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Notes

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NOTES

Bills and Notes—Recovery by Payee Against Drawee Bank on Checks Paid Over Forged Endorsement

In the recent case of *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.*,[1] the North Carolina Supreme Court wiped away an old and inconsistent holding in the area of bills and notes[2] and laid the legal cornerstone for related future litigation. The case involved the drawer of a check who had contracted with the plaintiff-payee to have a shell home built. Upon completion of the home the drawer, along with the plaintiff's agent, who was not authorized to endorse his principal's checks, went to the drawee bank. There the drawer made out a check to the plaintiff corporation for the amount due and gave it to the agent who endorsed it, "Modern Homes Construction Company by Ray Durham."[3] When the assistant cashier objected to cashing the check, the drawer told him, "This man is Modern Homes Construction Company, and you cash it for me,"[4] which the bank did. The agent absconded and the payee brought suit against the drawee bank. The bank moved for and received a nonsuit at the close of plaintiff's evidence. The plaintiff appealed. The court reversed and indicated that if the plaintiff were to recover on retrial it would have to be on the theory of conversion rather than on either acceptance or negligence as averred in their complaint.

Prior to the present case, North Carolina had allowed recovery by a payee in similar circumstances on the theory of acceptance.[5] This theory had survived even though the Negotiable Instruments Law (NIL) was adopted in 1899[6] and specifically required that

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[1] 266 N.C. 648, 147 S.E.2d 37 (1966).

[2] The legal issue in the case is presently covered by Negotiable Instrument Law enacted in North Carolina as N.C. GEN. STAT. §§ 25-1 to -199 (1953). Effective midnight, June 30, 1967, the Uniform Commercial Code, enacted as N.C. GEN. STAT. 25-1-101 to -10-107 (1965), will govern the law of bills and notes. Where applicable the Code will be cited in addition to current statutes.

[3] 266 N.C. at 650, 147 S.E.2d at 39.

[4] *Ibid.*

[5] Dawson v. National Bank, 197 N.C. 499, 150 S.E. 38 (1929); Dawson v. National Bank, 196 N.C. 134, 144 S.E. 833 (1929).

[6] See note 2 *supra.*

an acceptance be in writing.[7] The acceptance cases had erroneously been based upon North Carolina General Statutes section 25-144[8] (NIL section 137), which deems a drawee to have accepted a bill if the drawee destroys it or refuses within twenty-four hours to return it. But this section is concerned with bills that are "delivered for *acceptance*" and not with those, as is the situation at bar, that are presented for *payment.* As noted the inappropriate application of the above section ignores the requirement of North Carolina General Statutes section 25-139[9] (NIL section 132) that an "acceptance . . . be in writing and signed by the drawee." The rejection of the unsound and widely criticized[10] acceptance theory places North Carolina with the majority of jurisdictions, which treat the drawee's actions as a conversion.[11] The result is the same but the theory is different.

In applying the theory of conversion it is important to understand that the check made out to the holder-payee is not merely evidence of a promise to pay, but that it is *property*[12] and carries incidents of ownership by the payee. The value of the property is prima facie the face value of the check.[13] Thus, when a bank takes

[7] N.C. GEN. STAT. § 25-139 (1953).

[8] "Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." N.C. GEN. STAT. § 25-144 (1953).

[9] "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money." N.C. GEN. STAT. § 25-139 (1953).

[10] See 25 ILL. L. REV. 343 (1930); 7 N.C.L. REV. 191 (1929); 38 YALE L.J. 1143 (1929).

[11] See Annot., 137 A.L.R. 874 (1942); Annot., 69 A.L.R. 1076 (1930); 9 C.J.S. *Banks & Banking* § 343 nn.87 & 88 (1938); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 189 (7th ed. 1948); BRITTON, BILLS AND NOTES § 146 (2d ed. 1961); 4 ARK. L. REV. 219, 220 (1950).

[12] Louisville & N.R.R. v. Citizens' & Peoples' Nat'l Bank, 74 Fla. 385, 77 So. 104 (1917). For an example of the result when a court fails to recognize the property aspect of the check itself, see, Gordon Fireworks Co. v. Capital Nat'l Bank, 236 Mich. 271, 210 N.W. 263 (1926), where the conversion theory was rejected because "the bank did not convert *funds* of plaintiff." (Emphasis added.)

[13] Modern Homes Constr. Co. v. Tryon Bank & Trust Co., 266 N.C. at 653, 147 S.E.2d at 41; State v. First Nat'l Bank, 38 N.M. 225, 3 P.2d 728 (1934); BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 60 (7th ed. 1948). The applicable Uniform Commercial Code provision is N.C. GEN. STAT. § 25-3-419(2) (1965).

a check from an unauthorized person and makes payment to that person, even in the normal course of business and unwittingly, the bank is exercising unauthorized control over the payee's property and withholding it from its rightful owner. A tort arises in favor of the payee against the converting drawee.

Although *Modern Homes Constr. Co. v. Tryon Bank & Trust Co.* was remanded and must be retried,[14] the court's particularly thorough opinion establishes a firm base upon which business, banks, attorneys, and lower courts can rely in future transactions.[15]

It is also important to note that the holding is consistent with the newly adopted Uniform Commercial Code which becomes effective midnight, June 30, 1967.[16] Under the Code, payment over a forged endorsement is specifically covered and is treated as a conversion.[17] The theoretical change from acceptance to conversion is, therefore, also a fortunate step that will enable a smoother transition to the Uniform Commercial Code as well as offer sounder law until it is effective.

PHILIP G. CARSON

Constitutional Law—Due Process—Delay Between Offense and Arrest

The right to a speedy trial is guaranteed by the sixth amendment,[1] but this right becomes operative only upon indictment.[2] In

[14] There are questions of fact and collateral issues which could result in a verdict for either the plaintiff or defendant in the particular case of Modern Homes Constr. Co. v. Tryon Bank & Trust Co. *I.e.,* the drawer is deceased and his estate closed. There was a considerable time lapse between payment by the drawee bank to the absconded agent and the commencement of the payee corporation's action.

[15] Regardless of the outcome in a particular case, the court is perfectly clear and definite in its adoption of the conversion theory.

[16] N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965). The Uniform Commercial Code is treated in *The Uniform Commercial Code in North Carolina—A Symposium,* 44 N.C.L. REV. 525 (1966). See also 2 N.Y. LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 1079 (1955); Scope, *Purposes and Functions of the Code,* 16 ARK. L. REV. 1 (1961-62); Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code,* 62 YALE L.J. 417, 471 (1953).

[17] N.C. GEN. STAT. § 25-3-419 (1965). Faris, *Commercial Paper,* 44 N.C.L. REV. 598, 621 (1966), notes that the Uniform Commercial Code "will" force a change from North Carolina's acceptance theory to the conversion theory. The article was being printed when the court initiated the change before the Code forced it.

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." U.S. CONST. amend. VI.

[2] "[I]f there is unnecessary delay in bringing a defendant to trial, the

several recent cases the Circuit Court of Appeals for the District of Columbia has wrestled with the problem of prejudice to a defendant caused by delay between the time of the offense and the time of indictment.[3] In *Ross v. United States*,[4] where such delay had occurred, the court reversed a conviction for a narcotics violation and established a rule that is disturbingly vague, yet one that cannot be ignored by law enforcement officials.

On May 10, 1962, Ross allegedly sold some narcotics to an undercover police officer who, in order to protect his anonymity, did not swear out a complaint until his undercover activities had terminated seven months later.[5] At trial this officer was the only witness against Ross, and his testimony was given with the aid of notes made at the time of the offense. Ross contended that he did not remember the events of May 10 and was therefore unable to refute the officer's testimony.

The court reversed Ross's conviction on appeal, holding that "there was an undue subordination of appellant's interests which should not, at least in a record as barren of reassuring corroboration as this one, result in a sustainable conviction."[6]

In dissent, Circuit Judge Danaher chastized the majority for finding a "lack of 'reassuring corroboration,' "[7] asserting that they had ignored their recent decision in *Wilson v. United States*[8] where uncorroborated testimony was held to be sufficient to support a conviction. It would appear that the majority, while obviously aware

court may dismiss the indictment. . . ." FED. R. CRIM. P. 48b. See Hardy v. United States, 343 F.2d 233, 234 (D.C. Cir. 1964); Reece v. United States, 337 F.2d 852, 853 (5th Cir. 1964); Mack v. United States, 326 F.2d 481, 486 (8th Cir. 1964); Nickens v. United States, 323 F.2d 808, 809 (D.C. Cir. 1963).

[3] Hardy v. United States, *supra* note 2; Wilson v. United States, 335 F.2d 982 (D.C. Cir. 1964); Redfield v. United States, 328 F.2d 532 (D.C. Cir. 1963); Nickens v. United States, *supra* note 2. The court has considered such delay as denial of procedural due process under the fifth amendment. See Ross v. United States, 349 F.2d 210, 211 (D.C. Cir. 1965); Hardy v. United States, *supra* at 234.

[4] 349 F.2d 210 (D.C. Cir. 1965).

[5] The statute of limitations for this offense is five years. 75 Stat. 648 (1961), 18 U.S.C. § 3282 (1964).

[6] 349 F.2d at 212. Defendant had appealed on the grounds of violations of fifth and sixth amendment rights. *Id.* at 211. As in cases of delay after indictment, see note 24 *infra*, defendant must allege that he was prejudiced.

[7] 349 F.2d at 216.

[8] 335 F.2d 982 (D.C. Cir. 1964).

of *Wilson*,[9] found the lack of corroboration prejudicial only when considered with the delay, rather than prejudicial in itself.

In 1844 an English court indicated that delay between offense and arrest resulted in prejudice to the defendant, although the statute of limitations had not run.[10] No United States court clearly recognized the problem until 1955,[11] and even now such delay would probably not be grounds for dismissal in any jurisdiction in the United States except the District of Columbia Circuit.[12]

In 1963 the District of Columbia Circuit indicated that it might condemn such delay even though the statute of limitations had not run.[13] The court, in a footnote, recognized that "delay between offense and prosecution could be so oppressive as to constitute a denial of due process."[14]

Balancing the policy objectives of effective law enforcement[15] on the one hand and due process on the other, the *Ross* court dis-

[9] 349 F.2d at 211, 212 (citing dissent from denial of rehearing in *Wilson*).

[10] The Queen v. Robins, 1 Cox Crim. Cas. 114 (1844). Defendant was charged with bestiality, an offense forbidden by statute. The charge had been made within the two-year statute of limitations.

[11] Petition of Provoo, 17 F.R.D. 183 (D. Md. 1955). Finding it unnecessary "to decide how far rights under the speedy trial provision of the Sixth Amendment" go, the court considered a seven-month detention before charges were filed in conjunction with other deprivations of the defendant's right to a speedy trial. *Id.* at 202. A student note had recognized the problem three years before this case was decided. Note, 5 STAN. L. REV. 95 (1952).

[12] Other circuit courts have held, by circuit, as follows: United States v. Simmons, 338 F.2d 804, 806 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965) (delay in arrest does not violate rights); Reece v. United States, 337 F.2d 852, 853 (5th Cir. 1964) (right to speedy trial arises after prosecution instituted); Hoopengarner v. United States, 270 F.2d 465, 469 (6th Cir. 1959) (delay between offense and arrest is controlled by statute of limitations); United States v. Jakalski, 267 F.2d 609, 612 (7th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960) (statute of limitations controls institution of prosecution); Mack v. United States, 326 F.2d 481, 486 (8th Cir. 1964) (sixth amendment does not apply until indictment is filed); Venus v. United States, 287 F.2d 304, 307 (9th Cir. 1960) (statute of limitations controls time in which indictment must be returned); Wood v. United States, 317 F.2d 736, 740 (10th Cir. 1963) (delay before arrest not grounds for dismissal); United States v. Fraidin, 63 F. Supp. 271, 279 (D. Md. 1945) (prosecution limited only by statute of limitations). The First, Third and Fourth Circuits have not ruled directly on this question. Research reveals no state that has considered the problem.

[13] Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963).

[14] *Id.* at 810 n.2.

[15] The problems in enforcement of narcotics laws have been commented upon extensively. *E.g.*, Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 562-73 (1960); Note, *The Law of Entrapment in Narcotics Arrests*, 38 NOTRE DAME LAW. 741 (1963).

cussed the specific circumstances[16] of the case with regard to the necessity for and prejudice resulting from the delay. According to the prosecution, the delay was necessary to protect the anonymity of the undercover officer.[17] The court found that the delay was unnecessary, being influenced by testimony showing this particular officer had made few new contacts in his last months of undercover work.[18] Thus the delay could be considered unjustified. Of course this conclusion was made from hindsight, whereas the decision of the police not to expose the agent was made in anticipation of further contacts.

Juxtaposed with this policy of allowing some delay for effective law enforcement was the policy of protecting the rights of the accused. Delay could have been doubly injurious to him; his memory was dimmed by time[19] and, perhaps more important, he was charged *en masse* with all of the agent's contacts.[20] The danger of an erroneous charge or mistaken identification had been expressed by Judge Wright, dissenting in *Powell v. United States*:[21]

> I suggest that it defies human experience for any man, particularly a new policeman, to remember and to identify with absolute conviction the particular 102 [51 in *Ross*] faces, as distinguished from hundreds of others, that passed through his mind, many on just one occasion, during the kaleidoscope of his months-long undercover investigation. Indulging the unlikely assumption that he can remember the 102 particular faces, to suggest that he can allocate each face to the appropriate time and place shown in his diary offends credulity.[22]

Considering these circumstances, the *Ross* court found "(1) a purposeful delay of seven months between offense and arrest, (2) a

[16] These circumstances are as follows: (a) defendant alleged and showed prejudice, 349 F.2d at 212; (b) the delay was purposeful, *id.* at 213 (*Quaere*: Is the intent to delay determinative in the finding of prejudice?); (c) the time lapse was seven months, *ibid.* (*Quaere*: Would a shorter time lapse rebut an allegation of prejudice?); (d) defendant was charged with fifty-one other persons, *id.* at 212; (e) the officer testified from notes and admitted his dependency upon them, *id.* at 214; (f) the officer was the only prosecuting witness, *id.* at 211; and (g) only one transaction had been made between officer and defendant, *ibid.* Observe that the prejudice implicit in all factors except (b) and (c) would be lessened by more positive identification.

[17] 349 F.2d at 212.

[18] *Id.* at 212 n.1.

[19] *Id.* at 214.

[20] *Id.* at 213 n.2.

[21] 352 F.2d 705 (D.C. Cir. 1965).

[22] *Id.* at 710.

plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook."[23] The statute of limitations was rejected as the exclusive criterion for determining when an indictment must be made.[24]

The court was faced with a problem of abuse of procedural due process.[25] It justified its decision not to be limited by the statute of limitations by relying upon a combination of three interrelated factors: (a) purposeful delay; (b) prejudice caused by this delay, evidenced by defendant's professed inability to remember;[26] and (c) lack of corroboration or more positive testimony, evidenced by the single prosecuting witness' reliance upon his notes.[27]

Although describing the delay as purposeful, it is apparent that the court meant an *unjustified* purposeful delay. In *Ross,* this was indicated by the failure of the police to prosecute when they had all the information necessary but delayed prosecution in order to protect the undercover agent's anonymity. The police were not using the period within the statute of limitations to solve crimes or apprehend criminals but to delay prosecutions and provide undercover agents with more freedom of action. This delay is an underlying cause of both the prejudice proved by the defendant and the unreliable identification made for the prosecution. Yet if the police justified their delay,[28] assuming the statute of limitations had not run, it is doubtful that the court would give much weight to defendant's allegations of prejudice.

The initial factor for the court's consideration was the defen-

[23] 349 F.2d at 215. The similarity between these findings and the factors the Second Circuit considers when faced with delay in prosecuting after indictment should be noted. Those factors are "the length of delay, the reason for the delay, the prejudice to defendant, and waiver by the defendant." United States v. Fay, 313 F.2d 620, 623 (2d Cir. 1963).

[24] 349 F.2d at 215, where the court holds that the length of delay should not be "controlled *exclusively* by the applicable statute of limitations."

[25] "[A] due regard for our supervisory responsibility for criminal proceedings . . . requires . . . reversal." *Id.* at 216.

[26] The prejudice found by the court was the defendant's inability to remember. The prejudice that results from the officer's failure to recall was considered a problem of corroboration, or more accurately a lack of more positive testimony.

[27] Corroboration may be used to refer to substantiating testimony as provided by a corroborating witness. The court used corroboration to refer to the sufficiency of the identification of the defendant.

[28] The court did not consider what situations might justify delay. Would delay caused by an overworked staff be justified? Would delay in the hope that an addict might lead an investigator to the supplier be justified?

dant's allegation of prejudice, since if prejudice is not alleged and shown, there would be no need for further deliberation. The proof necessary to sustain this allegation will vary with the circumstances of the defendant and the case. As the delay increases, the court could more readily find that the defendant has been prejudiced by a loss of memory. In *Ross* the defendant was "so circumstanced that there would appear to be very little to differentiate one day from another, especially as they begin to recede into the past."[29] Prejudice could also result from the death of a defense witness or the destruction of documents during the unjustified delay. However, even if prejudice is found, it would seem that the court's ultimate decision should not be based solely upon that finding but upon the totality of the evidence, including both the length of delay and the quality of the prosecution's evidence. Thus a defendant having proved an absolute inability to remember would not be acquitted in the face of positive identification.

It appears that the decision in *Ross* could be justified on the ground of the prosecution's failure to present convincing evidence concerning the identity of the defendant rather than the denial of procedural due process. The court was apparently loath to modify its holding in *Wilson v. United States*[30] that one officer's testimony was sufficient for a conviction. Consequently it found a different reason to reverse the conviction of Ross. In so doing the court seemed to establish a new multi-factor approach to situations in which there has been delay in the initiation of prosecution after the case for the prosecution was complete.

No final conclusions can be drawn from *Ross*. If the rationale of the court were applied to offenses upon which no statute of limitations runs, a court might well find unjustified delay in prosecutions after a period of years to be prejudicial as a matter of law. In such a situation even positive identification by a witness might be disregarded by a court.

It seems certain that the court could have reached the same result in *Ross* by modifying *Wilson* and declaring the evidence to be insufficient to support a conviction. Instead, the court, discussing the

[29] 349 F.2d at 213.

[30] 335 F.2d 982 (D.C. Cir. 1964). Such modification would define a minimum standard for sufficiency of identification and testimony concerning the offense. The testimony of one agent could still be sufficient; however, it would have to meet this standard to result in conviction.

problem of unjustified delay, began an inquiry that may have further constitutional implications. Unjustified delay before arrest may come to be forbidden as a violation of due process under the fifth or the fourteenth amendment just as such delay between arrest and trial is now forbidden by the sixth amendment.

Ross v. United States lacks the clarity necessary to preserve certainty in the law. Though the objectives of the court could better be achieved by relying upon a ground other than delay, law enforcement agencies should heed the warning that the statute of limitations is not inviolate if it appears that prosecution was unjustifiably delayed.

GEORGE CARSON, II

Constitutional Law—Due Process—Incompetence of Defense Counsel

The petitioner in *Schaber v. Maxwell*[1] was convicted of murder and sentenced to death. At arraignment the presiding judge had entered an oral plea of not guilty on his behalf. Petitioner waived trial by jury, electing to be tried by a three-judge state court.[2] At the trial, the attorneys appointed to represent petitioner had virtually conceded that he was guilty of the acts alleged and, through their opening statement, indicated that they were relying solely upon the defense of insanity; yet they failed to enter a written plea of not guilty by reason of insanity required by Ohio law, without which the accused is conclusively presumed to have been sane at the time of the commission of the alleged offense.[3] After conviction and sentence, petitioner applied for a writ of habeas corpus in the federal district court alleging that counsel's failure to comply with the Ohio statute constituted incompetence and thus deprived him of effective assistance of counsel guaranteed by due process of law.[4]

[1] 348 F.2d 664 (6th Cir. 1965).

[2] OHIO REV. CODE ANNO. 2945.05 to -.06 (Page 1954).

[3] "A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged." OHIO REV. CODE ANNO. § 2943.03 (*E*) (Page 1954). Section 2943.04 provides that all pleas other than guilty or not guilty shall be in writing, subscribed by defendant or his counsel, and shall immediately be entered upon the court record.

[4] Petitioner had exhausted his remedies in the state courts of Ohio. The Supreme Court of Ohio denied a petition for habeas corpus on the grounds that incompetence of counsel was a matter which must be raised on appeal. Schaber v. Maxwell, 348 F.2d 664, 667 n.3 (6th Cir. 1965).

The district court denied the application for the writ on the ground that the oral plea of insanity had in fact been accepted by the trial court. On petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, it was held that the trial court did not accept the oral plea; consequently there had been no adjudication of petitioner's sanity.

In reversing petitioner's conviction the court held that

> under the facts and circumstances of this case we are of the opinion that petitioner was deprived of due process of law at his trial in the state court, . . . because of the failure of his counsel to file a written plea of 'not guilty by reason of insanity' and the conclusive presumption of sanity in the absence of a written plea.[5]

The right to counsel as guaranteed by the sixth and fourteenth amendments means effective assistance of counsel in the preparation of the accused's case.[6] The term "effective assistance of counsel" is generally used in two different senses. In a procedural sense, there must be timely assignment of counsel to allow an opportunity to prepare an adequate defense.[7] In addition courts use the term "effective assistance of counsel" in the sense of the quality of the defense actually rendered.[8] The principal case well demonstrates the problems created by claims of ineffective assistance of counsel pred-

[5] *Id.* at 673.

[6] *E.g.*, Powell v. Alabama, 287 U.S. 45 (1932). See Gideon v. Wainwright, 372 U.S. 335 (1963). A distinction must be made between those cases where there is a denial of the right to counsel and those cases where there was representation by counsel, but for some reason the representation was ineffective or inadequate.

[7] The concept of effective assistance of counsel is used to describe a procedural requirement, *i.e.*, that assignment of counsel be effective to allow useful participation in the preparation and trial of the defendant's case. See, *e.g.*, Hawk v. Olson, 326 U.S. 271 (1945) (assignment must be timely made to allow preparation); Avery v. Alabama, 308 U.S. 444 (1940) (denial of consultation privilege makes appointment a sham); Powell v. Alabama, 287 U.S. 45 (1932) (appointment of entire county bar not effective).

