example, he might be tempted to recommend a volatile stock which would respond more favorably to his recommendation than would a more solid stock. Another conflict of interests might arise if, after having bought the stock, but before having recommended it, he got unfavorable information regarding it, in light of which he would not have recommended it, had he not already taken a position in that security; in such a situation, he might be tempted to go ahead and recommend it anyway. A client might choose to follow the advice of an investment adviser despite the possibility of such a conflict of interest. Nonetheless, he should be given the information that a conflict does exist, so that he can choose whether or not to ignore it, rather than be left completely in the dark. It would seem that the majority reached the better result in saying that the fiduciary relationship between an investment adviser and his client requires disclosure in this situation, despite the absence of an explicit provision requiring disclosure.[12b]

Although Justice Harlan's dissent is not predicated upon lack of materiality, it conveys the impression that he felt the omissions in the case to be immaterial. Such an opinion would necessarily prevent him from agreeing with the majority. Since an investment adviser

[11] 375 U.S. at 195.
[12] 375 U.S. at 198.
[12a] 375 U.S. at 203.
[12b] 375 U.S. at 198.

cannot be required to disclose everything about every security he recommends, for practical reasons, his duty of disclosure must necessarily be limited only to those facts which are material, even under the most liberal reading of the act.

The principal case marks the first time that the Supreme Court has held failure to disclose a material fact to be fraud under any of the securities regulation acts. However, lower court and SEC decisions have interpreted antifraud provisions similar to those in the principal case to include such nondisclosure, although under facts perhaps more conducive to a finding that there was actual intent to defraud.[13] A brief look at some of these cases might shed light on the statutory interpretation in the principal case.

Charles Hughes & Co. v. SEC[14] involved sales of stock by customers' men at prices substantially above the over-the-counter price, without disclosing that the sale price was above the market price; there was conflicting testimony as to whether or not untrue statements had been made regarding the market price. In a petition to review an order which revoked the petitioner's registration as a broker and dealer, the Second Circuit Court of Appeals held that there need be no specific finding of whether or not the alleged statements had been made, since the failure to reveal the markup was both an omission to state a material fact and a fraudulent device, thus violating section 17(a) of the Securities Act of 1933.[15] The court said that the law of fraud knows no difference between express misrepresentation on the one hand and implied misrepresentation on the other.[16]

In another case, *Hughes v. SEC*,[17] the petitioner acted in a dual

[13] See, *e.g.*, Norris & Hirshberg v. SEC, 177 F.2d 228 (D.C. Cir. 1949); Hughes v. SEC, 174 F.2d 969 (D.C. Cir. 1949); Archer v. SEC, 133 F.2d 795, *cert. denied*, 319 U.S. 767 (1943); Speed v. Transamerica Corp., 99 F. Supp. 808 (1951), *modified on other grounds*, 235 F.2d 369 (3d Cir. 1956).

[14] 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

[15] 48 Stat. 84, as amended, 15 U.S.C. § 77q(a) (1958), which provides: "(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any instruments or means of transportation in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[16] 139 F.2d at 437.

[17] 174 F.2d 969 (D.C. Cir. 1949).

capacity of investment adviser and of broker and dealer. In such capacity she sold her own shares to clients without fully disclosing such things as the best price at which such securities could be purchased in the open market and the cost to her of the securities sold to such clients. In sustaining the revocation of the petitioner's registration, the District of Columbia Court of Appeals relied on express language in the Securities Act making unlawful "any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ."[18] The court also said that the acts constituted violations of the antifraud sections of the 1933[19] and 1934[20] acts, and the regulations[21] thereunder, as well as saying that they were omissions to state facts necessary to clarify half-truths, which was expressly made unlawful.

A third case, *Speed v. Transamerica Corp.*,[22] involved a class action on behalf of minority shareholders against the majority shareholder of the corporation, charging that the defendant had fraudulently deprived them of their rightful participation in the liquidation of the corporation. The majority shareholder had offered to buy the shares of the minority shareholders without disclosing facts which indicated the value of the stock to be much greater than the price that the defendant offered to pay. In holding that the defendant violated Rule X-10B-5 concerning corporate "insiders,"[23] the district court said:

---

[18] Securities Act of 1933, § 17(a)(2), 48 Stat. 84, as amended, 15 U.S.C. § 77q(a)(2) (1958).

[19] Securities Act of 1933, § 17(a), 48 Stat. 84, as amended, 15 U.S.C. § 77q(a) (1958).

[20] Securities Exchange Act of 1934, § 10(b), 48 Stat. 891, 15 U.S.C. § 78j(b) (1958); § 15, as amended, 49 Stat. 1377 (1936), as amended, 15 U.S.C. § 780 (1958).