[8] The term effective assistance is used to evaluate the quality of the defense representation rendered. When the defendant attacks his conviction alleging that trial counsel had a conflict of interests, the substance of the attack would seem to be that the conflict of interests lowered the quality of the representation rendered. See, *e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (accused's defense rendered less effective). *But see* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958) (procedural requirement, not quality of defense rendered). See generally Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964).

icated upon charges that defense counsel in a criminal case was incompetent.[9]

The Supreme Court has never undertaken to establish a standard of quality for defense counsel in criminal cases, but the lower federal and the state courts have enunciated various standards of quality required by the Constitution.[10] It would seem that to substantiate a claim of incompetence, the defendant must allege acts or omissions by counsel that are the result of insufficient knowledge of the law or facts of the case. A decision by counsel when he lacks a sufficient knowledge of the facts or law of the case that a reasonable inquiry would have produced is manifestly incompetent.[11] In *Turner v. Maryland*[12] defense counsel apparently made no investigation of the facts or law involved in the case. The defendant's conviction was reversed because appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional right to the effective assistance of counsel. In *Application of Tomich*[13] the defendant was convicted on the basis of evidence obtained by illegal search and seizure because counsel failed to make a pre-trial motion to suppress as required by state law. The court held that the mistake of counsel required "the finding that petitioner was without the 'effective' assistance of counsel that is guaranteed by the Constitution."[14] The defendants in *Lunce v. Overlade*[15] were represented by counsel who was completely unacquainted with the law of the jurisdiction. Counsel did not challenge the sufficiency of the affidavit, which apparently did not charge the crime for which the defendants were tried and convicted; furthermore, he failed to save his exceptions. In reversing the conviction, the Court of Appeals for the Seventh Circuit held, that "the record made by Ohio counsel in his defense of petitioners irrefutably demonstrates that he was so ignorant of Indiana law and procedure

[9] See generally, 78 HARV. L. REV. 1434 (1965); 49 VA. L. REV. 1531 (1963).

[10] *E.g.*, Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965) (defense with zeal); Hickock v. Crouse, 334 F.2d 95 (10th Cir. 1964), *cert. denied*, 379 U.S. 982 (1965) (defense with all counsel's skill); Willis v. Hunter, 166 F.2d 721 (10th Cir. 1948), *cert. denied*, 334 U.S. 848 (1948) (defense by able lawyer).

[11] Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

[12] 303 F.2d 507 (4th Cir. 1962).

[13] 221 F. Supp. 500 (D. Mont. 1963), *aff'd* 332 F.2d 987 (1964).

[14] *Id.* at 505.

[15] 244 F.2d 108 (7th Cir. 1957).

that it was virtually impossible for him to protect or even to assert petitioners' rights."[16] Defense counsel in *Poe v. United States*[17] advised the defendant not to take the witness stand because counsel believed certain statements by the defendant could be used to impeach him. In fact, the statements were inadmissible and could not have been so used. The district court for the District of Columbia in reversing the conviction said, "where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution."[18] Petitioner's allegation of incompetence in *Schaber v. Maxwell* would seem to come within this category. Counsel elected to rely on the defense of insanity, but did not have an adequate knowledge of the applicable state law, with the result that petitioner was conclusively presumed to be sane.

Courts are generally reluctant to allow claims charging that counsel was incompetent.[19] There is a presumption that counsel is effective and competent,[20] and mere general criticism of the attorney's conduct is insufficient to substantiate a claim of incompetence. The defendant must allege with particularity the acts or omissions alleged to constitute incompetence.[21] This burden is further complicated by the general proposition that acts of counsel involving judgment or trial strategy cannot be asserted as incompetence.[22]

[16] *Id.* at 110.

[17] 233 F. Supp. 173 (D.D.C. 1964).

[18] *Id.* at 178.

[19] See, *e.g.*, Johnson v. United States, 267 F.2d 813 (9th Cir.), *cert. denied*, 361 U.S. 889 (1959) (petition fabricated with aid of cell-mates).

[20] Michel v. Louisiana, 350 U.S. 91, 101 (1955).

[21] *E.g.*, Gilpin v. United States, 252 F.2d 685 (6th Cir. 1958) (allegation of general incompetence insufficient); United States *ex rel.* Weber v. Ragen, 176 F.2d 579 (7th Cir. 1949), *cert. denied*, 338 U.S. 809 (1949) (allegation of old age insufficient); United States v. Helwig, 159 F.2d 616 (3d Cir. 1947) (allegation of inexperience not sufficient).

[22] The acts of counsel that are considered to be within the ambit of counsel's judgment are too numerous to be listed here. See, *e.g.*, Johnson v. United States, 333 F.2d 371 (10th Cir. 1964) (failure to object to illegal confession); Tompa v. Virginia *ex rel.* Cunningham, 331 F.2d 552 (4th Cir. 1964) (failure to call particular witnesses); Rivera v. United States, 318 F.2d 606 (9th Cir. 1963) (failure to request bill of particulars); Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959) (failure to object to jury instructions); United States v. Duhart, 269 F.2d 113 (2d Cir. 1959) (failure to use one of several available defenses); Sweet v. Howard, 155 F.2d 715 (7th Cir. 1949), *cert. denied*, 336 U.S. 950 (1949) (failure to seek change of venue); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945) (advice to plead guilty).

However, where counsel makes several erroneous decisions in trial tactics that result in a total failure to present the cause of the accused, courts will find that degree of incompetence necessary to constitute a violation of due process.[23] For example, election between various available defenses is normally considered a matter of trial strategy, but where the defense actually rendered is highly insubstantial in relation to those not offered, doubt will be cast on the hypothesis that counsel made a competent and intelligent choice.[24] Thus, in general it is said that a tactical decision by counsel, to come within the immunity referred to above, must be based on an informed professional opinion.[25] In addition, the convicted defendant must show prejudice resulting from counsel's incompetence or demonstrate the result of the trial might have been different except for the incompetent conduct.[26] Some courts apparently extend the burden of proof even further and require the defendant to prove that counsel's conduct was so incompetent that it amounted to a breach of counsel's duty to represent faithfully his client.[27] In any event the defendant must prove the incompetence of counsel made the trial a sham,[28] a farce or mockery of justice,[29] or the equivalent of no defense at all.[30] In short the defendant must prove an extreme case.

[23] For example, where defense counsel failed to object to a coerced confession, failed to use certain witnesses, and offered no evidence, the court found incompetence that violated due process. Each of these could be considered a tactical decision, but the aggregate of the decisions constituted a total failure to present the cause of the accused. Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945).

[24] *E.g.,* Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963).

[25] For example, the decision not to argue the case to the jury would normally be a matter of trial tactics, but where the decision is the result of counsel's determination that his conscience would not allow him to argue the case, the court will find incompetency constituting a denial of due process. Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959).

[26] *E.g.,* United States v. Duhart, 269 F.2d 113 (2d Cir. 1959); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958) (per curiam); DuBoise v. North Carolina, 225 F. Supp. 51 (E.D.N.C.), *aff'd,* 338 F.2d 697 (4th Cir. 1964).

[27] *E.g.,* Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965), Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958), *cert. denied,* 359 U.S. 994 (1959).

[28] *E.g.,* United States *ex rel.* Mitchell v. Thompson, 56 F. Supp. 683 (S.D.N.Y. 1944).

[29] *E.g.,* Rivera v. United States, 318 F.2d 606 (9th Cir. 1963); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961); United States v. Wight, 176 F.2d 376 (2d Cir. 1949).

[30] *E.g.,* Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

In considering claims of incompetent counsel, some courts draw a distinction between retained and appointed counsel.[31] The majority of courts recognizing the distinction hold that ineptness and incompetency of the retained attorney is imputed to the defendant and the client is bound by the acts of the attorney unless he repudiates them in open court.[32] However, those courts that base the distinction on the agency rationale recognize that the rule has no application when it is made to appear that the defendant is unacquainted with criminal procedure and is ignorant of his rights.[33] It would seem there is little valid basis for the rule since the exception should apply in almost every instance. Even the intelligent and educated laymen will have only limited skill in the science of law and the intricacies of criminal procedure. Some courts refuse relief where counsel is retained, on the theory that incompetent acts of retained counsel are not state action and thus there is no violation of the fourteenth amendment.[34] But when the incompetence of the attorney results in an unfair trial, it would seem that the trial and the subsequent conviction constitute sufficient state action within the prohibitions of the fourteenth amendment.[35]

Regardless of whether counsel is appointed or retained, courts considering claims of incompetence are confronted with the same basic problems. In both situations, the ultimate consideration is whether the acts of counsel deprived the defendant of a fair trial. The standards applied by the courts should assure relief in those cases where counsel's incompetence has resulted in a substantial failure to present the accused's case. Every court considering claims of incompetence is confronted with the difficult task of determining how many errors counsel can make in a case before the defendant is deprived of a fair trial.[36] By its very nature, this must be an

[31] *E.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1952), *cert. denied*, 346 U.S. 865 (1953); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); *Ex parte* Haumesch, 82 F.2d 558 (9th Cir. 1936); See, Annot., 74 A.L.R.2d 1390 (1960).

[32] *E.g.*, Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).

[33] *Id.* at 98.

[34] *E.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d. Cir. 1952), *cert. denied*, 346 U.S. 865 (1953).

[35] It is well understood that private acts do not violate the fourteenth amendment, but where the state judicial machinery adds impetus to that conduct, there is state action sufficient to violate the fourteenth amendment. See Shelley v. Kraemer, 334 U.S. 1 (1948).

[36] Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945).

ad hoc determination with a consideration of the facts and circumstances in each case. While the courts must assure relief in those cases where there has been a denial of the effective assistance of counsel, they also must attempt to provide a solution that will avoid burdening the courts with full-scale hearings on frivolous and inadequately supported claims of incompetence.[37]

The reviewing courts must judge counsel's conduct by some external standard. If the convicted defendant alleges that counsel made an error of law, the courts can more objectively determine if the conduct was incompetent. However, when the defendant alleges counsel made an error in trial tactics, as is most frequently the case, the courts are required to apply a highly subjective test and view counsel's conduct retrospectively. By its very nature, advocacy is an art that is difficult to appraise. For the present, it would seem that the fair trial standard, coupled with the requirements of alleging particular acts and showing prejudice, is the most satisfactory solution. It would seem that where counsel has committed a clear error of law, the defendant will have little difficulty in alleging the particular act and proving resulting prejudice.[38] The courts should continue to apply rigid standards in attacks on counsel's tactics and judgment. The best trial lawyers often disagree on the proper strategy for a given case, and this variance of views on professional technique should not be deemed incompetence. It has been suggested that in any case where the trial judge is aware that counsel is conducting the trial in an incompetent manner, he should permit substitution of counsel and declare a mistrial if the defendant so desires.[39] However, it would seem more desirable for the court to

[37] For example, one convict alleged his trial counsel was incompetent because counsel was delinquent in payment of his State Bar dues at the time of trial. White v. Beto, 322 F.2d 214 (5th Cir. 1963), *cert. denied*, 376 U.S. 925 (1964).

[38] It can be argued that the requirements of alleging particular acts of incompetence and showing prejudice place an undue burden on the incarcerated prisoner who frequently drafts his on petition for post-conviction relief. However, the indigent defendant will usually have access to the assistance of appointed counsel on request. See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 296 (1964); N.C. GEN. STAT. § 15-220 (1965) (providing for counsel to indigents proceeding under post-conviction statute).

[39] Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176, 181 (1964). *But see* United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953), *cert. denied*, 346 U.S. 865 (1953) (indicating such intervention might be a violation of the defendant's right to develop his defense).

advise counsel of his mistakes and allow a recess for counsel to correct his errors. For example, in the *Schaber* case, the court said: "[I]n this case the mistake of counsel in a sense may have been induced by the failure of the trial court to indicate in any way that a written plea was necessary. . . ."[40]

Incompetence charges have a potentially detrimental effect on counsel. In those cases where the charge is sustained, counsel's professional reputation suffers even though his performance in the case may be no indication of his general level of professional capacity. Even where the charge of incompetence is unsupported, counsel may be professionally embarrassed and inconvenienced by the necessity of appearing in court to defend his actions. The courts therefore recognize that in addition to their duty to protect an accused from an unfair trial, they also have a duty to protect lawyers from unwarranted claims of incompetence.[41] Courts are fearful that frequent claims of incompetence will make lawyers reluctant to enter the criminal bar or accept court assignments.[42] The threat of charges of incompetence may deter counsel from taking those calculated risks that are normally equated with good advocacy.

The ultimate solution to alleviating the problems raised by claims of incompetent counsel may lie with the organized bar. There is general recognition that the criminal bar is inadequate for the demanding task of properly representing criminal defendants, particularly indigents.[43] The public tends to disparage the criminal lawyer, which may explain the reluctance of members of the bar to enter criminal work to any extent greater than absolutely necessary.[44] Bar associations should expend every effort to increase the status of the criminal bar in the view of the public and the profession. Only when there is an ample number of qualified members of the bar, interested and participating in criminal defense, can the supply of competent counsel meet the needs of the accused defendants for

[40] 348 F.2d 664, 673 (6th Cir. 1965).

[41] *E.g.*, DuBoise v. North Carolina, 225 F. Supp. 51 (E.D.N.C.), *aff'd*, 338 F.2d 697 (4th Cir. 1964). The courts generally recognize that an attack on the attorney's competence waives the attorney-client privilege and will permit counsel to defend his actions and testify as to understandings reached between counsel and client. See, *e.g.*, United States v. Butler, 167 F. Supp. 102 (E.D. Va. 1957), *aff'd*, 260 F.2d 574 (4th Cir. 1958).

[42] Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962).

[43] Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176 (1964).

[44] *Id.* at 179-80.

adequate representation. In the majority of cases the erring lawyer is reputable and professionally competent; he has merely committed error that made him ineffective in the disputed case. It would seem obvious that disciplinary action is warranted only if the performance of the attorney is such that it reflects on the integrity of the profession. Assuming that decisions in recent years are indicative of the trend, courts will become more objective and more demanding as to the quality of representation required by the Constitution. The organized bar should begin now to take steps that will aid the courts in formulating an adequate and workable standard. The efforts of the bar have been highly successful in solving problems for providing counsel to indigent defendants. It can be assumed that they will be successful in devising objective standards in evaluating the defense rendered in a given case.

DAVID S. ORCUTT

Constitutional Law—Religious Segregation of Public Schools—The Wearing of Distinctive Religious Garb by Public School Teachers While Teaching

In *Moore v. Board of Educ.*[1] a parent-taxpayer sought a declaratory judgment to the effect that defendant school board's method of operating three of the schools in the district violated the first amendment and Ohio constitutional prohibitions[2] against the establishment of religion. Also, a declaratory judgment was sought against the placement plan, the effect of which was to create three schools totally Catholic and one predominantly non-Catholic, on the ground that it was a denial of equal protection of the law under the fourteenth amendment as applied in *Brown v. Board of Educ.*[3] Prayer for an injunction to prohibit these practices was joined with the request for declaratory relief. The plaintiff further sought an injunction against the wearing of religious garb by nuns while teaching in public schools on the ground that it introduced sectarianism into the schools.

The court held that there was a governmental establishment of religion and issued an injunction accordingly, stating that the total effect of all of defendant's practices was to use public school funds

[1] 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P. 1965).
[2] OHIO CONST. art. 1, § 7. See note 23 *infra*.
[3] 347 U.S. 483 (1954).

for the operation of parochial schools.[4] The court, however, did not grant injunctive relief against the religious segregation effectuated by the placement plan, holding that *Brown v. Board of Educ.* was not applicable.[5] The court also refused to enjoin the practice of wearing religious garb by public school teachers while teaching, stating that such practice did not convert the school where they taught into a sectarian institution.[6]

The court is no doubt correct in its determination that there had been an establishment of religion. Taking into consideration the total effect of the defendant's released time program and other practices, no other result could have been reached on this issue.[7] It is felt that the court adequately discussed this aspect of the case in its opinion; consequently, it will not be further considered in this note.

In determining that *Brown v. Board of Educ.*[8] was not applicable, the court found lack of evidence that religious segregation adversely affected the students' motivation to learn or that the student in the segregated school received educational opportunities substantially inferior to those of the nonsegregated school. It will be recalled that the court in *Brown* reacted to a large volume of evidence showing the psychological, sociological, and economic impact that racially segregated schools have on the Negro child. Similar evidence might have been introduced in the principal case.[9] But even

[4] 4 Ohio Misc. at 271-77, 212 N.E.2d at 842-45.

[5] *Id.* at 268-69, 212 N.E.2d at 839-40.

[6] *Id.* at 269-71, 212 N.E.2d at 840-41.

[7] These practices included (1) providing a released-time religious program one hour per day, five days per week, with religious instruction given by the classroom teachers at a Catholic church nearby; (2) determination of attendance at the several schools on basis of religion rather than geography, supposedly under a parental choice plan; (3) allowing pupils from outside the district to attend such schools with tuition paid by their parish; and (4) renting from the Roman Catholic Church for ninety-nine years at a rental of one dollar per year the properties upon which three of the schools were constructed. *Id.* at 268-77, 212 N.E.2d at 839-45.

[8] 347 U.S. 483 (1954).

[9] The usual makeup of the Catholic parochial school encompasses students from all ethnic and cultural backgrounds. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 451 (1958). Therefore, it could be reasoned that religious segregation is not detrimental to the students' education. However, parochial schools have been criticized as contributing to a divisiveness in America and promoting religious bigotry. If so, they may be considered to have adverse effects upon the students. See MCCLUSKEY, CATHOLIC VIEWPOINT ON EDUCATION 36-38 (1959). See also Thomas, *Voluntary Religious Isolation—Another School Segregation Story,* 40 PHI DELTA KAPPAN 347 (1959).

without such evidence, it is submitted that *Brown* should apply. *Brown,* in its broader meaning, seems to stand for the proposition that the Constitution does not permit artificial classifications by the state whether they be made on the basis of race, color, status, or religion. These factors are said to be constitutionally irrelevant;[10] consequently, any classification founded upon them should be a violation of equal protection of the laws.[11]

Congress categorized these classifications as unlawful in the Civil Rights Act of 1964.[12] It would seem that the practices of the defendant school board violate this act.[13] The act defines desegregation as the assignment of students to public schools "without regard to their race, color, *religion,* or national origin. . . ."[14] The statute has no provision requiring any proof of equal or unequal facilities or that the students' motivation to learn has been impaired in any way. The inference seems to be that the classification itself is a violation of equal protection. Assuming the constitutionality of the relevant provisions of the act, the *Moore* court should have taken cognizance of them and stricken down the placement plan.

The religious garb question turns on the legality of the religious segregation. If the garbed teacher instructs only those of his own religion, as in *Moore,* then the objections to the garb would seem to have little merit.[15] But since the religious segregation would

[10] Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring).

[11] Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 353 (1941). A case very similar to *Moore* on its facts is Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942). There the Missouri Supreme Court found religious segregation of public schools to be a violation of complete *religious freedom* and did not consider the equal protection argument. The court did, however, recognize the unconstitutionality of the religious classification. See also Plessy v. Ferguson, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting). "[I]f this statute of Louisiana [requiring racial segregation] is consistent with the personal liberty of citizens, why may not the state require the separation . . . of *Protestants* and *Roman Catholics*?" (Emphasis added.) Justice Harlan's dissent is essentially the view espoused by the Supreme Court today. The present Court, if faced with religious segregation, would probably answer his rhetorical question in the negative.

[12] 78 Stat. 240, 42 U.S.C. § 1981 (1964).

[13] 78 Stat. 248, 42 U.S.C. 2000c-6(a)(1), (2) (1964).

[14] 78 Stat. 246, 42 U.S.C. § 2000c(b) (1964). (Emphasis added.)

[15] *But see* Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942), indicating that religious garb and insignia are impermissible in the school even when the garbed teacher and his pupils are of the same faith.

seem to be unconstitutional, the garb question will here be treated as though the classroom were religiously integrated.

The court followed what it stated to be the majority rule: the wearing of religious garb by public school teachers while teaching cannot be prevented in absence of a statute or regulation expressly prohibiting it.[16] The religious garb question seems to place two highly regarded constitutional provisions—the guarantee of free exercise of religion and the prohibition against governmental establishment of religion—in opposition to each other.[17] If a teacher is dismissed because of his religious dress, such dismissal would seem tantamount to denying him free exercise of his religious beliefs. However, to allow the teacher to wear his religious habit in the public school could be to favor one religion over others and thus to "establish" the favored religion.[18]

The leading case for the majority view is *Hysong v. Gallitzin Bourough School Dist.*[19] There it was held that to deny teachers

[16] 4 Ohio Misc. at 469-70, 212 N.E.2d at 841. *Quaere*: If the teacher has a constitutionally protected right to teach while wearing the garb, would not a statute or regulation prohibiting it be unconstitutional?

[17] Both provisions are set out in U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These provisions are made applicable upon the states through U.S. CONST. amend. XIV, § 1. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). All states have somewhat similar provisions. See PFEFFER & BAUM, MEMORANDUM ON DISPLAY OF CROSSES, CRUCIFIXES, CRECHES, AND OTHER RELIGIOUS SYMBOLS ON PUBLIC PROPERTY 2 (1957).

[18] See notes 20-23 *infra* and accompanying text. *"It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief."* Reed v. Van Hoven, 237 F. Supp. 48, 53 (W.D. Mich. 1965). (The emphasis is that of the court.)

[19] 164 Pa. 629, 30 Atl. 482 (1894). It is to be noted that *Hysong* represents the majority *in absence* of statute or regulation. Several jurisdictions have prohibited the practice by statute or regulation, and the trend seems to be moving in this direction. BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 197-99 (1950). See NEB. REV. STAT. § 79-1274 (1958); N.D. CENT. CODE § 15-47-29 (1959); ORE. REV. STAT. §§ 342.650-.655 (Supp. 1965), applied in 1926-28 ORE. OPS. ATT'Y GEN. 237. *But see* WIS. STAT. ANN. § 40.435 (1957), which seems to indicate that garbed nuns can be hired as public school teachers. This statute is discussed by Boyer, *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 214.

Even the *Hysong* case was overturned by PA. STAT. ANN. tit. 24, § 11-1112 (1962), which was upheld in Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910). Adhering to the *Hysong* rule are City of New Haven v. Town of Torrington, 132 Conn. 194, 43 A.2d 455 (1945); State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940); Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956); Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936).

employment because of their distinctive religious dress would be to impose a high penalty upon one for a particular religious belief. The dissent felt that such teachers could be excluded in that "the common schools cannot be used to exalt any given church or sect. . . ."[20] The leading case for the minority is *Knowlton v. Baumhover*,[21] which expressly adopted the dissenting opinion in *Hysong*. The *Baumhover* principle was later more explicitly set forth in *Zellers v. Huff*.[22] This court said that

> the wearing of religious garb and religious insignia must be henceforth barred, during the time the Religious are on duty as public school teachers. . . . Not only does the wearing of religious garb and insignia have a *propagandizing* effect for the Church, but by its very nature it introduced sectarian religion into the school.[23]

North Carolina has no case, statutory, or administrative law relative to religious garb in public schools. Public school authorities in North Carolina could apparently regulate the dress of teachers by analogy to a recent North Carolina Attorney General's opinion that school authorities could require students to conform to "a sensible personal appearance" or face expulsion. Greensboro Daily News, Sept. 25, 1965, p. 1, col. 1.

[20] 164 Pa. at 661, 30 Atl. at 485.

[21] 182 Iowa 691, 166 N.W. 202 (1918).

[22] 55 N.M. 501, 236 P.2d 949 (1951).

[23] *Id.* at 525, 236 P.2d at 964. (Emphasis added.) *Huff* should have been strong authority for the *Moore* court in that the applicable sections of the constitutions of Ohio and New Mexico are nearly identical. *Huff* was based in part upon N.M. CONST. art. 2, § 11, forbidding that any "preference be given by law to any religious denomination or mode of worship." OHIO CONST. art. 1, § 7, provides that "no preference shall be given, by law, to any religious society . . . ."

The *Huff* court relied extensively upon O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906), that upheld an administrative regulation prohibiting the wearing of religious garb by public school teachers while teaching. The court in *O'Connor* said:

> [T]he effect of the costume worn by these sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong.

Id. at 428, 77 N.E. at 614 (1906).

See also Outcalt v. Hoefler, (unreported), Logan County Dist. Court, Colo. (Aug. 1952), cited in Boyer, *supra* note 19, at 227 n.156; Harfst v. Hoegan, 349 Mo. 808, 163 S.W.2d 609 (1942); State *ex rel.* Pub. School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

See generally BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 157-59 (1963); DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS 84-85 (1962); PFEFFER, CHURCH, STATE, AND FREEDOM 412-27 (1953); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS 258-60 (1948). For a close look at the church-state problems of Kentucky in education, see COLLIER, EDUCATION, RELIGION, AND THE KENTUCKY COURT OF APPEALS (1960).

There is merit to the *Baumhover-Huff* doctrine. The *Moore* court, while indicating that the dress of the sisters did denote their membership in a religious sect, felt that the garb itself did not teach and that it merely represented "modesty, unworldliness, and an unselfish life."[24] It is true that the garb does not "teach" in the traditional sense. Even courts adhering to the *Hysong* doctrine would not allow the oral interjection of religious dogma into the classroom by the teacher.[25] Yet speech is only one form of communication. In *West Virginia State Bd. of Educ. v. Barnett*[26] the Supreme Court observed that "symbolism is a primitive but effective way of communicating ideas."[27] Going further, the Court said "the Church speaks through the Cross, the Crucifix, the altar and shrine, and *clerical raiment.* Symbols of State often convey political ideas just as religious symbols come to convey theological ones."[28]

The establishment clause is said to require a complete wall of separation between church and state, thus compelling governmental neutrality in regard to religion.[29] It would seem difficult to maintain this neutrality if public school teachers are allowed to bring their religion into the classroom by way of their religious habit. The school is second only to the family in the development of the child's personality, and the teacher plays an important role in the influence of the school.[30] Children seem to identify with the teacher and to take on his characteristics.[31] The result could be an inclina-

[24] 4 Ohio Misc. at 270, 212 N.E.2d at 841.

[25] See, *e.g.*, Rawlings v. Butler, 290 S.W.2d 801, 804 (Ky. 1956). It is difficult to believe that a nun could teach without openly interjecting her religion into the classroom. See CUSHING, THE MISSION OF THE TEACHER (1962).

[26] 319 U.S. 624 (1943).

[27] *Id.* at 632.

[28] *Ibid.* (Emphasis added.)

[29] There is no Constitutional language per se calling for "a wall of separation." This phrase was first used by Jefferson years after the adoption of the first amendment. He declared its purpose was to create a wall of separation. See Comment, 63 COLUM. L. REV. 73, 82 n.66 (1963). The courts have quoted him extensively. See, *e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

[30] BAUGHMAN & WELSH, PERSONALITY: A BEHAVIORAL SCIENCE 226-35 (1962). See also BERENDA, THE INFLUENCE OF THE GROUP ON THE JUDGMENTS OF CHILDREN (1950).

[31] Amatora, *Similarity in Teacher and Pupil Personality*, 37 J. OF PSYCHOLOGY 45 (1954). *Cf.* POUNDS & BRYNER, THE SCHOOL IN AMERICAN SOCIETY 271 (1959). It seems that the younger the child is, the greater influence the teacher has upon him. See BERENDA, *op. cit. supra* note 30.

tion to favor the religion of the teacher, especially if the teacher constantly keeps his or her religion before the child by means of symbolic dress.

This problem could take on added complexity if the student were of agnostic parentage or if the parents were adamantly opposed to the religion represented by the teacher. A somewhat parallel situation was presented in *Abington School Dist. v. Schemp*.[32] There the Supreme Court was in part concerned about the well-being of the nonbelieving students who were subjected to Bible reading as authorized by a state statute.[33] The Court indicated that the child who sought exemption from the Bible readings would be treated as an "odd ball" and would be under peer group pressure to conform to the beliefs of the majority.[34] Ohio has an education statute requiring mandatory school attendance that in a sense creates a captive audience for the teacher.[35] If the nonbelieving student could be psychologically impaired by pressures resulting from the daily recitation of the Bible, could not the conflicting pressures from the home, from the group, and from the teacher clothed in religious paraphenalia have at least an equal effect upon the student?

Apparently there has been no federal litigation regarding the wearing of religious garb by public school teachers while teaching.[36] If such litigation should occur, it is hoped that the Supreme Court would follow its present trend requiring a complete separation of church and state and adopt the minority rule, barring the wearing of religious garb. Such rule would avoid favoritism of any religion and could also alleviate any possible harmful effects to the students.

TOMMY W. JARRETT

The Missouri Supreme Court in Berghorn v. Reorganized School Dist., 364 Mo. 121, 132, 260 S.W.2d 573, 578 (1953) (per curiam), said "children of grade school age are under-developed and are particularly susceptible to the influence of their teachers and surroundings and the actions of the children with whom they are associated."

[32] 374 U.S. 203 (1963). See Hanft, *The Prayer Decisions*, 42 N.C.L. REV. 567 (1962).

[33] PA. STAT. ANN. tit. 24, § 15-1516 (1962).

[34] 374 U.S. at 289-91 nn. 68 & 69.

[35] OHIO REV. CODE ANN. §§ 3321.03-.04 (Supp. 1965).

[36] The only time this problem has ever been encountered within the federal government was by virtue of a regulation promulgated by the Commissioner of Indian Affairs in 1912. This regulation prohibited the wearing of religious insignia and garb by teachers employed in the Indian schools. A public controversy ensued, and President Taft permanently revoked the regulation. See JOHNSON & YOST, SEPARATION OF CHURCH AND STATE 119-22 (1948).

Constitutional Law—Retroactivity of Constitutional Decisions

In 1965, the United States Supreme Court in *Griffin v. California,*[1] held that comment by the prosecutor or judge on the accused's silence at a state trial is violative of the fifth amendment as applied to the states through the fourteenth amendment. In 1966, in *Tehan v. United States,*[2] the Court held that this no-comment rule would not be applied retroactively to judgments that became final prior to the 1965 opinion. How then do we reconcile the application of one constitutional principle to pre-1965 criminal judgments with the application of a different constitutional principle to post-1965 judgments?

Under the common-law view, the question of whether to apply a new judicial decision retroactively did not arise. The judge's role was merely to *declare* the law, not to change it. If a prior decision mistakenly declared the law, then a subsequent overruling decision declared it to be no law.[3] Consequently, under this "declaratory theory" the law remained constant; any overruling decision was, of necessity, applied retroactively.

The inequities arising from strict adherence to the declaratory theory led to several exceptions to the rule, especially where prospective limitation was deemed necessary to do fairness to a party.[4] With general acceptance of the view that the court has discretion to determine whether an overruling decision should operate retroactively or be limited prospectively,[5] the problem has become one of line-drawing rather than one of across-the-board adoption of any one theory.[6] The same development is also evident in decisions hold-

[1] 380 U.S. 609 (1965).

[2] —— U.S. ——, 86 Sup. Ct. 459 (1966).

[3] "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined." 1 BLACKSTONE, COMMENTARIES * 70.

[4] See Note, 43 VA. L. REV. 1279, 1281, 1290 (1957).

[5] This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal. We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.
Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

[6] The argument against prospective limitation is that such a result consti-

ing statutes unconstitutional.[7]

However, there seems to have been an implied adoption of the declaratory theory when the overruling decision expanded constitutional protections accorded the criminally accused, *i.e.*, when fairness to a party seemed to support retroactive application. This implied adoption resulted from a refusal by the Court to face squarely the issue.[8]

In *Eskridge v. Washington Prison Bd.*,[9] in 1958, the Court, in a per curiam decision, applied the rule that indigents on appeal must be provided transcripts[10] to a 1935 case with no discussion of the retroactivity issue.

Again, in *Norvell v. Illinois*,[11] the Court side-stepped the prob-

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tutes judicial legislation. See, *e.g.*, James v. United States, 366 U.S. 213, 224-25 (1960) (separate opinion of Black, J.).

[7] *Compare*, Norton v. Shelby County, 118 U.S. 425 (1886), *with* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). In *Norton*, it was stated:

> An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. Shelby County, *supra* at 442.

In *Chicot County* the same question was discussed as follows:

> The actual existence of a statute, prior to such a determination, [of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, *supra* at 374.

[8] Individual justices had foreseen the retroactivity problems in this area and had urged the Court to take a stand. In Griffin v. Illinois, 351 U.S. 12 (1956), which declared that due process required making necessary transcripts available to indigents on appeal, Justice Frankfurter spoke for express consideration of the issue as follows:

> The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasons, law generally speaks prospectively. . . . In arriving at a new principle, the judicial process is not impotent to define its scope and limits. . . . We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.

Griffin v. Illinois, *supra* at 25-26.

[9] 357 U.S. 214 (1958).

[10] Griffin v. Illinois, 351 U.S. 12 (1956).

[11] 373 U.S. 420 (1963).

lem. Following *Griffin v. Illinois,* in which the Court declared that due process required making necessary transcripts available to indigents on appeal, Illinois had, by statute, provided for free transcripts to all indigents convicted prior to or after *Griffin,* but granted the court authority to deny a petition for transcripts if the court reporter be dead or unable to furnish the record. Norvell had been convicted in 1941 and, because he could not afford transcripts, failed to pursue an appeal. In 1956 he requested transcripts and was refused because the reporter had died. No one could read the reporter's shorthand notes, and the trial testimony could not otherwise be reconstructed. The United States Supreme Court affirmed the denial of a new trial on the ground that Norvell had a lawyer at the trial and failed to pursue his remedy at that time. This unreasoned modification of what had been done summarily in *Eskridge* was attacked by Justices Goldberg and Stewart in a vigorous dissent.

> *Griffin* was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments. This, it seems to me, is the clear import of this Court's decision in *Eskridge v. Washington* . . . .[12]

An opportunity to meet the retroactivity question was again avoided in *Pickelsimer v. Wainwright,*[13] where the Court summarily applied with no discussion, *Gideon v. Wainwright*[14] retroactively.

This remained the situation until a decison finally spoke to the issue and established the framework within which subsequent arguments for retroactivity in this field are to be evaluated. The decision in *Linkletter v. Walker*;[15] it held that the *Mapp v. Ohio*[16] exclusionary rule would not be applied retroactively.[17]

After noting that "heretofore, without discussion, we have ap-

[12] *Id.* at 425 (Goldberg, J., dissenting).

[13] 375 U.S. 2 (1963). Justice Harlan dissented in *Pickelsimer* on the ground that the Court should address itself expressly to the problem of retroactivity.

[14] 372 U.S. 335 (1963) (indigent's right to counsel declared).

[15] 381 U.S. 618 (1965).

[16] 367 U.S. 643 (1961) (holding illegally-seized evidence not admissible at trial).

[17] It should be noted that the exclusionary rule was not limited to complete prospective application; it was applied to the *Mapp* case itself as well as to all cases pending on appeal at the time *Mapp* was decided.

plied new constitutional rules to cases finalized before the promulgation of the rule,"[18] the Court proceeded to enumerate the factors upon which it was now going to base its line drawing.

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.[19]

The main thrust of the opinion seems to have centered on the purpose argument. Viewed on this level, the exclusionary rule is necessary merely as an effective deterrent to illegal police action. Consequently, retroactive application of the rule would not serve to further the purpose of the rule, nor could it restore "the ruptured privacy of the victims' homes and effects."[20]

Continuing this pragmatic approach, the Court noted the terrible impact retroactive application would have upon the judicial machinery. The Court's concern for the problems inherent in new trials in which witnesses and evidence may be unavailable and with the increased burden upon trial dockets seems reminiscent of the *Norvell* result. However, the Court apparently incorporated an additional factor into its administration of justice argument, *i.e.*, the fact that in *Linkletter* "there is no likelihood of unreliability or coercion present. . . ."[21] The Court's statement that "to thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice"[22] would seem to imply that if the procedure had a "bearing on guilt," the administration of justice would not be deemed disrupted by retroactive application. The net result seems to be that hardship on the judiciary becomes a relevant argument for prospective limitation only if it is first determined that the newly announced constitutional

[18] 381 U.S. at 628.
[19] *Id.* at 629.
[20] *Id.* at 637.
[21] *Id.* at 638. This emphasis on the reliability of the guilt-determining process seems also to have played an important part, independent of the other criteria, in providing a ground for distinguishing the *Gideon* and *Griffin* line of cases, which had applied new rules retroactively in situations where the prior practice was deemed by the *Linkletter* Court to have effected the determination of guilt.
[22] *Id.* at 637-38.

principle has no bearing on the reliability of the guilt-determining process. Such a distinction seems very dubious.[23]

Finally, the Court gave some credence to the fact that the states had relied upon the *Wolf v. Colorado*[24] decision holding the exclusionary rule was not required by the fourteenth amendment. In speaking of the states' "vested interest" in sustaining prior decisions, the Court relied upon cases involving individual interests,[25] even though it would seem very difficult to view the states as having a vested interest in keeping a man incarcerated.

Justice Black's dissent in *Linkletter* warrants mention here because it was adopted by him in *Tehan*. In attacking what he considered to be discrimination against Linkletter solely because his trial proceeded more swiftly than did Miss Mapp's, Justice Black noted his failure to understand "why those who suffer from the use of evidence secured by a search and seizure in violation of the Fourth Amendment should be treated differently from those who have been denied other guarantees of the Bill of Rights."[26] In attacking the purpose argument, he noted that the exclusionary rule is more than a mere punishment against police officers;[27] it is also a right accorded the accused,[28] a right that the *Mapp* decision itself

[23] *Gideon* itself did not rely upon any showing of prejudice resulting from the denial of counsel. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 270 (1965). Unfortunately, the Court seems to have equated "fairness of trial" with the reliability of the guilt-determining process. It stated: "Finally, in each of the . . . areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process." 381 U.S. at 639.

[24] 338 U.S. 25 (1949).

[25] See 381 U.S. at 627.

[26] *Id.* at 646. In support of his position that there should be no such distinction, Justice Black relied upon the following language from *Mapp*:

> [W]e can no longer permit that right to remain an empty promise. Because it is enforceable *in the same manner and to like effect as other basic rights secured by the Due Process Clause*, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.

Mapp v. Ohio, 367 U.S. 643, 660 (1961). (Emphasis added.)

[27] The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the court's action in adopting it sounds more like law-making than construing the Constitution.

381 U.S. at 649.

[28] This was the position taken by the Ninth Circuit.

had recognized might lead to the release of some criminals.[29] On the increased burden retroactive application might place upon the judicial system, Justice Black merely stated his view that the argument is no more applicable to *Linkletter* than it was in the decisions growing out of *Gideon* and *Griffin v. Illinois*. In conclusion, Justice Black addressed himself to the reliance argument as follows:

> No State should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials. Careful analysis of the Court's opinion shows that it rests on the premise that a State's assumed interest in sustaining convictions obtained under the old repudiated rule outweighs the interests both of that State and of the individuals convicted in having wrongful convictions set aside.[30]

Notwithstanding these objections,[31] the majority opinion in *Linkletter* seems to establish the following criteria for determination of retroactivity.

(1) Line drawing will be applied on the question of retroactivity to decisions broadening the constitutional rights of criminal defendants.

(2) The relevant factors to be considered in drawing the line are the degree of state reliance upon the prior rule, the purpose of the newly announced rule, the effect retroactive application would have upon the attainment of this purpose and the effect of retroactivity upon the efficient administration of justice.

(3) If the new rule does not go to the "fairness of the trial—

> We agree that the underlying policy objective of the doctrine of exclusion is to deter. The doctrine of exclusion is nevertheless a Constitutional privilege of the victim, and its status as such is not altered by identification of its purpose.

California v. Hurst, 325 F.2d 891, 895 (9th Cir. 1963).

[29] "In some cases this will undoubtedly be the result. . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[30] 381 U.S. at 652-53.

[31] An additional objection has been voiced by some commentators that the retroactivity problem is an "illusion." Relying upon the language of the federal habeas corpus statute that the writ is available to state prisoners who are "in custody in violation of the Constitution of the United States," 28 U.S.C. § 2241(c)(3), these writers argue that the petition puts in issue only present confinement under present standards and that the legality of the initial incarceration is in no way relevant. See United States v. Fay, 333 F.2d 12, 25 (2d Cir. 1964) (Marshall, J., dissenting); Meador, *Habeas Corpus and The "Retroactivity" Illusion*, 50 VA. L. REV. 1115 (1964).

the very integrity of the fact-finding process,"[32] then it seems that it will not be applied retroactively.

Putting aside the propriety of the *Linkletter* rule, was it, as announced, properly applied in the *Tehan* situation?

In *Twining v. New Jersey*,[33] it was held that the federal constitution did not require the states to accord criminal defendants the fifth amendment privilege against self-incrimination. Then, in 1963, over fifty years later, *Twining* was overruled, and it was held that the privilege against self-incrimination is protected by the fourteenth amendment against abridgment by the states.[34] Two years later, *Griffin v. California*[35] held that the fifth amendment forbade comment on the accused's silence.

Griffin is important to the analysis of *Tehan* for its statement of the basis upon which the no-comment rule is established. The Court seems to have made it clear that allowing comment had a direct bearing upon the integrity of the guilt-determining process.

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.[36]

The Court in *Griffin* also viewed the comment rule as a "remnant of the 'inquisitorial system,' "[37] and as an attempt, while recognizing the accused's privilege against self-incrimination with one breath, to penalize its assertion with the next.[38]

The Court in *Tehan* was quick to note these multi-purposes of

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[32] 381 U.S. at 639.
[33] 211 U.S. 78 (1908).
[34] Malloy v. Hogan, 378 U.S. 1 (1963).
[35] 380 U.S. 609 (1965).
[36] *Id.* at 613.
[37] *Id.* at 614. The Court disposed of the argument that the jury will infer guilt from silence even though no comment be allowed as follows: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Ibid.*
[38] "It [comment] is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Ibid.*

the rule against compulsory self-incrimination.[39] Equally swiftly, it identified the "basic purpose" behind the privilege to be the preservation of the accusatorial system, stating that the basic purposes of the privilege "do not relate to protecting the innocent from conviction."[40] Then, by what appears to be somewhat doubtful reasoning, the Court stated that since all the states had granted the testimonial privilege against self-incrimination prior to *Griffin,* any variations in the application of the privilege "did not go to the basic purposes of the federal privilege."[41] Finally, the Court stated that as the privilege related to "our respect for the inviolability of the human personality,"[42] retroactive application could not remedy the already consummated intrusion. Thus, since the privilege is "not an adjunct to the ascertainment of truth,"[43] but merely represents values reflecting our concern for the "right of each individual to be let alone,"[44] the Court apparently viewed itself as clearly within the *Linkletter* rationale.[45]

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[39] The Court, in a footnote, quoted at length from a 1964 opinion written by Justice Goldberg:

> It [privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . ; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . ; our distrust of self-deprecating statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[40] Tehan v. United States, —— U.S. ——, 86 Sup. Ct. 459, 464 (1966).

[41] *Ibid. But see* Griffin v. California, 380 U.S. 609, 614 (1965), where it is stated: "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws."

[42] Tehan v. United States, —— U.S. ——, 86 Sup. Ct. 459, 465 (1966).

[43] *Ibid.*

[44] *Ibid.*

[45] The impact of retroactive application upon the administration of justice in those states that had relied upon *Twining v. New Jersey,* apparently six in number in 1960, was felt to be "so devastating as to need no elaboration." —— U.S. ——, 86 Sup. Ct. at 467. It should be noted, however, that in *Adamson v. California,* 332 U.S. 46 (1947), five justices felt that the fifth amendment forbade comment; but, Justice Frankfurter believed the fifth not applicable to the states through the fourteenth and thus made the majority for holding the comment practice constitutional. Consequently, reliance upon *Twining* would appear, at least no more warranted than was the reliance upon *Wolf v. Colorado.*

That which *Linkletter* implied, *Tehan* has apparently confirmed, *i.e.*, the approach to retroactivity in decisions expanding the constitutional rights of the criminally accused is to be pragmatic with emphasis on the practical reverberations in light of the one dominant objective sought by the new rule. Such an approach, at least in the *Tehan* situation, does not seem appropriate.