[21] Rule 10b-5, 17 C.F.R. § 240.10b-5 (1949); Rule 15c1-2, 17 C.F.R. § 240.15c1-2 (1949).

[22] 99 F. Supp. 808 (D. Del. 1951), *modified on other grounds*, 235 F.2d 369 (3d Cir. 1956).

[23] The rule, now denominated Rule 10b-5, declares it unlawful: "for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1949).

> Defendant's liability for non-disclosure is not based primarily upon the provision of subparagraph 2—subparagraph 1 of the Rule makes it unlawful "To employ any device, scheme, or artifice to defraud" and subparagraph 3 outlaws "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. . .". The three subparagraphs of this broadly remedial rule are mutually supporting and not mutually exclusive as defendant contends. Defendant's breach of its duty of disclosure accordingly can be viewed as a violation of all three subparagraphs of the Rule, i.e., (1) a device, scheme, or artifice to defraud; (2) an implied misrepresentation or misleading omission; and (3) an act, practice, or course of business which operates or would operate as a fraud upon the plaintiffs.[24]

Although the above cases did not concern the provisions of the Investment Advisers Act, they did concern provisions which are almost identical to those in question.[25] As a matter of fact, the antifraud provisions of the Investment Advisers Act were modeled from subsections (1) and (3) of section 17(a) of the Securities Act,[26] the same section from which Rule 10b-5 was copied.[27] Thus the decisions interpreting the provisions of section 17(a) and Rule 10b-5 should be applied with equal force in interpreting section 206 of the 1940 act. It should be noted, however, that each of the cases involved partial nondisclosure, and not complete failure to disclose.

In 1962 the SEC imposed a penalty upon a stockbroker for nondisclosure when he traded for discretionary accounts on information concerning a dividend decrease received from a corporate insider who was his business associate. That is, liability was imposed under the antifraud provisions of Rule 10b-5 for mere nondisclosure. The decision, *In the Matter of Cady, Roberts & Co.*,[28] has been hailed as exemplifying a continuing expansion of the scope of liability under Rule 10b-5.[29]

Although section 206 has now been amended so that it apparently

---

[24] 99 F. Supp. at 829.

[25] For the text of Rule 10b-5, see note 23 *supra*; for the text of section 17(a), see note 15 *supra*.

[26] 3 Loss, SECURITIES REGULATION 1515 (2d ed. 1961); SEC v. Capital Gains Research Bureau, Inc., 300 F.2d 745, 753 (1961), *aff'd on rehearing*, 306 F.2d 606 (2d Cir. 1962) (in banc), *rev'd*, 375 U.S. 180 (1963).

[27] JENNINGS & MARSH, SECURITIES REGULATION, CASES AND MATERIALS 793 (1963).

[28] SEC Securities Exchange Act Release No. 6668, Nov. 8, 1961.

[29] *E.g.*, Notes: 62 COLUM. L. REV. 735 (1962); 75 HARV. L. REV. 1449 (1962); 48 VA. L. REV. 398 (1962); 71 YALE L.J. 736 (1962).

covers "scalping,"[30] the nearly unanimous approval by the Supreme Court of the liberal interpretation of the provisions in this case should certainly have an impact upon securities regulation in the future. It should facilitate regulation of the industry, since broad legislation—intended to be interpreted broadly—can be enacted with reasonable assurance that its effect will not be unduly restricted by narrow interpretation.

COWLES LIIPFERT

Torts—Independent Contractors—Duty of Care

In *Heldenfels v. Hernandez*[1] an employee of the owner of property on which construction work was being done brought action against a paving subcontractor for injuries sustained by the employee when struck by a backing truck. The jury found that the subcontractor failed to provide a flagman to warn the employee of the backing truck but found no affirmative negligence. The Texas court held that the plaintiff was merely a licensee as to the subcontractor and that it had breached no duty owed to the landowner's employee by its failure to provide a flagman. Even though the subcontractor owned no interest in the land, the court reasoned that it became an occupant of the private premises for the purpose of the construction work, and that although an occupier or owner of land may owe to a licensee the duty to warn him of *concealed* hazardous conditions, there is no duty to warn him of dangers on the land which are not concealed.

Owners and occupiers of land have been given immunities concerning the exercise of care which are not, as a general rule, available to others. It may be broadly stated that an owner or occupier has no duty of care toward a trespasser except the duty not to wilfully injure him.[2] He has a duty toward licensees which includes a duty to warn of concealed dangerous conditions of the premises of which

[30] Investment Advisers Act of 1940, § 206(4), added by § 9, 74 Stat. 887 (1960), 15 U.S.C. § 80b-6(4) (Supp. IV 1963).