The mere fact that the declaratory theory has been discarded would not seem adequate reason for completely ignoring one of the apparent considerations behind the rule. Professor Mishkin has expressed the role of the declaratory theory as follows:

> [T]he 'declaratory theory' expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. . . . [T]his symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions. If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost; consider, for example, the loss involved if judges could not appeal to the idea that is 'the law' or 'the Constitution'—and not they personally—who command a given result.[46]

It would seem that when constitutional rights are in issue—when the rights in issue are pregnant with the ethical judgments that are involved in due process and fair trial discussions—the appropriateness of this declaratory theory concept is strengthened.[47] Society, with its sense of the eternalness and all-inclusiveness of ethical judgments, is likely to view any overruling decision as an admission of past error, rather than as a creative exercise of the judicial power to adopt to changed conditions[48]—that which is due process for Mr. Griffin should also be due process for Mr. Tehan. Consequently, the values of equality of treatment and the image of justice, if not controlling in such situations, merit, it would seem, at least some recognition by the Court in its line-drawing exercise.[49]

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[46] Mishkin, *The High Court, The Great Writ, and The Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965).

[47] See Comment, 16 RUTGERS L. REV. 587 (1962).

[48] Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 257 (1965).

[49] See *Ibid.*

Considerations of stability, reliance and the efficiency of the administration of justice seem insufficient in themselves to support arbitrarily drawing a line between cases pending and those finally decided.[50]

Nevertheless, it might be argued that the *Linkletter* result is supportable upon the policy for finality of judgments as it reflects concern for the efficient administration of justice. Thus, retroactivity would be applied only when the new constitutional standard was intended to improve the reliability of the guilt-determining process.[51] Since the exclusionary rule was deemed to be not so conceived, the refusal to allow collateral attack on the prior judgment through habeas corpus is, it is argued, justified.[52]

Assuming that this rationale is that which was intended by the purpose and judicial administration arguments of *Linkletter,* the standard still seems improperly applied in *Tehan.* By construing "purpose" to mean "dominant objective," the Court, in *Tehan,* apparently ignored the *Griffin* statements that the no-comment rule did serve, among other purposes, to assure the reliability of the guilt-determining process.[53] Where *Linkletter* had drawn a distinction between the right to counsel and the right to be protected against illegal search and seizure, *Tehan* has now apparently drawn a distinction between the various elements of the single right against compulsory self-incrimination dependent solely upon what is perceived to be the dominant purpose of the individual element of the privilege in issue. It is submitted that in treating the no-comment rule as unrelated to the reliability of the guilt-determining process and in giving controlling weight to considerations of dominant objective, reliance and judicial efficiency, the Court in *Tehan* reached an unwise result and in broadening the already doubtful base of

[50] See Mishkin, *supra* note 46, at 72-76.

[51] See *Id.* at 87.

[52] It would seem at least arguable that since across-the-board retroactivity might stifle the development of new legal principles, some such basis for line drawing is warranted.

[53] Although Professor Mishkin agreed with the *Linkletter* result, he believed that *Tehan* required retroactive application.

> Yet, though other factors may predominate, unless the court is willing to treat the asserted purpose of assuring the reliability of the guilt-determining process as insubstantial—which would seem virtually impossible in the face of *Griffin v. California*—the present requirements would . . . be applicable to all past convictions.

Id. at 94.

Linkletter allowed practical considerations to overcome considerations of justice and equality.

Fairness of trial would seem not to depend solely upon the accuracy of the ultimate determination of guilt or innocence. As Miss Mapp, Mr. Gideon and Mr. Griffin were deprived of certain elements of the ritual to which we refer as a "fair trial," so also was Mr. Tehan deprived. On this ground, there appears to be no distinction. Neither would a valid distinction between Mr. Gideon and Mr. Tehan seem permissible on the ground of accuracy of verdict.

Consequently, the *Tehan* result appears to be based upon an argument geared to support a preconceived decision against retroactivity, pleaded as a purpose argument but actually sounding in flooding the courts. In so extending the pragmatic approach, the Court has apparently lost sight of the remaining relevance of the theoretical approach based upon equality for persons similarly situated, equal protection of the laws and the often crucial image of judicial fairness.

How then do we reconcile the application of one constitutional principle to pre-1965 criminal judgments with the application of a different principle to post-1965 judgments? In Mr. Tehan's case, we can do so neither upon the basis of precedent nor of sound judicial policy.

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Corporations—1965 Amendment to the North Carolina Business Corporation Act

The following comments concern the changes in the North Carolina Business Corporation Act of 1955, Chapter 55 of the General Statutes, made by the 1965 General Assembly.

I. INSPECTION RIGHTS

Section 55-38 was amended by adding a new provision blocking shareholders of banks from inspecting "deposit records or loan records of a bank customer, except upon order of a court of competent jurisdiction for good cause shown."[1] This enactment obviously responds to the effort in *Cooke v. Outland*[2] to reach such records,

[1] N.C. Sess. Laws 1965, ch. 609, adding new subsection (i) to N.C. GEN. STAT. § 55-38 (1965).

[2] 265 N.C. 601, 144 S.E.2d 835 (1965).

although the legislation is not retroactive and thus does not affect that litigation. Although the new provision was doubtlessly motivated by the banking community's alarm over shareholder access to corporate records—and thus to some degree reflects the disposition of banks to curtail the information available to shareholders—it nevertheless achieves a sound balancing of the interests of shareholders on the one hand and of depositors and borrowers on the other in subjecting to court supervision the right of shareholders to obtain certain classes of documents.

The amendment does not generally affect the application of the inspection-right provisions of the corporation law to banks nor does it eliminate the shareholder's right to inspect deposit and loan records. What it does is to remove two types of corporate documents from the phrase "books and records of account" which, under the corporation law, may be inspected *as of right* by any shareholder, with the corporation carrying the burden of proving that the shareholder has no proper purpose.[3] It is doubtful that records of loans and deposit, which do have a confidential aspect, should be available *as of right,* with a penalty imposed on the bank officer who refuses to furnish them. However, *Cooke v. Outland,* the decision that this statute overturns for the future, had correctly read the phrase "books and records of account" to include such bank records instead of adopting a strained construction of the statute that would put them outside this inclusive category.

The effect of the amendment, then, is to throw loan and deposit records into the category of documents which may be inspected only on court order and on proof by a shareholder of his proper purpose.[4] Stated otherwise, the confidential character of the records overrides a shareholder's inspection as of right, but the documents may be available after a court has determined the shareholder's reasons and objectives. In contrast to the "proper purpose" standard generally applicable under section 55-38(f), the new test is framed in terms of "good cause shown." It is to be assumed, although the statute is not clear on this, (1) that the shareholder bears the burden of proving good cause, and (2) that "good cause" is a stricter standard than "proper purpose." Perhaps the difference, if any, is that "proper purpose" focuses more on a shareholder's

[3] N.C. GEN. STAT. § 55-38(b) (1965).
[4] See N.C. GEN. STAT. § 55-38(f) (1965).

motive and purposes, while "good cause" directs attention to objective factors and the reasonableness of the request.

II. Compulsory Dividends

Section 55-50 authorizes holders of at least twenty per cent of the shares of any stock class to compel payment of up to one-third of the "net profits" for a given accounting period, "allocable to [shares of] that class."[5] This statutory procedure for forcing dividends is in addition to, rather than in lieu of, traditional equity jurisdiction to compel declaration of dividends unreasonably withheld.[6] In 1965 subsection 55-50(i) was amended to make the provision inapplicable to "any corporation having total assets of one million dollars ($1,000,000) or more and whose shareholders number seven hundred and fifty (750) or more."[7] The evident purpose is to relieve larger corporations from possibly vexatious suits by shareholders seeking larger dividends, not to mention the fact that a compulsory dividend policy such as the statute prescribes would by exceedingly inconvenient to these corporations (as well as many others not so exempted). The author of this comment has criticized the compulsory dividend provision and welcomes any effort directed at removing the specific mathematical formula which makes dividend payments automatically enforceable and substituting as the exclusive test the sound "equitable" rule that directors may not withhold dividends unreasonably or for some unlawful purpose.[8]

In one respect, the new statute is a curiosity. Its language is obviously derived from section 12(g)(1)(A) of the federal Securities Acts Amendments of 1964.[9] The major thrust of the far-reaching amendments is to extend the protection[10] hitherto available only

[5] N.C. Gen. Stat. § 55-50(i) (1965). With certain limitations, the general rule is that the amount of dividends that must be paid is the difference between the amount paid during the relevant accounting period and one-third of "net profits" for that period allocable to shares of the class seeking the additional payout. "Net profits" receives a special definition in the first sentence of section 55-50(i).

[6] N.C. Gen. Stat. § 55-50(j) (1965).

[7] N.C. Sess. Laws 1965, ch. 726.

[8] See Folk, *Revisiting the North Carolina Corporation Law*, 43 N.C.L. Rev. 768, 843-45 (1965).

[9] Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78*l*(g)(1)(A) (1964).

[10] Briefly stated, the 1964 amendments require corporations subject to the act to register their securities with the Securities Exchange Commission, § 12(g)(1); to make periodic reports to the SEC, § 13; to conform to federal standards as to proxy solicitation or, if proxies are not solicited,

to shareholders of corporations whose securities are listed on a national securities exchange to all corporations (with exceptions) meeting certain specific statutory standards as to asset size and number of shareholders. These corporations are the large "over-the-counter corporations," that is, corporations whose shares are traded more or less regularly on securities markets maintained by brokers and dealers.[11] Cannon Mills and Lance, Incorporated, are examples of local corporations in this category. The federal law took effect in two stages: Initially it applied to corporations with $1,000,000 dollars or more of assets whose equity securities of any class are held of record by at least 750 persons;[12] a year later it became applicable to corporations with 500 shareholders of record, the asset test remaining unchanged.[13]

The North Carolina statute is obviously intended to afford the compulsory dividend exemption to corporations subject to the federal requirements, or at least one infers so from the close similarity of language. Curiously enough, the state amendment is framed so that it applies only to those corporations that immediately became subject to the federal statute, that is, corporations with 1,000,000-dollar assets and 750 shareholders, but not to those that are now subject to the more expansive coverage of the statute—those with 500 to 750 shareholders. It is difficult to see why state law would make this distinction. Presumably if corporations with 750 or more shareholders can safely be left to manage their dividend policies, subject only to the "equitable" test, those with 500 to 750 shareholders equally can be trusted. The point is simply that the North Carolina amendment makes an irrational cut.[14] Since it chose not to go all the way and eliminate the compulsory dividend provision but instead seemingly aped the federal definition, it would have been more sensible to make the state law exemption coterminous with

to furnish shareholders with information comparable to that going out with proxy statements, § 14. The provision for recovering short-swing profits by insiders now applies to officers, directors, and 10% shareholders of corporations subject to the act. § 16.

[11] This, incidentally, is a definition recognized in the North Carolina Business Corporation Act. N.C. GEN. STAT. § 55-73(b) (1965).

[12] Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78*l*(g)(1)(A) (1964).

[13] Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78*l*(9)(1)(B) (1964).

[14] This is not to say that the federal test of 500 shareholders is more rational. Any such cut-off point is bound to be arbitrary, and a good case can be made for cutting it at a lower figure such as 200 or 300 shareholders.

the federal provision. Moreover, the North Carolina amendment is ambiguously worded. Unlike the federal provision which specifies 500 or 750 shareholders "of record"—a provision now interpreted by Securities Exchange Commission regulation[15]—the North Carolina statute leaves the matter open, so that one does not know whether or not to count the beneficial owners of shares held of record by a nominee. Thus if a broker owns of record shares for twenty-five customers it is uncertain whether this counts as one or as twenty-five shareholders. Absent some strongly persuasive reason to the contrary, to the extent corporate rights and obligations depend upon counting shareholders, the test should refer to shareholders of record. Otherwise, the corporation is inconvenienced in trying to get information concerning beneficial owners and may in fact never be able to obtain it.[16]

Thus, this faultily drafted amendment should be corrected in at least two respects: (1) it should exempt corporations with 500 (rather than 750) shareholders, and (2) it should specifically refer to shareholders of record. It would be better, however, to delete all of section 55-50(i) and leave compulsory dividends to the traditional equity test rather than to erect an automatically applicable formula, even though it is limited to relatively small corporations.

III. Miscellaneous Provisions

Section 55-14[17] and section 55-142[18] detail the procedure for corporations, domestic and foreign respectively, to change their registered office or agent or both, by executing and filing a statement of the change. Since many corporations are represented by a single agent, either an attorney or a corporation service company, it is worthwhile to authorize a simple method by which the *agent* itself may file a single document reflecting the change of the corporation's registered office to a different address. A 1965 amendment[19] adding a new subsection (e) to section 55-14 (domestic corporations) and

[15] SEC Securities Exchange Act Release No. 7492, January 5, 1965.

[16] In a different context, the Supreme Court of Delaware recently stated that "the corporation is entitled to confine itself to dealing with registered stockholders in intracorporate affairs such as mergers; it should avoid becoming involved in the affairs of registered stockholders vis-à-vis beneficial owners. . . ." Olivetti Underwood Corp. v. Jacques Coe & Co., 217 A.2d 683, 686 (Del. Sup. Ct. 1966).

[17] N.C. Gen. Stat. § 55-14 (1965).

[18] N.C. Gen. Stat. § 55-142 (1965).

[19] N.C. Sess. Laws 1965, ch. 298.

a new subsection (d) to section 55-142 (foreign corporations) permits the agent to handle this matter. It is of limited interest, but of considerable utility to agents serving corporations by furnishing a registered office and agency.

A 1965 amendment[20] added, to the tail-end of the Uniform Stock Transfer Act, a new section 55-97.1 authorizing stock transfer through transfers and pledges of shares within a central depository system, such as the New York Stock Exchange has available through its Clearing Corporation. The provision is identical with section 8-320 of the Uniform Commercial Code which was adopted when the Code was enacted in North Carolina.[21] Since the Code will be effective July 1, 1967, it is difficult to see why the same language was added to the corporation law, especially as a dangling appendix to the soon-to-be-repealed Stock Transfer Act, unless possibly it was intended to make immediately effective this new and sophisticated mode of transfer.

ERNEST L. FOLK, III*

Corporations—Stock Options—Validity and Federal Tax Requirements

The stock option plan as an incentive device for key corporate personnel has come into widespread use. Although the prime factor for the growth of such plans in the corporate community has been the favorable tax treatment of the proceeds, compliance with the requirements of the Internal Revenue Code provisions,[1] necessary to obtain capital gains rates, is not per se sufficient to insure the validity under state law of a plan challenged by a minority stockholder.[2] Thus, a corporation seeking to adopt an option plan must

[20] N.C. Sess. Laws 1965, ch. 843.
[21] N.C. GEN. STAT. § 25-8-320 (1965).
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[1] INT. REV. CODE OF 1954, §§ 421-425.
[2] [S]ince, under the Internal Revenue Code, the favored position with respect to options granted as part of compensation to corporate officials can be obtained only if the options are exercised while in the corporation's employ, the result will be to persuade the optionees to remain in the corporation's employ. Even if the inferences . . . are justified, they are dependent entirely upon the present state of the federal taxing policy and, as such, too insecure in nature to be regarded as a condition of the stock option plan designed to insure that the corporation will receive the contemplated benefit.
Kerbs v. California Eastern Airways, 33 Del. Ch. 69, 77, 90 A.2d 652, 657 (Sup. Ct. 1952).

recognize the requirements of local corporation statutes[3] as well as the provisions of the Internal Revenue Code if the plan is to achieve its desired effect.[4]

The courts have been reluctant to prescribe a set of minimum requirements[5] by which a corporation can insure the plan will not be invalidated if attacked as a waste of corporate assets[6] or as unreasonable compensation.[7] It is clear that there must be at least legal consideration to the corporation for the grant of the options.[8] Acquiring and retaining key personnel[9] and securing contracts of employment[10] are the two most common benefits received by the corporation, and the presence of either is usually deemed sufficient consideration to support the grant of the options.

The Delaware courts have abandoned testing the validity of stock options solely on the basis of legal consideration in the con-

[3] Controversy resulting from the issuance of stock option plans by corporations upon the approval of the board of directors and stockholders involves the internal affairs of the corporation and is therefore governed by the laws of the state of the corporation's origin. *E.g.*, Gaynor v. Buckley, 318 F.2d 432 (9th Cir. 1963); Beard v. Elster, 39 Del. Ch. 153, 160 A.2d 731 (Sup. Ct. 1960).

[4] Stock options may be granted for reasons other than the receipt of capital gains rates. For a discussion of the tax treatment of "non-statutory" stock options, those not specifically sanctioned by the Internal Revenue Code, see generally Edwards, *Executive Compensation: The Taxation of Stock Options*, 13 VAND. L. REV. 475 (1960). See also 44 GEO. L.J. 426 (1956); 35 N.C.L. REV. 160 (1956).

[5] No rule of thumb can be devised to test the sufficiency of the conditions which are urged as insurance that the corporation will receive the contemplated benefit. The most that can be said is that in each case there must be some element which, within reason, can be expected to lead to the desired end. What that element may be can well differ in each case.

Kerbs v. California Eastern Airways, 33 Del. Ch. 69, 76, 90 A.2d 652, 657 (Sup. Ct. 1952).

[6] Where a gift or waste of corporate assets is concerned, shareholder ratification is not effective against the protest of a minority stockholder. Shareholder ratification to be effective in these circumstances must be unanimous. Rogers v. Hill, 289 U.S. 582, 591 (1933). *Accord*, Kaufman v. Shoenburg, 33 Del. Ch. 211, 91 A.2d 786 (Ch. 1952); Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (Ch. 1948).

[7] 5 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 2143 (Rev. ed. 1952) [hereinafter cited as FLETCHER].

[8] Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (Ch. 1948); 5 FLETCHER § 2142.

[9] See Wise v. Universal Corp., 93 F. Supp. 393 (D. Del. 1950); Olson Bros. v. Englehart, 211 A.2d 610 (Del. Ch. 1965); Sandler v. Schenley Indus., Inc., 32 Del. Ch. 46, 79 A.2d 606 (Ch. 1951); Eliasburg v. Standard Oil Co., 23 N.J. Super. 431, 92 A.2d 862 (Ch. 1952).

[10] See Wyles v. Campbell, 77 F. Supp. 343 (D. Del. 1948); Forman v. Chesler, 39 Del. Ch. 484, 167 A.2d 442 (Sup. Ct. 1961).

tract sense, adopting instead a rule based on benefit to the corporation. The rule, first announced in the leading case of *Kerbs v. California Eastern Airways*,[11] has been stated as follows:

> Each stock option must be tested against the requirements that it contains conditions, or that surrounding circumsances are such, that the corporation may reasonably expect to receive the contemplated benefit from the grant of the options, and there must be a reasonable relationship between the value of the benefits passing to the corporation and the value of the options granted.[12]

The presence of the legal consideration is partial but not conclusive assurance that the corporation will receive the benefit it expects to gain from the issuance of the options.

In the *Kerbs* case a stock option plan was adopted by an interested board, five of the eight directors ultimately benefiting under the plan. The proposal, approved by a majority of the stockholders,[13] provided that the options were to be exercisable at any time within a five-year period and, in addition, could be exercised for a period of six months after the termination of the optionee's employment. In invalidating the plan, challenged by a minority shareholder as being without consideration to the corporation, the court found the fact that the optionee could have resigned and still exercised his option rights *in toto* did not reasonably insure that the corporation would receive the contemplated benefit—the retention of the services of the employee.

Although *Kerbs* stood on a lack of consideration to the corporation, the Delaware court indicated that, had consideration been present, it would investigate the reasonable relationship between the value of the options granted and the value of the services rendered even where the plan had been ratified by a majority of the stockholders.[14] This approach, which amounts to judicial review of the

[11] 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952); Annot., 34 A.L.R.2d 839 (1954). See generally Dean, *Employee Stock Options*, 66 HAR. L. REV. 1403 (1952). See also Dwight, *Employee Stock Options: The Clydesdale Rule*, 52 COLUM. L. REV. 1003 (1952); 62 YALE L.J. 84 (1952).

[12] Olson Bros. v. Englehart, 211 A.2d 610, 612 (Del. Ch. 1965).

[13] Ratification by a majority of the stockholders cures any voidable defect in the action of the board of directors and is effective for all purposes unless the action of the directors constitutes a gift of corporate assets or is *ultra vires*, illegal, or fraudulent. See Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904 (Sup. Ct. 1938); 5 FLETCHER § 2139.

[14] Kerbs v. California Eastern Airways, 33 Del. Ch. 69, 75, 90 A.2d 652, 656 (Sup. Ct. 1952). See note 13 *supra*.

business judgment of the directors, was even more evident in *Gottlieb v. Heyden Chem. Corp.*,[15] decided simultaneously with *Kerbs*. In reversing summary judgment for the defendant corporation, the Delaware Supreme Court held that the interested board must satisfy the court that the option was as favorable a bargain to the corporation as if the directors had been dealing with outsiders. On rehearing, however, the court rested the burden of proof as to the reasonable relation between the values of the options granted and benefits received on the directors only absent shareholder ratification, noting that such approval would not preclude a judicial inquiry into the adequacy of consideration to the corporation where the board of directors was interested.[16]

The term "consideration" as used in the *Kerbs* and *Gottlieb* decisions is somewhat misleading, since it is apparent that there must be something more than the proverbial "peppercorn." In *Beard v. Elster*,[17] the Delaware Supreme Court clarified the meaning of consideration as applied to stock options, noting that the use of this term in *Kerbs*

> was possibly ill-advised since it is regarded, apparently, by some as a measurable *quid pro quo* . . . . It, of course, by the very nature of things cannot be that. It is incapable of measurement except in terms of business judgment that the plan will spur employees on to greater efforts which in the long run will benefit the corporation.[18]

The *Beard* case, a pivitol decision in this area, applied to stock options the traditional Delaware policy of generously recognizing

[15] 33 Del. Ch. 82, 90 A.2d 660 (Sup. Ct. 1952), *on reargument*, 33 Del. Ch. 177, 91 A.2d 57 (Sup. Ct. 1952); 101 U. PA. L. REV. 407.

[16] On a motion for summary judgment by the defendants in a stockholder's action, the burden of proof, absent shareholder ratification, is on the interested directors to show to the court's satisfaction that the directors did, in fact, act in utmost good faith and exercised scrupulous fairness. The plaintiff does not have the burden of coming forward with further evidence to demonstrate that there was a genuine issue of material fact relating to the question of fairness until the moving defendant has discharged his burden of negating the plaintiff's claim of unfairness. If the stockholders ratified the plan, the burden of proof on the directors is reduced to showing that the terms of the plan were not so unbalanced as to amount to waste or that the question is such a close one factually as to fall within the realm of sound business judgment. Alcott v. Hymen, 40 Del. Ch. 449, 208 A.2d 501 (Sup. Ct. 1965).

[17] 39 Del. Ch. 153, 160 A.2d 731 (Sup. Ct. 1960); 2 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 405 (1961); 6 How. L.J. 213 (1960).

[18] *Id.* at 160, 160 A.2d at 736.

the business judgment of the directors. Prior to *Beard* the Delaware courts had not clearly recognized incentive as sufficient benefit to the corporation to support an option.[19] However, the courts had viewed incentive as the motivation for granting options but had required a showing that existing conditions or circumstances reasonably insured that the corporation would, in fact, receive the contemplated benefit.[20] Rather than conclude that incentive was not sufficient benefit to the corporation, the court placed the burden of proof on the objector to show that there was no reasonable relation between the values of the options granted and the services rendered.[21] Absent such a showing, the proper solution was to accept the bona fide business judgment of the directors.[22]

This view was carried to its logical conclusion in *Olson Bros., v. Englehart.*[23] The interested board of a derelict corporation, termed an "empty shell"[24] by the court, adopted an option plan later ratified by a majority of the stockholders. The court upheld the validity of the options even though several directors seeking to exercise them were no longer employed by the corporation. The fact that the directors had remained with the corporation until their services were no longer required vindicated the sound business judgment of the board.[25] As the objector had failed to demonstrate conclusively that the value of the options had no reasonable relation to the value of the services rendered,[26] the court accepted the directors' decision.

[19] See Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 82, 90 A.2d 660 (Sup. Ct. 1952); Kerbs v. California Eastern Airways, 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952); Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (Ch. 1948).

[20] See Kaufman v. Shoenburg, 33 Del. Ch. 211, 91 A.2d 786 (Ch. 1952).

[21] See note 16 *supra.*

[22] After the *Kerbs* and *Gottlieb* decisions, Delaware amended its statute making directors' decisions as to consideration for the issuance of options conclusive absent actual fraud. DEL. CODE ANN. tit. 8, § 157 (Supp. 1964). See, *e.g.,* N.C. GEN. STAT. § 55-46(f) (1965). *But see* Frankel v. Donovan, 35 Del. Ch. 443, 120 A.2d 311 (Ch. 1956).

[23] 211 A.2d 610 (Del. Ch. 1965).

[24] Orzeck v. Englehart, 41 Del. Ch. 223, 195 A.2d 375 (Sup. Ct. 1963).

[25] It appears that if the optionee remains in the corporation's employ until the contemplated benefit has passed to the firm, the court will uphold the option by the application of a test of "hindsight," despite an absence of conditions insuring its receipt. See Olson Bros. v. Englehart, 211 A.2d 610, 615 (Del. Ch. 1965); Beard v. Elster, 39 Del. Ch. 153, 165, 160 A.2d 731, 738 (Sup. Ct. 1960).

[26] The issue was "in the twilight zone where reasonable businessmen, fully informed, might differ." Beard v. Elster, 39 Del. Ch. 153, 165, 160 A.2d 731, 738 (Sup. Ct. 1960).

While state law controls the validity of stock options challenged by minority stockholders, it has been noted that the tax benefits gained by compliance with the Internal Revenue Code provisions[27] often motivate the adoption of a plan. In 1964, Congress, recognizing the abuses inherent under the old restrictive stock option provisions but convinced that stock options could provide incentive to key personnel, made radical amendments now appearing as sections 421 through 425 of the Code.[28] The former restrictive stock option provisions are now found in section 424 and, with certain exceptions, relate only to options granted prior to January 1, 1964.[29] The qualified stock option[30] is intended by Congress to replace the former restricted stock option as an incentive to personnel whose individual efforts influence the fortunes of their firm.[31] This plan is to be distinguished from the employee stock purchase plan,[32] required to be made available to all employees on a basis that does not discriminate in favor of supervisory or highly compensated personnel,[33] although both plans receive the favorable tax rates previously accorded the restricted stock option.

Although the new rules of the 1964 Revenue Act have substantially increased the technical difficulties of devising and exercising options,[34] the amended provisions have eased the burden of drafting a plan that complies with both state law and the Code requirements. The statute requires the existence of a written plan ratified by the stockholders,[35] which insures that they are apprised of and approve the plan.[36] This ratification would then seem to be sufficient in questions concerning the burden of proof as to the

[27] INT. REV. CODE OF 1954, §§ 421-425.

[28] See generally Baker, *Employee Stock Option Plans Under the Revenue Act of 1964,* 20 TAX L. REV. 77 (1964).

[29] INT. REV. CODE OF 1954, § 424(c)(3).

[30] INT. REV. CODE OF 1954, § 422.

[31] H.R. REP. No. 749, 88th Cong., 1st Sess. 64 (1963); S. REP. No. 830, 88th Cong., 2d Sess. 88 (1964).

[32] INT. REV. CODE OF 1954, § 423.

[33] INT. REV. CODE OF 1954, § 423(b)(4)(D).

[34] See Rubenfeld, *Qualified Stock Options: Some Developing Problems Under the 1964 Revenue Act,* 21 J. TAXATION 140 (1964). See also Baker *supra* note 28.

[35] INT. REV. CODE OF 1954, § 422(b)(1).

[36] In order to ratify effectively an option plan adopted by an interested board, shareholders must be given reasonably full information as to its advantages and disadvantages and ratification extends only to things about which the shareholders are informed. See Gaynor v. Buckley, 318 F.2d 432 (9th Cir. 1963); Kaufman v. Shoenburg, 33 Del. Ch. 211, 91 A.2d 786 (Ch. 1952).

reasonable relation between the options granted and the benefits received under state law.[37] Too, the requirement that the option price be the fair market value of the stock at the time the option is granted[38] reduces the compensatory nature of the option and is additional evidence of reasonableness.

Under the new tax provisions, the employee must remain in the corporation's employ at all times from the date of the granting of the option until a date three months before its exercise.[39] If the option complies with the statute in this respect, it would seem by implication to meet the requirements of state law that there be a valid contract of employment or other device to retain the continued services of the optionee as long as this is sufficient benefit to the corporation under the *Kerbs* test.[40] It would also seem to negate the court's argument in *Kerbs* that compliance with the Code provisions does not reasonably insure the corporation will receive the contemplated benefit.[41] However, if the corporation is best to insure the continued services of the optionee, the plan should provide that the options granted may be exercised in installments spaced over the entire period of the option, in no event more than five years from the date of the grant of the option.[42]

The new Internal Revenue Code provisions have forced firms to decide whether favorable tax rates are the primary reason for granting options. If so, the plan must recognize and comply with the Code requirements. Having complied with the tax statute the corporation still may exercise broad discretion as to the conditions that it may impose on the enjoyment of options by executives, but that must be included to insure benefit to the corporation as required by state law. A balancing of interests must be considered; for if too many restrictions are imposed on the employee's enjoyment of that right, the purpose of the plan, employee incentive, may well be defeated.

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[37] See note 16 *supra*, as to the burden of proof.
[38] INT. REV. CODE OF 1954, § 422(b)(4).
[39] INT. REV. CODE OF 1954, § 422(a)(2).
[40] See note 12 *supra*, and accompanying text.
[41] See note 2 *supra*.
[42] INT. REV. CODE OF 1954, § 422(b)(3). See, *e.g.*, Gruber v. Chesapeake & O. Ry., 158 F. Supp. 593 (N.D. Ohio 1958).

Criminal Law—Appellate Review of Legal but Excessive Sentences

In 1907 England recognized the right of a felon to seek review of his conviction,[1] thus giving full effect to a slowly developed concept[2] that has now become so firmly entrenched in our system of jurisprudence that few would question its value. However, the development may not yet have ended, for the merits of appellate review, so obvious and unquestioned when applied to pre-conviction proceedings, are still accorded surprisingly little recognition when applied to the equally crucial proceedings after conviction. Thus, the defendant, whose rights are so amply protected while he stands accused, is deprived of the most basic of all safeguards when it comes to the sentence he must serve.[3] The paradoxical nature of this "deliberate abandonment of the legal norm after conviction"[4] is readily apparent, but in the United States[5] only a minority of the jurisdictions provide for appellate review of legal but excessive sentences.

The position of the North Carolina Supreme Court on this matter was reiterated in *State v. Stubbs*[6] where the defendant was convicted of committing the "crime against nature" in violation of section 14-177 of the North Carolina General Statutes.[7] In a vain attempt to obtain appellate review of his sentence of imprisonment for not less than seven nor more than ten years, he contended that this was cruel and unusual punishment. But the court, concluding

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[1] Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 3.

[2] The *vox populorum* is final. Such was true of the early Roman law, as well as early common law. Indeed, the English common law was exceedingly slow in recognizing any judicial review in criminal cases. When appellate review was finally recognized, it was not a matter of right, but was permitted only upon consent of the Crown. Not until 1705 did review upon request become permissible in cases involving misdemeanors . . . .

Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences,* 15 VAND. L. REV. 671, 672 (1962).

[3] Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences,* 21 BROOKLYN L. REV. 2 (1954).

[4] Kadish, *Legal Norm and Discretion in the Police and Sentencing Process,* 75 HARV. L. REV. 904, 919 (1962).

[5] The United States is the only country that allows "a single judge to set a minimum sentence at his own dictate." Second Circuit Court of Appeals Judicial Conference, *Appellate Review of Sentences,* 32 F.R.D. 249, 269 (1962).

[6] 266 N.C. 295, 145 S.E.2d 899 (1966).

[7] N.C. GEN. STAT. § 14-177 (1953).

that the sentence was within the limits authorized by statute,[8] persisted in its traditional approach and held that when "punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense."[9]

North Carolina's refusal to review legal but excessive sentences is unquestionably the same rule presently applied by the federal courts. Under the Act of 1879 the old circuit courts held that the statutory authority "to pronounce final sentence and to award execution thereon"[10] gave them the power to render a sentence different from that of the district court.[11] But when the circuit courts of appeal were created, the view was adopted that the omission of the crucial language repealed the old law by implication in spite of some suggestions that the power was preserved by cross reference to the Act of 1879.[12] The statutory authority "to affirm, modify . . . or reverse" still exists,[13] but this provision has been largely ignored[14] with the result that "since 1891, federal upper courts have unswervingly denied themselves the power to revise sentences on appeal."[15]

The most searching judicial examination of the federal position is perhaps that of Judge Frank in the case of *United States v. Rosenberg*.[16] Julius and Ethel Rosenberg were convicted of delivering information to Russia and sentenced to death under section thirty-two of the United States Code, title fifty.[17] In stating his reasons for the use of maximum punishment the trial judge displayed something less than detached objectivity by holding the defendants responsible for causing the Korean War and altering the

[8] At the time of his conviction the statute authorized a sentence of not less than five nor more than sixty years. A subsequent amendment, however, deemed the offense a felony and provided for a fine or imprisonment in the discretion of the court. Thus, the sentence was well within the limits of the statute under which Stubbs was convicted but, assuming that the new statute will not be construed as providing for specific punishment and will therefore be limited to a maximum punishment of ten years under N.C. GEN. STAT. § 14-22, it approached the maximum allowable at the time of appeal. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

[9] 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966).

[10] Act of March 3, 1879, ch. 176, § 3, 20 Stat. 354.

[11] United States v. Wynn, 11 Fed. 57 (C.C.E.D. Mo. 1882); Bates v. United States, 10 Fed. 92 (C.C.N.D. Ill. 1881).

[12] United States v. Rosenberg, 195 F.2d 583, 604 n.25 (2d Cir. 1952).

[13] 28 U.S.C. § 2106 (1964).

[14] United States v. Rosenberg, 195 F.2d 583, 605 (2d Cir. 1952).

[15] *Id.* at 604 n.25.

[16] 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

[17] Act of June 15, 1917, ch. 30, title I, § 2, 40 Stat. 218-19 (now 18 U.S.C. 794 (1964)).

course of history.[18] In spite of the severity of the sentence and the somewhat shaky basis proffered, Judge Frank felt compelled to reject the argument that section 2106 of the Judicial Code granted the power to modify sentences on appeal. Were this a case of first impression, he reasoned, the section would require serious consideration, but because "for six decades federal decisions . . . have denied the existence of such authority, it is clear that the Supreme Court alone is in a position to hold that Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute."[19] In addition an eighth amendment argument was rejected because, even assuming that a sentence under a constitutional statute could be held cruel and unusual, there were no circumstances in the case to justify a holding that this sentence shocked the conscience and sense of justice of the community. It is necessary, Judge Frank said, "to treat as immaterial the sentences given (or not given) to the other conspirators,[20] and also to disregard what sentences this court would have imposed or what other trial judges have done in other espionage or treason cases. For such matters do not adequately reflect the prevailing mood of the public."[21]

The United States Supreme Court has never interpreted section 2106 in regard to the modification of sentences on appeal but it has expressed a disinclination to enter this area. In *Gore v. United States*[22] the defendant received multiple sentences for an offense consisting of a single sale of narcotics. Relying on the intent of Congress and rejecting a double jeopardy argument, Mr. Justice Frankfurter's opinion for the Court upheld the sentences declaring that the proper apportionment of punishment was within the do-

[18] "I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. . . . But in your case, I believe your conduct . . . has already caused, in my opinion, the Communist aggression in Korea, with the resulting casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country." United States v. Rosenberg, 195 F.2d 583, 605-06 n.28 (2d Cir. 1952).

[19] *Id.* at 605-06.

[20] It is, perhaps, worthy of note that one of the conspirators, Sobell, was sentenced to thirty years imprisonment (*id.* at 590) and that another who had helped bring "to justice the arch criminals in this nefarious scheme" received only a fifteen year sentence (*id.* at 606 n.28).

[21] *Id.* at 609.

[22] 357 U.S. 386 (1958).

main of penology and peculiarly a question of legislative policy. Equally so, he continued, "are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. . . . This Court has no such power."[23]

One case in the federal courts stands alone in this area. *United States v. Wiley*[24] involved five defendants, four of whom pleaded guilty to an indictment for possession of stolen goods under section 659 of the United States Code, title eighteen. Of these four the ringleader, a four-time convicted felon, received a two-year sentence and the other three, each of whom had a prior record, received sentences of one year and a day. On the other hand Wiley, who elected to stand trial, was convicted and sentenced to three years even though he was, as the trial judge admitted, only a minor participant. On appeal the Second Circuit Court of Appeals remanded the case for resentencing and observed, "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime. . . . It is evident that the punishment imposed . . . on Wiley was . . . only in part for the crime for which he was indicted."[25]

The situation in the federal courts, then, appears somewhat static for the time being but there are some indications of development in the states. No less than ten states have, between 1843 and 1964, provided express statutory authorization for appellate review of sentences.[26] In those jurisdictions, of course, no real problem is encountered though a few of the courts, Arizona and Illinois for example, proclaim that sentences will be modified only for abuse of discretion.[27] In only two states, New Jersey[28] and Tennessee,[29]

[23] *Id.* at 393.

[24] 278 F.2d 500 (1960).

[25] *Id.* at 504.

[26] ARIZ. REV. STAT. ANN. § 13-1717(B) (1956); CONN. GEN. STAT. REV. § 51-196 (Supp. 1963); HAWAII REV. LAWS § 212-14 (Supp. 1960); IDAHO CODE ANN. § 19-2821 (1948); ILL. ANN. STAT. ch. 38, § 121-9 (Smith-Hurd 1964); IOWA CODE ANN. § 793.18 (1946); MASS. ANN. LAWS ch. 278, § 28(B) (1956); NEB. REV. STAT. § 29-2308 (1956); N.Y. CODE CRIM. PROC. § 543; ORE. REV. STAT. § 138.050 (1964). Iowa was the first state to adopt such a statute. IOWA REV. STAT. § 47-75 (1843).

[27] State v. Cuzick, 97 Ariz. 130, 397 P.2d 629 (1964); People v. Hobbs, 56 Ill. App. 2d 93, 205 N.E.2d 503 (1965). *But see* State v. Monks, 96

have the courts assumed the power completely without the aid of statute. But by far the more typical are the states with ambiguous statutes granting the appellate courts the authority to "reverse, affirm, or modify the judgment"[30] of the lower courts. Only a few courts in states of this type have used the statutes to modify sentences[31] but their example points up the potential for change in a large number of states where the power is not now exercised.[32]

In North Carolina the supreme court is given statutory authority in any case to "render such sentence . . . as on inspection of the whole record it shall appear to them ought in law to be rendered. . . ."[33] Although that provision appears plain enough on its face, a search of the cases indicates that it has never been seriously considered as a basis for the modification of sentences on appeal. Instead, the arguments discussed by the court have repeatedly been based either on cruel and unusual punishment or on abuse of discretion.

The court in more recent cases has made some effort, not apparent in the early cases, to separate the two arguments.[34] If any distinction can be drawn here, it would seem to be that no sentence within the statutory limits can be considered cruel and unusual but that a sentence within the discretion of the trial judge can be reviewed where there is palpable abuse. However, such a distinction does not seem particularly valuable analytically for in either instance the contention urged must ultimately be the same; *i.e.*, under the circumstances of the case the sentence is a greater penalty than ought to have been imposed. In studying the cases, then, it is help-

Ariz. 354, 395 P.2d 711 (1964); State v. Evard, 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965).

[28] See, *e.g.*, State v. Hall, 87 N.J. Super. 480, 210 A.2d 74 (Super. Ct. App. Div. 1965).

[29] See, *e.g.*, Brooks v. State, 187 Tenn. 361, 215 S.W.2d 785 (1948).

[30] ARK. STAT. ch. 27, § 2144 (1947).

[31] See, *e.g.*, Commonwealth v. Garramone, 307 Pa. 507, 161 Atl. 733 (1932).

[32] A 1962 survey shows the number of states in which the question is undecided as twenty-two, but of the fifteen listed as denying the power by case law eight are shown to have statutes of the ambiguous type. Mueller, *supra* note 1, at 688-97.

[33] N.C. GEN. STAT. § 7-11 (1953). Also worthy of consideration is the language of N.C. GEN. STAT. § 7-10 (1953): "The Supreme Court has jurisdiction to review, upon appeal . . . any matter of law or legal inference."

[34] *Compare* State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950), *with* State v. Hamby, 126 N.C. 1066, 35 S.E. 614 (1900).

ful to look at all of those in which this basic contention has been made.

Although the contention has been rejected in almost every instance regardless of the argument used, the precedent is not as firm as the pat language of the court implies, for the early cases, later cited as authority for denying the power of review, actually left the question open. Thus, in one of the earliest cases in which the contention was urged, the court found that a statute permitting the sheriff to collect the fine of an indigent defendant by renting him to the highest bidder was not open to the criticism that the punishment was "too severe or not of an usual kind." But the court did recognize that punishment open to that criticism would raise a question about their power to review it.[35] The question raised, however, appeared to be resolved by *State v. Driver*[36] where the court held clearly that a five-year sentence for wife beating was cruel and unusual and that there could be no such anomaly as an "unconstitutional judgment of an inferior Court affecting the liberty of the citizen, not the subject of review by the Court of Appeals, where every order or judgment involving a matter of law or legal inference is reviewable!"[37]

The cases following *Driver* involved relatively short sentences, typically two years or less, and rarely provided the court with an opportunity to invoke that holding. However, the possibility was not foreclosed for in each case the court found reason to point out either that the discretion had not been abused or that the sentence did not err on the side of severity.[38] Undeniably, the question was still open in 1914 for in *State v. Lee,*[39] where the conviction of a Negro boy for robbery of eleven cents was reversed for error in the charge, the court said that while it was unnecessary to decide the extent of their power to review the judge's discretion, a nine-year sentence was not commensurate with such an offense. Again,

[35] State v. Manuel, 20 N.C. 144 (1838).
[36] 78 N.C. 423 (1878).
[37] *Id.* at 427.
[38] See, *e.g.,* State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906); State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900); State v. Hamby, 126 N.C. 1066, 35 S.E. 614 (1900); State v. Apple, 121 N.C. 584, 28 S.E. 469 (1897); State v. Reid, 106 N.C. 714, 11 S.E. 315 (1890); State v. Miller, 94 N.C. 904 (1886); State v. Pettie, 80 N.C. 367 (1879).
[39] 166 N.C. 250, 80 S.E. 977 (1914).

in *State v. Woodlief*[40] where the sentence was only thirty days, the court said, "We are not prepared to say that this Court cannot review the judge as to the quantum of punishment, even where there is a limit set to the exercise of his discretion; but if the right exists, we will not do so except in a plain case. . . ."[41]

In spite of this precedent the court in 1929 dismissed the contention out of hand. In *State v. Daniels*[42] the court in a per curiam opinion held, apparently for the first time, that a sentence authorized by law "cannot be held to be 'cruel or unusual.' "[43] However, not one of the four cases cited in support of this proposition had failed to consider the possibility of reviewing sentences and certainly none of them had foreclosed it.[44] Four years later the court went so far as to cite *Woodlief* and *State v. Jones*[45] for a similar holding.[46] Since the court said in *Jones* that there was nothing in the record to show abuse of discretion and in *Woodlief* that the quantum of punishment might be reviewed in a proper case, the authority is at least questionable. But the language, once used, was soon followed and in 1940 the error was compounded when in *State v. Brackett*[47] the court cited *Daniels* for the same easy rule.