[1] 366 S.W.2d 641 (Tex. Civ. App. 1963).

[2] Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Hooker v. Routt Realty Co., 102 Colo. 8, 76 P.2d 431 (1938); Previte v. Wanskuck Co., 80 R.I. 1, 90 A.2d 769 (1952). See generally 2 HARPER & JAMES, TORTS § 27.1 (1956) [hereinafter cited as HARPER & JAMES].

he has knowledge.[3] He has no duty to use care to inspect his premises or take precautions for the safety of a licensee.[4] The principal case raises the question who, if anyone, should be permitted to take advantage of the limited duties of the owner or occupier of land. On this question there is a solid division of authority in this country. Generally all courts agree that these immunities of the owner or occupier extend to the members of his household and to his servants during the course of their employment.[5] The *Restatement of Torts* adds independent contractors to the list of those who may derive the benefit of these exemptions,[6] and several jurisdictions, including the Texas court in the principal case, have adopted this view.[7] Other courts have limited the exemptions to those designated either as "owner," "possessor" or "occupant." These courts have taken the view that on strictly technical and historical grounds the exemptions should apply only to those who have a proprietary interest in the land.[8] The term "possession" in this context is held to mean under one's control and the right to exclude every other person from dealing with it.[9] The term "occupant" ordinarily implies a person having possessory rights who can control any activity on the premises.[10]

There are reasonable grounds for extending a landowner's exemptions to the members of his family for a verdict against a mem-

[3] See, *e.g.*, Straight v. B. F. Goodrich Co., 354 Pa. 391, 47 A.2d 605 (1946). See generally 2 HARPER & JAMES § 27.1 (1956).

[4] Rosenberger v. Consolidated Coal Co., 318 Ill. App. 8, 47 N.E.2d 491 (1943); Brauner v. Leutz, 293 Ky. 406, 169 S.W.2d 4 (1943); Myszkiewicz v. Lord Baltimore Filling Stations, Inc., 168 Md. 642, 178 Atl. 856 (1935).

[5] See, *e.g.*, Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal. 2d 499, 50 P.2d 803 (1935); Mikaelian v. Palaza, 300 Mass. 354, 15 N.E.2d 480 (1938); Sohn v. Katz, 112 N.J.L. 106, 169 Atl. 838 (Ct. Err. & App. 1934). See also RESTATEMENT, TORTS § 382 (1938).

[6] RESTATEMENT, TORTS § 383 (1938).

[7] McIntyre v. Converse, 238 Mass. 592, 131 N.E. 198 (1921); Waller v. Smith, 116 Wash. 645, 200 Pac. 95 (1921). Annot., 90 A.L.R. 886 (1934). It is now probably the majority opinion that one who maintains wires over another's land cannot take advantage of the landowner's exemptions. Annot., 56 A.L.R. 1021 (1928).

[8] Fort Wayne & N. I. Traction Co. v. Stark, 74 Ind. App. 669, 127 N.E. 460 (1920); Godfrey v. Kansas City Light & Power Co., 299 Mo. 472, 253 S.W. 233 (1923); Cooper v. North Coast Power Co., 117 Ore. 652, 244 Pac. 665 (1926).

[9] Green v. Menveg Properties, Inc., 126 Cal. 2d 1, 271 P.2d 544 (1954). It is that condition of facts under which one can exercise his power over a corporeal thing to the exclusion of all other persons. Starits v. Avery, 204 Iowa 401, 213 N.W. 769 (1927).

[10] United States v. Fox, 60 F.2d 685 (2d Cir. 1932); Lechler v. Chapin, 12 Nev. 65 (1877); Wittkop v. Garner, 4 N.J. Misc. 234, 132 Atl. 339 (Sup. Ct. 1926).

ber of the family will in all probability ultimately fall on the shoulders of the landowner. The extension of these exemptions to his servants during the course of their employment may also be justified, for if the servant is held liable, the master may also be liable under the doctrine of *respondeat superior*. To deny the servant the exemption would deprive the landowner of that to which the law says he is entitled. No such result would follow in refusing to extend the exemptions to an independent contractor. The *Restatement of Torts* recognizes a distinction between one who is on the land "on behalf of" the landowner, such as an independent contractor, and one on the land in some other capacity, such as an easement owner.[11] The former but not the latter, according to the *Restatement*, gets the landowner's immunity. Dean Prosser says that this distinction reconciles most of the cases.[12]