In the next twenty years there was from time to time a slight recognition that some limitation existed but on the whole the precedent was taken as established.[48] For example, where a defendant sought review of a sentence for obtaining money by false pretenses, the court answered that authorized punishment could not be cruel and unusual and that the discretion of the trial judge could be reviewed "only in case of manifest gross abuse."[49] But the possibility of gross abuse occurring seems to have diminished considerably

[40] 172 N.C. 885, 90 S.E. 137 (1916).
[41] *Id.* at 891, 90 S.E. at 140.
[42] 197 N.C. 285, 148 S.E. 244 (1929).
[43] *Id.* at 286, 148 S.E. at 244.
[44] State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906); State v. Pettie, 80 N.C. 367 (1879); State v. Manuel, 20 N.C. 144 (1838).
[45] 181 N.C. 543, 106 S.E. 827 (1921).
[46] State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932).
[47] 218 N.C. 369, 11 S.E.2d 146 (1940).
[48] See, *e.g.*, State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Lee, 247 N.C. 230, 100 S.E.2d 372 (1957); State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950); State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949); State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Wilson, 218 N.C. 769, 12 S.E.2d 654 (1941).
[49] State v. Stansbury, 230 N.C. 589, 55 S.E.2d 185 (1949).

when the court decided *State v. Wright* in 1964.[50] In that case the defendant forged a check for only a small amount but was sentenced to prison for seven to ten years. The court noted that no more than ten years could be given for a check large enough to break a bank, quoted *Woodlief* to point out that there is a limit to the trial judge's discretion, but then concluded, "If the sentence is disproportionately long, the Governor and the Board of Paroles have ample authority to make adjustment. This Court, lacking such authority, must affirm the judgment."[51]

Thus, the rule in North Carolina and the majority of jurisdictions in this country is, undeniably, no appellate review of legal sentences. But a potential for change exists. In many jurisdictions, including North Carolina, there is statutory authority available to a willing court. And in North Carolina and the federal courts there is a precedent, however thin, that can be argued in a proper case. Also, proposed congressional bills indicate forthcoming legislative scrutiny.[52] Further, the recently established principle of applying the eighth amendment to the states[53] and the correlative tendency to examine sentences more closely[54] suggests that reluctant state courts and legislatures may yet be prodded by the federal courts. An example of this possibility occurred recently in the Sixth Circuit Court of Appeals when a state prisoner, sentenced to life imprisonment without possibility of parole under an habitual criminal statute, sought federal habeas corpus on the ground that the sentence was so excessive as to constitute cruel and unusual punishment. The district judge relied on precedent established before *Robinson v. California* to reject the contention but the circuit court of appeals, while instructing the petitioner to exhaust his state remedies, held that reliance on such authority was no longer adequate.[55]

Perhaps the strongest argument for the appellate review of legal sentences is the opportunity it provides for the establishment of a jurisdiction-wide sentencing policy that would reflect current penology. Under the present rule it is manifest that the "courts are

[50] 261 N.C. 356, 134 S.E.2d 624 (1964).
[51] *Id.* at 358, 134 S.E.2d at 625.
[52] S. 2722, 89th Cong., 1st Sess. (1965).
[53] Robinson v. California, 370 U.S. 660 (1962).
[54] See Rudolph v. Alabama, 375 U.S. 889 (1963) (dissenting opinion); Driver v. Hinnant, 356 F.2d 761 (1966), 44 N.C.L. REV. 818.
[55] Goss v. Bomar, 337 F.2d 341 (6th Cir. 1964).

governed by individual and varying philosophies of crime control rather than by an orderly and consistent approach for the judiciary as a whole."[56] Thus, in North Carolina a trial judge remains free to follow such maxims as the one cited by the supreme court in 1925, "The deterrence theory is the kingdom of the criminal law."[57] But, quite aside from differences in active philosophies, the more frightening, though hopefully more rare, possibility exists for arbitrary and emotional judgments or simple mistake.[58] This is not to suggest that all discretion should be taken from the trial judge but rather that the objective should be "to provide a technique whereby discretion shall be allowed ample creative scope and yet be subject to some degree of discipline."[59] Without such discipline trial judges are left in a lonely position indeed and respect for the law on the part of those who come under its scrutiny suffers.

MARTIN N. ERWIN

Criminal Law—Nolle Prosequi With Leave—Possibility of Abuse

On February 24, 1964, an Orange County grand jury indicted Peter Klopfer for a trespass that had occurred on January 3, 1964. The defendant entered a plea of not guilty during a special criminal session of Orange County Superior Court in March, 1964. The jury was unable to agree on a verdict, and a mistrial was declared. The defendant was ordered to return for retrial during the same session, but the case was not reached at this time. Approximately one year later the solicitor indicated to the defendant's attorney that he intended to have a *nolle prosequi*[1] with leave entered. At

[56] Bennett, *The Sentence—Its Relation to Crime and Rehabilitation,* 1960 U. ILL. L.F. 500.

[57] State v. Swindell, 189 N.C. 151, 155, 126 S.E. 417, 418 (1925).

[58] In *Stubbs* it should be noted that the trial judge obviously intended to fix the sentence on the lower end of the permitted scale. In view of the fact that the old statute allowed a fifty-five year range of discretion, almost any factor could have caused him to add two years to the minimum. It is at least open to speculation that under the new statute the sentence would have been fixed at the lower end of the new scale, yet under the existing system the judicary must leave the correction of its mistakes to other branches of government.

[59] Second Circuit Court of Appeals Judicial Conference, *Appellate Review of Sentences,* 32 F.R.D. 249, 273 (1962).

[1] *Nolle prosequi* will hereinafter be abbreviated as *nol. pros.*

the April, 1965, session, the defendant in open court opposed the entry of a *nol. pros.* with leave to the trespass charge. The court indicated its approval of a *nol. pros.* with leave, but the solicitor then asked that the case be retained in its trial docket status. The case was not listed on the trial calendar for the August, 1965, session, and the defendant filed a motion to ascertain its status. The case was considered during the August, 1965, session, and the solicitor's motion for entry of a *nol. pros.* with leave was allowed over the defendant's objection. The defendant appealed, contending that the entry of a *nol. pros.* with leave under the circumstances of the case deprived him of the right to a speedy trial secured to him by the constitutions of North Carolina and the United States. The North Carolina Supreme Court held that the solicitor and the trial judge followed customary procedure in entering the *nol. pros.* with leave and that their discretion was not reviewable under the facts disclosed by the record.[2]

It is well settled in North Carolina that the entry of a *nol. pros.* is not an acquittal and does not bar a subsequent prosecution of the defendant for the same offense.[3]

> A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time . . . but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he may be tried upon it.[4]

The solicitor or prosecuting officer normally decides when a *nol. pros.* will be entered. The solicitor has a discretionary power with respect to a *nol. pros.*, and he is responsible for its proper exercise.[5] The court will not usually interfere with the decisions of the solicitor unless his power is used oppressively.[6] However, since the

[2] State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909, *cert. granted*, —— U.S. —— (1966).

[3] See, *e.g.*, State v. Smith, 170 N.C. 742, 87 S.E. 98 (1915); State v. McNeill, 10 N.C. 183 (1824).

[4] State v. Thornton, 35 N.C. 256, 257-58 (1852). See Wilkinson v. Wilkinson, 159 N.C. 265, 266, 74 S.E. 740, 741 (1912).

[5] State v. Thompson, 10 N.C. 613 (1825).

[6] *Ibid.*

solicitor acts under the control of the court,[7] the entry of a *nol. pros.* is always subject to final approval and assent of the court.[8]

Where a *nol. pros.* has been entered, neither the solicitor nor the clerk can order an arrest order issued without permission of the court.[9] This restraint is placed on the power of the solicitor to issue new process in order to prevent any abuse or oppression.[10] However, this restriction can be circumvented by the judge's discretionary entry of leave with the *nol. pros.*: leave may be given by the court at the time the *nol. pros.* is entered empowering the solicitor to issue another *capias* when and if he deems it proper to do so[11] without further permission of the court. A *nol. pros.* with leave authorizes the clerk to issue a new arrest order at the request of the solicitor.[12]

There are basically three legitimate uses for the *nol. pros.* or the *nol. pros.* with leave in North Carolina.

(1) There is a statutorily prescribed use of a *nol. pros.* with leave in all criminal actions where an indictment has been pending for two terms of criminal court, the defendant has not been apprehended, and a *nol. pros.* has not been entered.[13]

(2) The solicitor may enter a *nol. pros.* with or without leave against one or more multiple defendants in a case in order to obtain testimony against co-defendants.[14]

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[7] State v. Conly, 130 N.C. 683, 684, 41 S.E. 534, 540 (1902); State v. Moody, 69 N.C. 529, 531 (1873).

[8] N.C. Att'y Gen. Ruling, Letter of Oct. 7, 1953.

[9] State v. Smith, 129 N.C. 546, 547, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256, 258 (1852).

[10] Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912); State v. Thornton, 35 N.C. 256, 258 (1852).

[11] State v. Smith, 129 N.C. 546, 547, 40 S.E. 1 (1901).

[12] *Id.* at 547, 40 S.E. at 1. N.C. Att'y Gen. Ruling, Letter of Feb. 18, 1947.

[13] N.C. GEN. STAT. § 15-175 (1965):

> A nolle prosequi "with leave" shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a nolle prosequi has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. . . .

[14] See, *e.g.*, State v. Bullard, 253 N.C. 809, 810, 117 S.E.2d 722, 723 (1961) (defendant's objection to solicitor's entering a *nol. pros.* against another defendant in order to obtain testimony against objecting defendant overruled); State v. Ammons, 204 N.C. 753, 758, 169 S.E. 631, 633 (1933)

(3) A *nol. pros.* with or without leave may be entered by the solicitor if he finds available evidence insufficient to support a conviction.[15]

The North Carolina court has said that if the trial judge thinks it proper to grant leave at the time the *nol. pros.* is entered, it does not see why he may not do so.[16] However, the court clearly implies that the use of the *nol. pros.* with leave should be limited to cases where it is "necessary to so use it as to bring offenders to trial and justice."[17]

Since the entry of a *nol. pros.* does not terminate the prosecution on the indictment, the court has held that the two-year statute of limitations for misdemeanors is tolled.[18] Thus it does not matter when the trial takes place provided the bill of indictment was seasonably returned.[19]

The defendant in *State v. Klopfer* contended that the entry of the *nol. pros.* with leave was an arbitrary refusal by the state to prosecute the charge pending against him and, as such, deprived him of his right to a speedy trial.[20]

(entry of *nol. pros.* with leave in the presence of the jury as to some defendants not prejudicial to the remaining defendants).

[15] State v. Furmage, 250 N.C. 616, 622, 109 S.E.2d 563, 568 (1959) (discretionary power solicitor may exercise prior to prosecution).

[16] State v. Smith, 129 N.C. 546, 548, 40 S.E. 1 (1901).

[17] *Id.* at 547-48, 40 S.E. at 1. The defendant in *Klopfer* was not at large, nor was the state attempting to elicit testimony against any co-defendants. The only apparent legitimate basis for entering the *nol. pros.* with leave was a lack of sufficient evidence to convict the defendant. However, there was no indication that all possible evidence concerning the alleged offense was not at hand during the eighteen months between indictment and the entry of the *nol. pros.* with leave. The defendant did not deny his act, but contended that any trespass conviction in this case would be contrary to recent decisions of the United States Supreme Court. See note 20 *infra*. At least one state court has held that the court should refuse to allow a *nol. pros.* to be entered where the defendant is entitled to an acquittal. State v. Deso, 110 Vt. 1, 1 A.2d 710 (1938).

[18] State v. Williams, 151 N.C. 660, 661, 65 S.E. 908, 909 (1909).

[19] *Id.* at 661, 65 S.E. at 909; N.C. Att'y Gen. Ruling, Letter of Nov. 6, 1941.

[20] 266 N.C. 349, 350, 145 S.E.2d 909, 910 (1966). The motion in *Klopfer* objected to the entry of a *nol. pros.* with leave and asked that the case be permanently concluded. The motion contended

> that the continued pendency of said charge against the defendant is causing substantial and recurring problems in regard to the defendant's scheduling lecture and conference trips outside the State of North Carolina and trips outside the United States in connection with research projects of the defendant, said defendant being a Professor of Zoology at Duke University and said research projects

Article I, section 35 of the Constitution of North Carolina provides:

> All courts shall be open; and every person for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or *delay*.[21]

The North Carolina court has asserted that the right of a person accused of a crime to a speedy trial is a right guaranteed to all people basing their system of jurisprudence on the principles of common law.[22] In *State v. Patton*[23] the court said that the right to a speedy trial has been guaranteed since the Magna Carta and is embodied in the sixth amendment and in the North Carolina Constitution. The right to a speedy trial is expressly designed to prohibit arbitrary and oppressive delays that might be caused by the prosecution.[24] In *State v. Lowry*[25] the North Carolina court found federal protection of the right to a speedy trial unnecessary since the "fundamental law" of North Carolina fully secures to a defendant the right to a speedy trial. The determination of whether a speedy trial is afforded has to be determined in the light of the circumstances of each case, and the court has discretion in deciding what is a fair and reasonable time.[26]

The Supreme Court of the United States has not held expressly that the sixth amendment right to a speedy trial is made mandatory in state proceedings. However, the court has held that most of the other sixth amendment rights are binding on the states through the fourteenth amendment,[27] and at least one lower federal court has

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including projects for the Defense Department of the United States Government . . . .

The defendant's motion asserted that prosecution of the trespass offense was barred by the decisions of the United States Supreme Court in Blow v. North Carolina, 379 U.S. 684 (1965), and Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[21] Emphasis added. This section applies to both criminal and civil actions. See, *e.g.*, State v. Pope, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962); State v. Godwin, 216 N.C. 49, 59, 3 S.E.2d 347, 352 (1939). See N.C. CONST. art. I, § 17.

[22] State v. Webb, 155 N.C. 426, 429, 70 S.E. 1064, 1065 (1911).

[23] 260 N.C. 359, 363, 132 S.E.2d 891, 894 (1963), *cert. denied*, 376 U.S. 956 (1964).

[24] *Id.* at 364, 132 S.E.2d at 894.

[25] 263 N.C. 536, 542, 139 S.E.2d 870, 874 (1965).

[26] *Ibid.* See N.C. GEN. STAT. § 15-10 (1965), requiring speedy trial or discharge on commitment for *felony*.

[27] See, *e.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of

held that the federal guarantee of a speedy trial applies to the states.[28]

There is something of a practical conflict between the right of a defendant to a speedy trial and the use of a *nol. pros.* with or without leave, and it is obvious from the nature of the *nol. pros.* with leave[29] that it presents possibilities of abuse if granted indiscriminately by the court. This is especally so where it is employed on the grounds of lack of sufficient evidence for conviction.[30] A flaw in the scheme of criminal procedure that has the *potential* of denying a defendant the right to a speedy trial is pointed out by the situation in *Klopfer*. It would seem to be a practical and realistic solution to the problems of both the state and the defendant to require the solicitor, when his application for permission to enter a *nol. pros.* with leave is challenged by the defendant, to show just cause for such an entry that has the effect of indefinitely suspending the prosecution and tolling the statute of limitations.[31] The time required for this simple, and doubtless infrequently needed, procedure would be negligible, but the effect would be to insure the protection of a defendant's right to a speedy trial while leaving the legitimate usefulness of the *nol. pros.* with leave unimpaired.[32]

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prosecuting witness); Escobedo v. Illinois, 378 U.S. 478 (1964) (counsel prior to trial); Douglas v. California, 372 U.S. 353 (1963) (counsel at appellate level); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel at trial).

[28] Suit v. Ellis, 282 F.2d 145 (5th Cir. 1962). *Contra,* Phillips v. Nash, 311 F.2d 513 (7th Cir. 1962); Maryland v. Kurek, 233 F. Supp. 431 (D. Md. 1964).

[29] See notes 11 and 12 *supra.* The *nol. pros.* without leave does not present the potentiality of misuse that is present where leave is granted without a showing of good cause.

> To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias,* after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. . . .

Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912).

[30] This situation opens the door to potential harassment of the defendant by the prosecution. In cases where a *nol. pros.* without leave is entered this possibility is practically precluded.

[31] See notes 3, 18 & 19 *supra.*

[32] In order for a *defendant* to obtain a continuance to have additional time to prepare for trial, the reasons for such delay must be fully established. The court has indicated that it is desirable, if not necessary, that an application for a continuance be supported by an affidavit showing sufficient grounds for the continuance. See State v. Gibson, 229 N.C. 497, 501, 50 S.E.2d 520, 523 (1948); State v. Banks, 204 N.C. 233, 237, 167 S.E.

The question of whether a speedy trial has been afforded a defendant is a determination that must be made on a case-by-case basis,[33] but it is important to provide a safeguard in advance where practicably possible so that this issue will not arise.

J. TROY SMITH, JR.

Damages—Contractual Limitation of Liability

If a purchaser of real estate is required to put up a good faith deposit before the sale is confirmed, he may provide in the sales contract that if he fails to purchase the property, the deposit shall be forfeited to the seller as liquidated damages. If the purchaser does default, what damages will the seller be able to obtain if the property is later sold at such a low price that the difference between the original and second sale prices is greater than the amount of deposit that the buyer forfeited? A court has the following alternatives:[1]

(1) To treat the stipulated sum retained as liquidated damages and limit the plaintiff's (seller's) recovery to that amount regardless of whether the actual damages suffered were more or less. Designating the sum liquidated damages primarily benefits the plaintiff (seller) by entitling him to his pre-estimation of his probable damages upon a showing of the breach without the necessity of proving actual damages and incidentally benefits the defendant (buyer) by setting his minimum and maximum liability.

(2) To treat the stipulated sum retained as a penalty and allow the plaintiff (seller) to recover his provable actual damages sustained because of the breach. Designating the sum a penalty primarily benefits the defendant (buyer) by placing upon the plaintiff (seller) the additional burden of establishing his actual damages, which are almost always lower, and incidentally benefits the plaintiff (seller) by removing the maximum limit to liability of the defendant (buyer).

851, 852 (1933); N.C. GEN. STAT. §§ 1-176, -177 (1953), -175 (Supp. 1965). The requisite of good cause that a defendant must show to obtain a continuance apparently is not required in actual practice of a solicitor when he seeks a *nol. pros.* with leave.

[33] See note 26 *supra.*

[1] For a general discussion of these alternatives, see 5 WILLISTON, CONTRACTS §§ 781A, 790 (3d ed. 1961).

(3) To treat the stipulated sum retained as a contractual limitation of liability to an agreed maximum and allow the plaintiff (seller) to recover his actual damages proved up to but not in excess of the limitation. Designating the sum a contractual limitation of liability *exclusively* benefits the defendant (buyer) by setting his maximum liability in case of a breach, leaving actual damages in a lesser amount to be established by the plaintiff (seller).

These alternatives were recently illustrated in *City of Kinston v. Suddreth*.[2] There a buyer forfeited a 4000-dollar deposit when he failed to comply with his bid. When the property later sold at a 5000-dollar "loss," the seller sued the buyer for the 1000-dollar difference. The seller's position was that the contract provision was a penalty which the court would not enforce, thus permitting a recovery of actual damages. The buyer demurred on the ground that the seller could recover no more than the agreed amount which the parties denominated liquidated damages. The court sustained the defendant's demurrer by interpreting the contract provision as a valid contractual limitation of liability to an agreed maximum instead of a liquidated damage clause or a penalty clause.

Contractual limitations of liability are not innovations in North Carolina law. Although not favored and construed strictly, contracts exempting a party from liability for his own negligence have been upheld.[3] Moreover, contractual modifications of liability, that is, insurance limits in the event of intentional death, are valid.[4] If liability can be eliminated or modified, the parties to a contract ought to be able to limit their liability to an agreed maximum amount, leaving actual losses in a lesser amount to be determined by the ordinary rules and principles of damages. In fact, writers generally recognize the validity of contracts limiting liability,[5] and North Carolina, with the aid of a federal statute, has allowed a telegraph company to limit its liability in case of faulty transmis-

[2] 266 N.C. 618, 146 S.E.2d 660 (1966).

[3] Hall v. Sinclair Refining Co., 242 N.C. 707, 89 S.E.2d 396 (1955). *Cf.* Miller's Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951).

[4] Williford v. Southern Fire Ins. Co., 248 N.C. 549, 103 S.E.2d 804 (1958); Daily v. Washington Nat'l Ins. Co., 208 N.C. 817, 182 S.E. 332 (1935).

[5] *E.g.*, 5 CORBIN, CONTRACTS § 1068 (1964); 5 WILLISTON, CONTRACTS § 781A (3d ed. 1961); RESTATEMENT, CONTRACTS § 339(1), comment *g* (1932).

sions.[6] The principal case stands with these decisions as a recognition of freedom of contract.

The importance of the decision, however, is that it establishes North Carolina as one of the few jurisdictions to consider an attempt to limit liability through a liquidated damage provision.[7] To call a liquidated damage clause a limitation of liability clause requires a willingness on the part of the court to interpret the contract because the two doctrines are inconsistent, differing both in intent and in effect.[8] A provision for liquidated damages is an attempt by the parties to pre-estimate the actual loss; if it is found to be valid,[9] the plaintiff must plead and prove only the breach. The stipulated amount is then awarded whether the actual loss is greater *or* less.[10] On the other hand, a limitation of liability clause is an attempt by one of the parties to limit his maximum liability; if it is valid,[11] the plaintiff must still plead and prove his damages after establishing a breach. If the actual damages are less than the limited amount, the plaintiff takes only the amount proved; if more, he takes the limited figure.[12]

Of course in construing a clause the parties' characterization of it in the contract is no more controlling than where courts have been called upon to construe a liquidated damage clause to be a penalty.[13]

[6] *Compare* Meadows v. Postal Tel. & Cable Co., 173 N.C. 240, 91 S.E. 1009 (1917) *with* Young v. Western Union Tel. Co., 168 N.C. 36, 84 S.E. 45 (1915).

[7] Fritz, *"Underliquidated" Damages as Limitation of Liability,* 33 TEXAS L. REV. 196 (1954).

[8] See authorities note 5 *supra.*

[9] Two tests are generally applied to determine the validity of a liquidated damages clause: if, judging from appearances at the time of making the contract, (1) the actual damages in case of breach are difficult to ascertain, and (2) the stipulated amount is reasonably proportional to the actual damages, the clause is generally valid. 47 IOWA L. REV. 964, 965-66 (1962).

[10] *Compare* Better Food Mkts., Inc. v. American Dist. Tel. Co., 40 Cal. 2d 179, 253 P.2d 10 (1953) (less) *with* Community Home Improvement Co. v. Turner, 80 N.Y.S.2d 629 (1947) (greater).

[11] While most authorities agree that limitation clauses are generally valid, there are no broad guides comparable to the two tests used in establishing the validity of liquidated damages clauses. There appears to be a general willingness to allow parties to protect themselves by limiting their liability to a reasonable amount. 47 IOWA L. REV. 964, 967 (1962).

[12] Western Union Co. v. Nestor, 309 U.S. 582 (1940).

[13] A provision has been construed a limitation of liability even though designated "liquidated damages," American Dist. Tel. Co. v. Roberts & Son, 219 Ala. 595, 122 So. 837 (1929), and though designated a "penalty," Cellulose Acetate Silk Co. v. Widnes Foundry, [1933] A.C. 20 (H.L. 1932).

Rather, courts interpreting clauses dealing with the parties' remedial rights have looked to the entire agreement—its scope, purpose and subject matter.[14] In this manner courts have seized upon the situation of the parties and the clause's express language of limitation, that is, liability limited and fixed at a specified amount[15] or not liable beyond a specified amount,[16] to construe the clause as a limitation of liability even though the specified amount was designated as liquidated damages. Other courts, despite the ever-present dicta that an underestimation is just as condemned as an overestimation of damages and will not be enforced,[17] have upheld the stipulated sum, which was much less than the actual damages, as a valid liquidated damage clause.[18] To accomplish the same result achieved through a valid limitation of liability provision, these latter courts had to adopt the foresight point of view and fictionalize the probabilities as they must have appeared to the parties at the time they contracted.[19]

The North Carolina court definitely picked the firmer foundation to achieve the result desired. But in deciding that the provision of the defendant's contract was a valid limitation of liability, the court has taken the final step in formulating a rule for the defendant's (promisor's) bar.[20] The initial step is revealed in prior North Carolina decisions, which, in almost every instance where no actual damages existed[21] or the actual damages sustained were less than the stipulated amount,[22] the buyer has not been held to his promise even though the parties designated the sum liquidated damages. The courts in this state have been very receptive to the argument that the stipulated sum is not a reasonable pre-estimate of probable damages but is merely "a *punishment,* the threat of which is de-

[14] 5 STAN. L. REV. 822, 826 & n.17 (1953).

[15] American Dist. Tel. Co. v. Roberts & Son, 219 Ala. 595, 122 So. 837 (1929).

[16] Western Union Co. v. Nestor, 309 U.S. 582 (1940).

[17] See Fritz *supra* note 7, at 214.

[18] Atkinson v. Pacific Fire Extinguisher Co., 40 Cal. 2d 192, 253 P.2d 18 (1953); Better Food Mkts. v. American Dist. Tel. Co., 40 Cal. 2d 179, 253 P.2d 10 (1953). *Cf.* Stone, Sand & Gravel Co. v. United States, 234 U.S. 270 (1914); Owen v. Christopher, 144 Kan. 765, 62 P.2d 860 (1936).

[19] See note 7 *supra* at 217-18.

[20] 5 CORBIN, CONTRACTS § 1060 (1964); 5 STAN. L. REV. 822, 826-27 (1953).

[21] *E.g.,* Crawford v. Allen, 189 N.C. 434, 127 S.E. 521 (1925); Disosway v. Edwards, 134 N.C. 254, 46 S.E. 501 (1904).

[22] *E.g.,* Wheedon v. American Bonding & Trust Co., 128 N.C. 69, 38 S.E. 255 (1901); Thoroughgood v. Walker, 47 N.C. 16 (1854).

signed to prevent the breach, or as *security* . . . to insure that the person injured shall collect his actual damages."[23] In fact, there is authority to say that North Carolina would judge the clause from a hindsight point of view, in which the actual loss suffered will be regarded as of great, if not controlling, importance to the decision whether or not the clause was an acceptable attempt to estimate the loss in advance.[24] The *Suddreth* decision is certainly in keeping with the desire of the court to shield the defendant "from an absurd or oppressive claim which is entirely disproportionate to the actual damage he has caused,"[25] because with the limitation of liability interpretation, a plaintiff will never be able to recover more than his actual damages.

The next step in the evolution of the "defendant's rule" is to deny the ability of a plaintiff to assert affirmatively that the stipulated sum is unjust. Despite the apparent inequity, the court in the principal case indicates that the result of the case would be the same even if the plaintiff's contention that the clause is a penalty is accepted because the North Carolina measure of damages, where a liquidated damages clause is deemed a penalty, is the compensation for the actual loss, not exceeding the penalty named.[26] The court's authority for such a proposition is merely dictum,[27] and no North Carolina cases have been found following this rule. Moreover, the decisions allowing a recovery in excess of the stipulated amount of a performance bond, declared a penalty,[28] were not mentioned by the court in *Suddreth.*

In spite of this, the court in the principal case adopted a rule for the defendant that combines the past disfavor with a liquidated

[23] Definition of "penalty" contained in McCormick, Damages § 146 (1935).

[24] See Thoroughgood v. Walker, 47 N.C. 16 (1854), where it was stated that "if the sum agreed on by the parties is to be construed liquidated damages, as the terms import, then the defendant will be bound to pay a greater sum for a less, which cannot be, as that, according to all the cases, is a penalty." *Id.* at 22.

[25] City of Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966).

[26] *Id.* at 621, 146 S.E.2d at 662.

[27] The dictum was taken from Wheedon v. American Bonding & Trust Co., 128 N.C. 69, 71, 38 S.E. 255, 255 (1901), which involved actual damages that were *less* than the stipulated sum.

[28] Peeler v. Peeler, 202 N.C. 123, 162 S.E. 472 (1932); Barber-Paschal Lumber Co. v. Boushall, 168 N.C. 501, 84 S.E. 800 (1915); Rhyne v. Rhyne, 160 N.C. 559, 76 S.E. 469 (1912); Gordon v. Brown, 39 N.C. 399 (1846).

damages interpretation when the actual loss is less than the stipulated amount with a disfavor with a "true" penalty interpretation when the actual loss is greater than the stipulated amount. Even so, the upholding of a limitation of liability provision is of no real consequence if this is indeed what the parties contracted for. It is, however, of consequence when a court takes this final step for a defendant with the ease exhibited in *Suddreth*. For example, one of the justifications for construing a liquidated damages clause as a penalty is the rule of construction that the ambiguities of a contract will be construed against the responsible party.[29] Normally a liquidated damages clause is inserted by the plaintiff (promisee) to avoid litigation on the issue of damages. Here, the defendant-buyer (promisor) inserted the provision. The clause is also ambiguous since it contained no additional words of limitation on which other courts have placed such heavy reliance in construing a liquidated damages clause to be a limitation of liability clause.[30] And yet, the court interpreted the contract in the defendant's favor and stated that he "intended to limit the amount of damages which could be recovered against him in the event he did not purchase the property. Whatever the [plaintiff] may have intended, that was the effect of the contract which it accepted."[31] Moreover, the willingness on the part of the court to support its interpretation of the contract by stressing the intention of one party is inconsistent with prior cases dealing with modification and elimination of liability.[32] Such freedoms of contract have been upheld *only* with reservations, such as equality of bargaining position and notice of the limitation and its consequences to the promisee.[33] In the principal case, it appears that these reservations were replaced by the defendant's intent.

[29] 5 WILLISTON, CONTRACTS § 621 (3d ed. 1961).

[30] See notes 15 & 16 *supra*.

[31] 266 N.C. at 621, 146 S.E.2d at 663.

[32] See notes 3 & 4 *supra*.

[33] See Miller's Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951), indicating that contracts exempting a party from liability may or may not be enforced depending on the nature and subject matter of the contract, relation of the parties, presence or absence of equality of bargaining power and attendant circumstances. This is to say nothing of the clauses limiting liability that have been struck where a party tries to excuse a willful or gross breach of duty or excuse a public duty that are cited in 5 STAN. L. REV. 822, 825 (1953). Also see Note, 47 IOWA L. REV. 964 (1962), which recognizes the uncertainty of the enforceability of contractual limitations of liability and tries to articulate a standard for them with special emphasis on disclaimers in consumer goods sales under the Uniform Commercial Code.

Contractual limitations of liability have their place in the law as when the promisee accepts the additional risks and is compensated for them. But the freedom of contract should not exist for only one party to the contract.

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Domestic Relations—Voluntary Nonsuit in Custody Action

In a civil action in North Carolina the plaintiff may obtain a voluntary nonsuit if the defendant has not asserted some claim or cross-action arising out of the same transaction entitling him to affirmative relief.[1] In *Griffith v. Griffith*,[2] the North Carolina Supreme Court has held that the plaintiff should be allowed a nonsuit in a proceeding involving the custody of a child when the defendant does not answer the complaint.

The plaintiff instituted an action for alimony without divorce under section 50-16 of the General Statutes[3] and requested custody

[1] *E.g.*, Ashley v. Jones, 246 N.C. 442, 98 S.E.2d 667 (1957); McLean v. McDonald, 173 N.C. 429, 92 S.E. 148 (1917); Francis & Brother v. W. J. & J. G. Edwards & Co., 77 N.C. 271 (1877). A counterclaim is defined by N.C. GEN. STAT. § 1-137 (1953) and is "broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured on the same state of facts." Aetna Life Ins. Co. v. Griffin, 200 N.C. 251, 253, 156 S.E. 515, 516 (1931). The rule had a counterpart in equity where the plaintiff was not allowed to have his rule dismissed when the defendant claimed a set-off. March v. Thomas, 63 N.C. 87 (1868). The counterclaim must arise out of the same transaction as the plaintiff's cause of action in order to bar the nonsuit. Olmsted v. Smith, 133 N.C. 584, 45 S.E. 953 (1903). See generally 2 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1645 (2d ed. 1956).

[2] 265 N.C. 521, 144 S.E.2d 589 (1965).

[3] In a proceeding instituted under this section, the plaintiff or the defendant may ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this section.

N.C. GEN. STAT. § 50-16 (Supp. 1965). In addition to this statute, custody may be determined in North Carolina by way of habeas corpus proceedings when the parents are separated but not divorced under N.C. GEN. STAT. § 17-39 (1953); by habeas corpus proceedings generally under N.C. GEN.

of the two children of the marriage. The defendant did not answer the complaint, but appeared in court pursuant to a show cause order and testified as a witness. The court found that each parent was a suitable custodian for the children, but in their best interest ordered that they be placed in the custody of the plaintiff.

The request for alimony pendente lite was denied, but the defendant was required to pay 450 dollars per month for support of the children and 500 dollars for attorney's fees.

After these orders had been entered, the plaintiff moved for a voluntary nonsuit that was denied, and she appealed. The court reversed the judgment, holding that since the defendant had asserted no claim for affirmative relief, the nonsuit should have been allowed.

Section 50-16 authorizes the court to make orders respecting custody "as might be entered upon a hearing on a writ of habeas corpus" under section 17-39 where "at any time after the making of such orders the court or judge may, on good cause shown, annul, vary, or modify the same." Adjudications for custody are never final,[4] but the court retains jurisdiction until the child reaches his majority.[5] Another superior court may not alter the order, however, unless a change in circumstances is shown.[6] To allow the plaintiff

STAT. § 17-39.1 (Supp. 1965); as an incident to a divorce action under N.C. GEN. STAT. § 50-13 (1950); by the juvenile branch of the superior court when neither of the parents is seeking custody under N.C. GEN. STAT. § 110-21 (1960); or by a domestic relations court under N.C. GEN. STAT. § 7-103 (1953). See generally LEE, 3 NORTH CAROLINA FAMILY LAW § 222 (3d ed. 1963); LIGON, NORTH CAROLINA CASES AND MATERIALS ON FAMILY LAW 203-13 (1962).

[4] Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964). *Cf.* Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958). There it was held that a custody decree in another state does not preclude a North Carolina court from determining custody rights. See Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

In Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956) the plaintiff instituted a divorce action and filed a motion for custody of one of the children. After receiving notice of the motion, the defendant took the child out of the jurisdiction. The court held that since any proceeding involving the custody of a child is in rem, the court is without power to make an order awarding the child's custody if he is not within the jurisdiction. See generally 3 LEE, *op. cit. supra* note 3, § 226.

[5] Weddington v. Weddington, note 4 *supra*. *Cf.* Blankenship v. Blankenship, note 4 *supra*, where it was held that the court in which an action for alimony pendente lite is brought retains jurisdiction to award custody of the children over another court in which the husband has brought an action for absolute divorce.

[6] A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when

to take a voluntary nonsuit after a custody order has been made as in the instant case is to contravene the policy of the statute, since there is nothing to prevent the plaintiff from trying another court if he does not like the custody or other interlocutory orders of the first. Meanwhile the ultimate status of the child has not been determined and a showing of good cause or change in circumstances will not be necessary since the nonsuit erases the proceedings of the first court, including any orders requiring support of the child.

Our court in *Cox v. Cox*[7] held that in an action for absolute divorce, the plaintiff could not take a voluntary nonsuit when the defendant has filed an answer requesting custody of the child. The opinion in the instant case made no reference to *Cox,* but presumably the court would have distinguished the two cases on the grounds that in *Griffith* there was no answer and, indeed, the defendant admitted in his testimony that his wife was a suitable custodian for the children. This distinction may be more apparent than real. The court in *Cox* and in other cases[8] has held that once jurisdiction is invoked in a question of custody, the child becomes a ward of the court and his welfare becomes of primary concern. Recognizing the danger that the child, who has no one to represent his interests, may become a pawn in the battle between his parents, the court is sensitive to his well-being and becomes his champion.

It would seem that the basic policy considerations reflected in the rule forbidding a voluntary nonsuit when the defendant requests affirmative relief are present in a greater degree in a custody case. A child, who unlike one of the parties cannot come back into court in his own right, should have his custody determined in the original action, subject only to a showing of changed circumstances as provided by statute. It should make no difference that there has been no answer to the complaint, since it is the rights of the child that are being protected.

In *Caldwell v. Caldwell,*[9] an action for divorce where custody was not involved, our court said:

> they occur. In a bitter controversy between separated parents over the custody of children, one is usually dissatisfied with the award. The aggrieved party, however, must appeal to the Supreme Court, or must wait for a more favorable factual background in which to demand another hearing by motion in the case.

Stanback v. Stanback, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965).

[7] 246 N.C. 528, 98 S.E.2d 879 (1957).

[8] *E.g.,* Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962).

[9] 189 N.C. 805, 128 S.E. 329 (1925).

> The better rule seems to be that a motion by the plaintiff for judgment dismissing his action for divorce upon a voluntary nonsuit will not be allowed by the court as a matter of right, but is addressed to the sound discretion of the court, which will be exercised in the interest not only of the plaintiff, but of the defendant and the State. The State and defendant, each, have an interest in the status of plaintiff and defendant, and the purpose of an action for divorce is to change or alter this status.[10]

This position was labeled as dictum and the court reversed itself in *Scott v. Scott*,[11] a case cited as precedent for the decision in the principal case. The *Scott* case did not involve custody, and even if it be conceded that the court was justified in its conclusion that "in the long view, we do not perceive that public policy requires that divorce actions be excepted from the general rule with reference to nonsuits,"[12] the case furnishes no authority for a proceeding involving custody. The court's jurisdiction to award custody is not lost when a divorce is not granted under section 50-13,[13] nor presumably when alimony pendente lite is denied under section 50-16.[14] The plaintiff should not be allowed to destroy the court's jurisdiction by taking a voluntary nonsuit as a matter of right. The parties should be permitted to get out of court if a reconciliation is achieved and therefore a voluntary nonsuit should not be strictly prohibited, but when a question of custody is to be decided, the interest of the state is considerable, and it is to be hoped that the judge will be given discretion to deny the motion when the welfare of the child warrants doing so.[15]

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[10] *Id.* at 812, 128 S.E. at 333.

[11] 259 N.C. 642, 131 S.E.2d 478 (1963).

[12] *Id.* at 648, 131 S.E.2d at 482.

[13] Bunn v. Bunn 258 N.C. 445, 128 S.E.2d 792 (1963).

[14] See 3 LEE, note 3 *supra*, § 222, at 11 n.20. The language of N.C. GEN. STAT. § 50-16 (Supp. 1965) suggests that the determination of custody rights is not dependent on a favorable ruling on the request for alimony without divorce.

[15] Of the cases found in other jurisdictions that dealt with the question, the most nearly in point is Ford v. Superior Court, 340 P.2d 296, 171 Cal. App. 2d 288 (Dist. Ct. App. 1959). There plaintiff and defendant were divorced, and the suit was for custody of the child. The defendant filed a demurrer to the complaint and a motion for an order to pay attorney's fees and costs. Thereafter the plaintiff requested a dismissal of the action, and the defendant moved the court to vacate the dismissal and was successful. The defendant then filed an answer and a cross-complaint by which she sought to establish a Nevada decree as a domestic judgment. The court held that "when the complaint was filed, the child for whose benefit the

Eminent Domain—Public Use in North Carolina

The nature and character of "public use" sufficient to justify an exercise of the power of eminent domain has again been considered by the North Carolina Supreme Court. In *State Highway Comm'n v. Batts*,[1] the Highway Commission sought to exercise the power of eminent domain over the lands of the defendant and of a Mrs. Joyner to construct a cul-de-sac[2] to serve three property owners whose property did not abut a public road. There were four families living on these properties. Three of the families were related to the fourth family, that of Mr. W. H. Batts. The lower court, sitting without a jury, held that the proposed road was for a public use. The North Carolina Supreme Court reversed saying the road was for the private use of W. H. Batts and a few of his relatives and thus denied the Highway Commission the right to exercise the power of eminent domain.[3]

A precise definition of public use is impracticable. In *City of Charlotte v. Heath*[4] the court said: "Perhaps none can be devised which is not challengeable, since, with the progressive demands of society and changing concepts of governmental function, new subjects are constantly brought within the authority of eminent domain."[5] The basic problem in defining public use is that the term "use" has been interpreted as having two different meanings: "em-

action was commenced was brought under the protection of the court and was in effect a party to the action and the petitioner as the plaintiff in the action representing the child was in the same position as a guardian ad litem and was without power to dismiss the action without the consent of the court." *Id.* at 298, 171 Cal. App. 2d at 290. See also Evans v. Taylor, 128 S.W.2d 77 (Tex. Ct. App. 1939). There the trial court delayed ruling on a motion for discontinuance in a habeas corpus proceeding for custody until the defendant had filed an answer requesting affirmative relief. The court held that the trial judge was authorized to refuse to act on the motion until the answer had been filed. Stout v. Pate, 208 Ga. 768, 69 S.E.2d 576 (1952). In this case there was an entry of dismissal by the plaintiff before the answer in a habeas corpus proceeding for custody. The court held the dismissal improper. See also Collard v. McCormick, 162 Ga. 116, 132 S.E. 757 (1926); *Ex parte* Welsh, 93 N.J. Eq. 303, 116 Atl. 23 (1922); *Ex parte* Rich, 3 N.Y.2d 689 (App. Div. 1938); Commonwealth *ex rel.* Gimbel v. Gimbel, 94 Pa. Super. 577 (1928); McClendon v. McClendon, 289 S.W.2d 640 (Tex. Civ. App. 1956).

[1] 265 N.C. 346, 144 S.E.2d 126 (1965).

[2] "A blind alley; a street which is open at one end only." BLACK, LAW DICTIONARY (4th ed. 1951).

[3] 265 N.C. at 360, 144 S.E.2d at 136.

[4] 226 N.C. 750, 40 S.E.2d 600 (1946).

[5] *Id.* at 755, 40 S.E.2d at 604.

ployment" or "use by the public" and "advantage" or "public benefit."[6] The "use by the public" test is considered a strict interpretation[7] while the "public advantage" test is considered a broad interpretation of the term.[8]

The North Carolina Supreme Court apparently uses a combination of the two tests as it has not specifically adopted either one. In *Cozard v. Hardwood Co.*,[9] a lumber company wanted to construct a railroad across an individual's land so that a large tract of timber could be harvested. The lumber company pointed out that new land would be open for cultivation, that new tanneries and factories would be established in the area to utilize the byproducts of the logging industry that would otherwise be wasted, that immigration would occur to fill the available jobs, and that many other benefits would accrue to the public.[10] However, the lumber company only wanted its trains to be able to use the proposed tracks. Even though the public advantage would have been immense, the use by the public would have been negligible. After weighing the considerations of both tests, the court denied the company permission to build the railroad. The court seemed to give great weight to whether or not the public would have a full and unrestricted right to use the way, which in turn would determine the public character of the facility.[11]

In *Reed v. State Highway & Pub. Works Comm'n*[12] the court permitted the Highway Commission to condemn property to construct a road that would provide an outlet for five homes from the top of a mountain to the county seat and also would serve as part of a scenic highway. While the number of people actually using the road would be limited, the court did envision some public benefit because it would tend to promote tourism. The court felt having scenic roads would induce tourists to come to an area and spend

[6] 2 NICHOLS, EMINENT DOMAIN § 7.2 (3d ed. 1963).

[7] *Id.* § 7.2[1]. Thus if a sufficient number of people will use the subject of the power of eminent domain, it will be a permitted public use.

[8] *Id.* § 7.2[2]. Thus if people generally in the community or state will benefit from the exercise of the power of eminent domain, regardless of whether they use the subject the power is exercised upon, it will be a permitted public use, *i.e.*, if it will create a better economy or if the general welfare will be improved, it is for the public advantage.

[9] 139 N.C. 283, 51 S.E. 932 (1905).

[10] *Id.* at 290, 51 S.E. at 935.

[11] *Id.* at 288, 51 S.E. at 934.

[12] 209 N.C. 648, 184 S.E. 513 (1936).

the summer and put money into circulation, which would benefit all the people in the area.[13] The fact that more money is put into circulation and thus a public benefit results, standing alone, should be insufficient to qualify as a public use that would support condemnation of private property. However, when coupled with the fact that it will be used by the public, though limited in number, the condemnation is more reasonable. Thus it seems the court has used a combination of both tests to support a public use in *Reed.*

In *City of Charlotte v. Heath*[14] the court recognized that a public convenience would constitute a public use when the public has a legal right to make use of the convenience.[15] Seventeen families were to be served by a sewer line extension. The court said: "The public nature of the project cannot be made to depend on a numerical count of those to be served or the smallness or largeness of a community."[16] While the number of the public actually using the proposed sewer line was limited, there was some general public advantage in that odors and insect growth were controlled. Again public advantage and use by the public tests were used in conjunction with each other and the condemnation was sustained.

Perhaps the *Batts* decision can be explained in that it failed one if not both of these tests. The court apparently did not think there would be any general public advantage because it felt "that any use by, or any benefit for, the general public will be only incidental and purely conjectural. . . ."[17] The number of the public that would have actually used the road would have been limited since it would have served only four families and would have been a dead-end road also. But, the court did not discuss the *right* of the general public to use the road that was considered in *Cozard v. Hardwood Co.*[18]

Many courts declare that if the public has a right to use the road, it is immaterial that some people will benefit from the road more than others, or that only a few people will use the road, or that one end does not terminate at a public place, or that it is very

[13] *Id.* at 654, 184 S.E. at 516.
[14] 226 N.C. 750, 40 S.E.2d 600 (1946).
[15] *Id.* at 755, 40 S.E.2d at 604.
[16] *Ibid.*
[17] 265 N.C. at 360, 144 S.E.2d at 136.
[18] 139 N.C. 283, 51 S.E. 932 (1905).

short in length.[19] While usually the courts are concerned with a landlocked party's right to reach a public road, some courts attach importance to the right of the public to reach the landlocked party in the event he is summoned as a witness or to sit on a jury.[20] A court recently recognized that a public road to a landlocked property owner could be justified because it might be used by doctors, nurses, ambulances, salesmen or farm organization representatives.[21] Nor is the public road allowed only when there is no other means available for access to the landlocked property.[22]

Perhaps the court considered that the landlocked parties in *Batts* had an adequate remedy under the cartway statute[23] if they proved such a way was necessary, reasonable and just. While the court did not comment on this provision in its opinion, the appellant did raise this issue on appeal.[24] Apparently weight was given to the fact that all of the interested parties were related to one of the property owners. Throughout the opinion the court referred to the proposed road serving "W. H. Batts and a few of his relatives." It should be immaterial that these families were related to each other, but the court did not intimate it would have held otherwise had they not been related.