Dean Prosser's observation may well explain the North Carolina court's refusal to extend the exemptions in some early cases, but one who looks at the cases with the cynic's eye might well wonder if the results might not be explained by something other than the "on behalf of" theory. In most of the cases in which the court has specifically refused to extend the exemptions to the holder of an easement, the defendant was an electric power company.[13] Since the exemptions stem from land ownership, it would appear that the easement owner would be more entitled to the exemptions than would a defendant who has no interest in the land of any kind. The inclusion of the independent contractor stands on a different footing than the inclusion of members of the landowner's family or his servants. Upon analysis it would seem to be unjustified upon any sound grounds. His exclusion from the requirement of using due care does not spring from the land, for he has no interest in the land. He is not an "occupant," "owner" or "possessor" as these terms are used in designating an estate in land.[14]

---

[11] RESTATEMENT, TORTS §§ 383-86 (1938).

[12] PROSSER, TORTS § 76 (2d ed. 1955). According to Dean Prosser the "in behalf of" theory extends the landowner immunities to independent contractors who are acting in behalf of the landowner and denies the immunities to those, such as electric power companies, who have an easement across the lands of another in order to further their own interest.

[13] Ferrell v. Durham Traction Co., 172 N.C. 682, 90 S.E. 893 (1916); Benton v. North Carolina Pub. Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).

[14] For a discussion of these terms see Garver v. Hawkeye Ins. Co., 69 Iowa 202, 28 N.W. 555 (1886); Nevin v. Louisville Trust Co., 258 Ky. 187, 79 S.W.2d 688 (1935).

North Carolina seems to have agreed with the absurdity of allowing one to defend on the grounds that the plaintiff was a trespasser as to a third party, although it should be kept in mind the considerations as to whether or not the defendant was on the land in his own behalf rather than "on behalf of" the landowner. In *Ferrell v. Durham Traction Co.*[15] the court aptly stated the basis of the exemption from the duty of reasonable care as being "a principle growing out of and dependent upon the rights of ownership and considered essential to their proper enjoyment.... [R]ecovery is not... denied merely because... the injured party is himself a trespasser"[16] (to a third party). In *Benton v. North Carolina Pub. Serv. Corp.*[17] a child was killed while climbing a tree growing on land over which defendant held an easement when the child came in contact with defendant's poorly insulated wires. It was held that "it is immaterial to consider whether the boy killed was a trespasser. He certainly was not trespassing upon any property of the defendant."[18] Although the defendant's easement merely contemplated

---

Denial of recovery can be best explained by the fact that there was no negligence. In Ellis v. Orkin Exterminating Co., 24 Tenn. App. 279, 143 S.W.2d 108 (1939), the defendant was employed to fumigate the residence of the plaintiff. To effectuate this purpose it was necessary that the plaintiff and his family vacate the residence for twenty-four hours. The plaintiff's intestate, a child of tender years, entered the house and was asphyxiated. The evidence disclosed that the defendant had warned the family of the extreme danger involved and of the imperative necessity of remaining out of the house for twenty-four hours; in addition the defendant had locked the house from the inside, placed two substantial padlocks on the two outside doors, and placed large red-lettered warning signs around the premises. The court found no liability on the basis that the deceased child was a trespasser.

In Hamakawa v. Crescent Wharf & Warehouse Co., 4 Cal. 2d 499, 50 P.2d 803 (1935), General Steamship Company had general control of the dock where the defendant was engaged in loading a ship. The steamship company required persons to obtain from them a permit to go upon the dock. Plaintiff, without permission, went on the dock and in so doing went upon a portion which he would have been guided around had he obtained permission. While on this portion of the dock he was struck by a bale of paper which the defendant knocked off the balcony of the warehouse. It was held that since plaintiff was present without permission of defendant and that as he had no business with either defendant or the ship he was a trespasser and defendant only owed a duty to refrain from wilful injury. The court could have better supported a decision of no liability on the basis of no duty because of the unforeseeability of someone being in the restricted area without permission.

[15] 172 N.C. 682, 90 S.E. 893 (1916).

[16] *Id.* at 684, 90 S.E. at 893-94.

[17] 165 N.C. 354, 81 S.E. 448 (1914).

[18] *Id.* at 357, 81 S.E. at 449.

transmission lines, he obviously had more of an interest in the land than would a mere independent contractor.

In 1937 Mr. Pafford[19] seemed to have brought North Carolina in line with the *Restatement*,[20] and those jurisdictions which have adopted its view,[21] by falling down an elevator shaft maintained by an independent contractor on the property of another. The court in denying recovery designated Mr. Pafford a licensee. The court seems to have given no thought to the possibility that in relieving the defendant from the exercise of due care while on the premises of another, it was relieving defendant from such duty altogether, as it may reasonably be assumed that its business will always be carried out on the property of another. It is not disclosed whether or not Mr. Pafford was left with the ability to ponder this question. The court made no reference to its earlier decisions and in designating the defendant as one in possession there is no indication that serious consideration was given to the question.

A defendant who was engaged in activity similar to the defendant in the *Pafford* case was held to the duty of exercising due care in *Bemont v. Isenhour*,[22] but on the theory that the plaintiff's position with respect to the defendant was "at least that of an invitee." The court seems to imply that recovery would have been denied otherwise, and yet the proper test would seem to be whether or not the plaintiff's presence and resulting injury could have been reasonably foreseen by the defendant.

In *McIntyre v. Monarch Elevator Co.*[23] an independent contractor was repairing an elevator located in a medical clinic. The plaintiff was on her way to see one of the doctors when she fell down the shaft as a result of the defendant having left the elevator door open. The court held that the defendant was chargeable with the duty of exercising reasonable care for the safety of *those who rightfull use* or attempt to use the elevator. No mention was made in the opinion as to plaintiff's position as either invitee or licensee, and except for the qualifying clause emphasized it would appear that the court was reaffirming its earlier decisions not to consider

[19] Pafford v. J. A. Jones Constr. Co., 217 N.C. 730, 9 S.E.2d 408 (1940).
[20] RESTATEMENT, TORTS § 382 (1938).
[21] Key West Elec. Co. v. Roberts, 81 Fla. 743, 89 So. 122 (1921); Hafey v. Turners Falls Power & Elec. Co., 240 Mass. 155, 133 N.E. 107 (1921); Parshall v. Lapeer Gas-Elec. Co., 228 Mich. 80, 199 N.W. 599 (1924).
[22] 249 N.C. 106, 105 S.E.2d 431 (1958).
[23] 230 N.C. 539, 54 S.E.2d 45 (1949).

the limitations of a landowner's duty except in cases involving a landowner, members of his household or his servants. Again whether or not the defendant could reasonably foresee harm resulting to someone would seem to be the proper test as to whether the defendant be chargeable with the duty to exercise reasonable care for their safety, rather than any label which might be attached to the body liying at the bottom of the shaft. The exemptions traditionally extended to a landowner require these labels, but there seems to be no good reason to extend such exemptions further.

It is difficult to determine with any degree of certainty what position the North Carolina court would take if called upon to decide head-on whether an independent contractor was entitled to the exemptions allowed the landowner or possessor on whose premises he was conducting his activity. In the cases noted here the defendants were held to have a duty of due care with the exception of the *Pafford* case. *Quaere* if the court there did not inadvertently give to the words "one in possession" a wider scope than they would have been willing to give after deliberate consideration of the possible effect of such extension. It is conceivable that a building contractor might lease the premises upon which he had contracted to construct a building in order to acquire the immunities granted to such proprietary interest. Were this the purpose it would seem to be an attempt to contract away his liability. The courts have consistently held such contracts void as being detrimental to the public good.[24] It is inconceivable that the court would consciously do for the independent contractor that which they would not tolerate his doing for himself. It would also seem that the court would be very reluctant to deliberately overrule the sound logic of the earlier cases which held that a trespass was immaterial if only an infringement upon the rights of a third party.[25]

The landowner has been a favorite of the law. According to Blackstone the right of private ownership of property was one of the three absolute rights of English law. The law's regard for this right was so great that it would "not authorize the least violation of it . . . even for the general good of the whole community."[26]

[24] Brown v. Postal Tel. Co., 111 N.C. 187, 16 S.E. 179 (1892); Jankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936).

[25] Ferrell v. Durham Traction Co. 172 N.C. 682, 90 S.E. 893 (1916); Benton v. North Carolina Pub. Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).

[26] 2 BLACKSTONE, COMMENTARIES *138.

The exemption was applied with harshness and inflexability. From this strict observance of the sanctity of property, courts have attempted to restrict the application of the exemptions in particular instances through classification of plaintiffs into categories such as "trespasser," "licensee" or "invitee." The landowner's freedom from a duty was in this manner modified. Even as to the trespasser most courts have discarded the "wilful or wanton" formula and have stated that a duty of due care is owed to preceived trespassers.[27] The many decisions creating exceptions to the limitations of a landowner's duty would seem to illustrate an attempt to confine the exemptions allowed within narrow limits. The principal case would appear to be a marked reversal of this trend and should merit close examination and critical appraisal.

LUCIUS M. CHESHIRE

[27] See generally 2 HARPER & JAMES § 27.1.