The court made it clear it was not holding that the proposed road was not for a public use merely because it was a cul-de-sac.[25] In effect the court overruled *State v. M'Daniel*,[26] which had held that a cul-de-sac that did not terminate at a public place was not a public road.

[19] *E.g.*, Sherman v. Buick, 32 Cal. 241, 255 (1867); Leach v. Manhart, 102 Colo. 129, 133, 77 P.2d 652, 653 (1938); Hightower v. Chattahoochee Industrial R.R., 218 Ga. 122, 125, 126 S.E.2d 664, 666 (1962); Taylor v. Wentz, 15 Ill. 2d 83, 89, 153 N.E.2d 812, 816 (1958); Law v. Neola Elevator Co., 281 Ill. 143, 150, 117 N.E. 435, 437 (1917); Butte, A. & Pac. Ry. v. Montana Union Ry., 16 Mont. 504, 523, 41 Pac. 232, 238 (1895); Phillips v. Stockton, 270 S.W.2d 266, 270 (Tex. Civ. App. 1954); Heninger v. Peery, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904).

[20] *E.g.*, Leach v. Manhart, *supra* note 19; Pagels v. Oaks, 64 Iowa 198, 203, 19 N.W. 905, 907 (1884); Johnson v. Supervisors of Clayton County, 61 Iowa 89, 91, 15 N.W. 856, 857 (1883).

[21] Tracey v. Preston, 114 Ohio App. 206, 181 N.E.2d 479 (1960).

[22] Denham v. County Comm'rs of Bristol, 108 Mass. 202 (1871). The party seeking the public road already had two other accesses to public roads.

[23] N.C. GEN. STAT. § 136-69 (1964).

[24] Brief for Appellant, p. 13.

[25] 265 N.C. at 357, 144 S.E.2d at 135.

[26] 53 N.C. 284 (1860).

If the *Batts* decision holds that a cul-de-sac serving only four families is not a road for a public use, it would seem the State Highway Commission may encounter problems of using public funds to maintain other dead-end roads on the Secondary Road System that serve only a limited number of families. Any taxpayer would have standing to bring suit to prevent misuse of agency [State Highway Commission] power.[27] The court said: "To sustain the proposed condemnation . . . under the facts and circumstances here would set a dangerous precedent for the expenditure of public funds by the State Highway Commission. . . ."[28] However, there was not an expenditure of public funds under the facts and circumstances here because the landlocked parties had given the Highway Commission an indemnity bond to cover any damages to the defendants' property. The only expenditure of funds would be for the construction and maintenance of the road, not acquiring the right of way.

Also in the light of the *Batts* decision, it seems that the State Highway Commission will have to alter its administrative policy of adding roads and streets to the Secondary Road System which is maintained by the Commission. At the present time the Commission policy requirements are: "(2) Roads less than one mile in length must have at least four occupied residences fronting the road. . . . (4) There must be at least two individual property owners on the road."[29] The proposed road in *Batts* met both these requirements.

HAROLD D. COLSTON

Evidence—Admissibility of Agent's Declaration Against His Principal

The plaintiff's decedent in *Branch v. Dempsey*[1] was fatally injured in a head-on collision with the defendant owner's truck being operated by the defendant driver in the scope of his employment.[2]

[27] Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394 (1899).
[28] 265 N.C. at 360, 144 S.E.2d at 137.
[29] N.C. STATE HIGHWAY COMM'N, SECONDARY ROADS 14.

[1] 265 N.C. 733, 145 S.E.2d 395 (1965).
[2] The agency relationship between the owner and his driver was presumptively established by N.C. GEN. STAT. § 20-71.1(b) (Supp 1965), which provides:

Proof of the registration of a motor vehicle in the name of any

Sometime after the wreck, the driver told an investigating officer that the truck stalled while he was attempting to make a left turn.[3] When the plaintiff offered this officer's testimony on the issue of the driver's negligence against both defendants, the trial judge instructed the jury that the declaration by the defendant driver was to be considered only against him and not against the owner, and at the close of the plaintiff's case, he entered a nonsuit in favor of the owner.[4] The North Carolina Supreme Court in a four-to-three decision[5] affirmed.[6] The court held that the officer's testimony was hearsay and inadmissible against the owner since the driver had no authority to speak on his behalf.[7] It further held that the defendant owner could not be adjudged liable for the negligent acts of his driver committed within the scope of his employment since the only evidence of his driver's negligence was incompetent against him.[8] The majority and dissenting opinions in this case enunciate almost all the theories advanced with respect to the admissibility of a driver's extrajudicial declaration against his principal and the necessity for such admission where it is the only evidence offered on the issue of a driver's negligence to establish his principal's liability.

It is a well established rule that where an agent has authority to speak for his principal, his extrajudicial declarations are treated "as if" made by the principal and admissible against the principal under the admission of a party opponent exception to the hearsay rule.[9] The rationale is not based on any rule of evidence but is

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person, firm, or corporation, shall for the purpose of any action be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

[3] The investigating officer talked with the driver at the hospital where the plaintiff's decedent was taken after the accident and later at the police station. He testified to the driver's declaration but failed to state in which of these conversations the statement was made. 265 N.C. at 738, 145 S.E.2d at 399.

[4] *Id.* at 739, 145 S.E.2d at 400.

[5] Justice Parker, joined by Chief Justice Denny, dissented. *Id.* at 749, 145 S.E.2d at 406. Justice Sharp also dissented. *Id.* at 756, 145 S.E.2d at 411.

[6] *Id.* at 746, 145 S.E.2d at 404.

[7] *Ibid.* The court reasoned that the North Carolina statute creating a prima facie agency relationship between the registered owner of a motor vehicle and the driver applies only when the vehicle is in operation and not to what the driver says afterwards merely narrative of a past occurrence.

[8] *Ibid.*

[9] STANSBURY, NORTH CAROLINA EVIDENCE § 168 (1963).

founded upon the substantive responsibility of the principal for the acts of his agent committed within the scope of his authority.[10] In the situation where a driver makes a statement, the North Carolina[11] and majority rule[12] is that the principal is not chargeable with the declaration in the absence of proof that his driver had authority to speak. Thus, a driver's statement to an investigating officer of how the accident occurred is inadmissible against his principal. In *Branch,* Justice Sharp dissented[13] and argued that every owner is charged with contemplating the possibility of his driver's having an accident; consequently, public policy demands that he extend his driver's authority to include a narrative statement to an investigating officer.[14]

It appears that the North Carolina Supreme Court could have admitted such extrajudicial declaration against the principal on the basis of other existing decisions. Under the res gestae exception to the hearsay rule,[15] an agent's declaration is admissible against his principal when made contemporaneously with the event complained of or before any time has elapsed for reflection or fabrication that eliminates the "safeguard of trustworthiness."[16] The rationale for this exception is the inherent trustworthiness of the declarant's statement, *i.e.,* the circumstances under which it was uttered makes it extremely unlikely that such declaration was fabricated.[17] Since it is just as unlikely under the circumstances that a

[10] 4 WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

[11] *E.g.,* Hobbs v. Queen City Coach Co., 225 N.C. 323, 34 S.E.2d 211 (1945) (bus driver's admission of conduct). STANSBURY, *op. cit. supra* note 9, § 169.

[12] 8 AM. JUR. 2D *Automobiles* § 968 (1963). See MCCORMICK, EVIDENCE § 244 (1954); 4 WIGMORE, *op. cit. supra* note 10, § 1078.

[13] 265 N.C. at 756, 145 S.E.2d at 411.

[14] *Id.* at 765, 145 S.E.2d at 417. In Martin v. Savage Truck Line, 121 F. Supp. 417 (D.D.C. 1954), the court said:

> To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy.

Id. at 419. For other cases in accord, see Branch v. Dempsey, 265 N.C. 733, 756, 145 S.E.2d 395, 411 (1965) (Sharp, J., dissenting).

[15] STANSBURY, *op. cit. supra* note 9, § 164.

[16] *Ibid.*

[17] *Ibid.*

driver would fabricate a responsive statement to an investigating officer that could subject him to civil liabilities and possible criminal penalties and additionally might cause him to lose his job, a driver's post rem admission of allegedly negligent conduct should be accepted as equally trustworthy.[18] Thus, the court could admit such declaration against the principal by logically extending the res gestae exception as some courts have done[19] or possibly by invoking another limited exception to the hearsay rule.

In addition to the possible approach above, the court appears to have recognized an exception to the rule excluding an agent's post rem declaration. The plaintiff in *Jones v. Raney Chevrolet Co.*[20] was injured when the driver of the car in which he was riding lost control because of defective brakes. In a suit against the defendant car dealer who had recently sold this car to the driver, the plaintiff offered in evidence an unauthorized statement made by the defendant's foreman that he knew the brakes on this type of car were defective but had not changed them before the sale.[21] The court held the agent's statement admissible against the principal for the limited purpose of imputing knowledge of the defective brakes to him.[22] In contrast to the situation where a driver admits his conduct in allegedly causing a wreck, Justice Sharp argued that this distinction seemed illogical since, in both situations, the plaintiff is attempting to establish the principal's liability by such evidence.[23] Furthermore, in *Jones* the risk of the declaration being untrustworthy was far greater than in *Branch* since the declarant-foreman was not an active tort-feasor.[24] This distinction creates the additional problem of defining what is admissible for this limited purpose. For example, if in *Branch* the driver had also told the investigating officer that the truck had stalled on several occasions, would this have been admissible under the knowledge exception? It

[18] Justice Sharp made this statement of trustworthiness as a general argument for admitting an agent's declaration "as if" made by his principal. 265 N.C. at 764-65, 145 S.E.2d at 417.

[19] *E.g.*, Lucchesi v. Reynolds, 125 Wash. 352, 216 Pac. 12 (1923), where the court said, "[T]o argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles." *Id.* at 355, 216 Pac. at 13.

[20] 217 N.C. 693, 9 S.E.2d 395 (1940).

[21] *Id.* at 695, 9 S.E.2d at 396.

[22] *Ibid.*

[23] 265 N.C. at 765, 145 S.E.2d at 417.

[24] *Ibid.*

would seem that the court could extend this post rem exception to include a driver's post rem admission of conduct.

Apart from these alternatives for admitting a driver's extrajudicial declaration against his principal, the ultimate question arises: Is it necessary that evidence of an agent's negligence be admissible against his principal to impose liability upon him under respondeat superior? It is a well established rule of law that a principal is substantively responsible for the acts of his agent committed within the scope of his employment.[25] As Justice Parker argued in his dissenting opinion,[26] once the jury finds the tortfeasor's liability upon evidence competent against him and the agency relationship is established for that tortious act, the agent's liability is imputed to the principal by operation of law since "to hold otherwise would be to make a mockery of the law. . . ."[27] This approach is substantively correct, but it creates a dilemma where the principal is sued separately and the only evidence of his agent's negligence is incompetent against him. Had the plaintiff in *Branch* sued the owner without joining the driver as co-defendant, he could not have introduced the driver's admission of allegedly negligent conduct since the driver was not a party to the action.[28] Thus, recognizing that joinder was only a matter of convenience, a majority of the court refused to apply respondeat superior in the *Branch* situation.[29] Even though its rationale is plausible, the court enunciated a rule that undermines the entire concept of a principal's substantive responsibility for the negligent acts of his agent, since it is now possible for a principal to escape liability even though his agent has admitted and been held liable for his alleged negligent conduct.

Where there is other evidence of an agent's negligence in addition to his admission so that his principal cannot obtain a nonsuit, a problem arises as to the effectiveness of a trial judge's instruction to the jury on the issue of their respective liability. The judge will have to charge the jury that they must not consider the agent's admission in deciding the principal's liability so that they must find for the principal if the other evidence of the agent's negligence is insufficient in their minds to establish the agent's negligence. It

[25] 35 AM. JUR. *Master and Servant* § 543 (1941).
[26] 265 N.C. at 749, 145 S.E.2d at 406.
[27] *Id.* at 751, 145 S.E.2d at 407, where Justice Parker was quoting from Grayson v. Williams, 256 F.2d 61, 68 (10th Cir. 1958).
[28] 265 N.C. at 741-42, 145 S.E.2d at 401.
[29] *Ibid.*

is unrealistic to say that a jury will not give added weight to this other evidence of an agent's negligence in view of his admission. Thus, the practical effect of rendering an agent's statement inadmissible against his principal is insignificant where there is enough other evidence of negligence to get the issue of his principal's liability before the jury.

From an insurance standpoint, it may be immaterial in certain instances whether a principal is granted a nonsuit. In the *Branch* type situation involving motor vehicles, the ultimate result might well be the same as if the owner had been adjudged liable unless the verdict exceeds the policy's coverage, since the owner's motor vehicle liability insurance policy would have included the driver as an "insured" under its omnibus provision.[30] However, in other situations where a principal's insurance policy covers only his actions and those of his agents if he is legally liable,[31] an injured plaintiff would be relegated to seeking relief from a possibly uninsured agent if his principal obtained a nonsuit under the *Branch* rule. Thus, to provide adequate redress for a plaintiff injured by an agent in the scope of his employment, the court should reconsider its approach.

It appears that the North Carolina Supreme Court could have either admitted an agent's admission against his principal or applied the doctrine of respondeat superior without regard to the dilemma appearing in successive actions. Should the court continue its harsh approach, it is hoped that the legislature will provide appropriate relief by making an agent's statement to an investigating officer admissible against his principal.

COMANN P. CRAVER, JR.

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[30] The National Standard Policy contains the following provision:

> *Definition of Insured.* With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the [motor vehicle] . . . provided the actual use of the [motor vehicle] is by the named insured or with his permission. . . .

GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 559 (1959). In North Carolina, all motor vehicle owners must carry minimum liability insurance coverage. N.C. GEN. STAT. § 20-309 (Supp. 1965). Even though there is no requirement that such policies contain an omnibus provision, most policies provide this encompassing provision.

[31] This is a general liability insurance policy carried by employers that covers almost all types of liabilities except those arising from motor vehicle operation. For a discussion of the various types of policies, see RIEGEL & MILLER, INSURANCE PRINCIPLES AND PRACTICES 669-726 (1959).

Federal Jurisdiction—Removal of Civil Rights Cases—Fourth Circuit Affirms Limitations

Subsection 1443(1) of the Judicial Code[1] permits removal to the federal district court of a case commenced in a state court when a defendant "cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens. . . ."[2] This provision has gained new importance because section 901 of the Civil Rights Act of 1964 permits appellate review of a district court order remanding such a case to the state court. Such review was not previously available.

In *Baines v. City of Danville*,[3] the United States Court of Appeals for the Fourth Circuit affirmed by a three-to-two decision the remand of 105 civil rights cases, holding that the equal protection clause of the fourteenth amendment was not a "law providing for the equal civil rights of citizens"[4] and that the inability to enforce the "law" must be shown to result from a state statute or constitutional provision which, on its face, violates the provisions of the federal constitution.[5] The Fourth Circuit thus put itself in conflict with holdings of the Second, Fifth and Ninth Circuits that the equal protection clause was such a "law providing for the equal civil rights of citizens"[6] and a further holding of the Fifth Circuit

[1] U.S.C. § 1443(1) (1964). For a more complete discussion of the removal of civil rights cases and the origin, history and recent interpretations of § 1443 see Comment, 44 N.C.L. Rev. 380 (1966). See also Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 805 (1965).

[2] 28 U.S.C. § 1443(1) (1964).

[3] 357 F.2d 756 (4th Cir.), *affirmed without opinion*, 34 U.S.L. Week 3425 (June 21, 1966). The United States Supreme Court decision was announced after this note was written. The petitioners alleged that they were being prosecuted for demonstrating in the streets of Danville in protest against customs and practices perpetuating racial segregation, that the injunctive order [which they were charged with violating] is unconstitutional for "making criminal" conduct which is constitutionally protected [by the first and fourteenth amendments] and that the injunction is in violation of their civil rights. *Id.* at 758.

[4] *Id.* at 764.

[5] *Id.* at 765.

[6] Peacock v. City of Greenwood, 347 F.2d 679, 682, rev'd, 34 U.S.L. Week 4572 (June 21, 1966); New York v. Galamison, 342 F.2d 255, 271 (2d Cir. 1965) (dictum); Steele v. Superior Court, 164 F.2d 781 (9th Cir. 1947) (dictum). The dissenting opinion in *Baines* relied upon these cases for authority that the equal protection clause is a "law providing for equal rights" within the meaning of the statute.

that removal was justified in situations other than where the "law" was rendered unenforceable by state statute or constitutional provision.[7] The conflict is primarily one of statutory construction, and this note will examine the opposing constructions as developed in the majority and dissenting opinions in *Baines*.

I. The Equal Protection Clause

In *Baines* the Fourth Circuit insisted that the petitioners' allegations "that they were acting in aid of fourteenth amendment rights . . ." furnished no basis for removal.[8] Section 1 of the original civil rights removal act, the Civil Rights Act of 1866,[9] had enumerated rights which if denied made removal appropriate. This law was re-enacted in 1870, and in the Revision of 1875 the enumeration was taken out of the removal provision and placed elsewhere in the Judicial Code.[10] The court concluded that the replacement of the phrase "those rights enumerated in section 1" with the language "all rights secured to him by any law providing for the equal civil rights of citizens . . ." was not intended to extend coverage in excess of those rights which had been previously enumerated in section 1, but that "the revisers understood that the laws were not static and that the Congress in the future might enact additional legislation . . . with an intention to expand the removal rights."[11] The statute was open-ended in that new laws might come within its purview, but the fourteenth amendment was not included for two reasons: it had been passed by Congress and ratified by the states in the period between the passage of the original act and the re-enactment of 1870, and it was not a "law" in the sense in which the word is used in the removal provision.[12] The court maintained the word "law" as used in the section refers only to *statutes* providing for equal civil rights, and since the fourteenth amendment is not a statute its inclusion was not intended.[13]

A contrary conclusion in regard to the equal protection clause was reached by the dissenting opinion. Also relying upon the scope of the original removal act of 1866,[14] it depended upon what it

[7] Peacock v. City of Greenwood, 347 F.2d 679, 682 (5th Cir. 1965).
[8] 357 F.2d at 764.
[9] Act of April 9, 1866, ch. 31, 14 Stat. 27.
[10] Rev. Stat. § 641 (1875).
[11] 357 F.2d at 764.
[12] *Id.* at 763.
[13] *Id.* at 764.
[14] 357 F.2d at 774.

asserted was the "general understanding" of both the supporters and opponents of the measure that the rights in section 1 were to be given the broadest possible interpretation.[15] After the passage of the original civil rights act, the dissenters observed, there was some concern over its constitutionality, and the fourteenth amendment, they concluded, was passed to insure the act's legality.

> The enactment of the Equal Protection Clause, in language closely paralleling section 1 of the 1866 statute, legitimated beyond question Congress' attempt to protect the type of rights granted in the statute, and there is no reason to think that the rights contemplated by section 1 are of less breadth than those contemplated by the Equal Protection Clause.[16]

The dissenters thought that the adoption of the language " 'law[s] providing for equal civil rights' in the 1875 recodification . . . evidences the revisor's understanding of the broad view taken by the 1866 Congress of the rights protected by removal"[17] and that the section is thus not limited to "statutory" rights as the majority contended.[18]

The Supreme Court may decide whether the equal protection clause is a "law providing for equal civil rights" when examining the conflict between the circuit courts.[19] This determination is not likely to increase or decrease removal litigation to any great extent. Should it be decided that the clause is not such a law, a petitioner can, without too much trouble, draft the removal petition so as to base the claim upon a federal statute guaranteeing substantially the same substantive right.

II. What Petitioner Must Show To Demonstrate That He Cannot Enforce the Right

The early United States Supreme Court cases of *Virginia v. Rives*[20] and *Kentucky v. Powers*[21] did not allow removal because

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[15] *Ibid.*

[16] *Id.* at 775.

[17] *Id.* at 777.

[18] *Ibid.*

[19] After this note was written the United States Supreme Court reversed Peacock v. City of Greenwood, 34 U.S.L. Week 4572 (June 21, 1966), and affirmed Rachel v. Georgia, 34 U.S.L. Week 4563 (June 21, 1966).

[20] 100 U.S. 313 (1880).

[21] 201 U.S. 1 (1906). In both *Rives* and *Powers* the petitioners based their right to remove on the allegation that a group to which they belonged would be excluded from the jury that would try them in the state court. The alleged exclusion, in each case, would not result from a state statute but from a practice within the community.

the petitioner could not satisfy the court that the protected right would be denied in the state court.[22] The *Baines* majority read these cases as establishing the rule that a right must be denied by a state statute or constitutional provision that is unconstitutional on its face in order to remove to the federal court. It concluded, furthermore, that the right to remove must be apparent before trial and cannot be based "upon the supposition that during the course of the trial or the sentencing, a protected right would be denied or the defendant would find himself unable to enforce it."[23] On the other hand, the dissenting opinion maintained that the *Rives-Powers* line of decisions has no application when removal is sought "on assertions . . . relating not to some future stage of the proceedings, but to the very arrests and prosecutions which give rise to these proceedings."[24] In this situation the Fifth Circuit had allowed removal in *Peacock v. City of Greenwood*[25] where the allegation was that the arrests and prosecutions denied the petitioners "equal civil rights,"[26] that is, the right to demonstrate against the segregation policies of the community.

The original act, the Civil Rights Act of 1866, contained a provision for post-judgment removal which was deleted by the Revision of 1875.[27] The majority in *Baines* maintained that this rendered the act virtually unenforceable.[28] "[T]he judiciary cannot restore what the Congress struck from the statute or construe what remains to approximate the congressional intention before it struck the most important part of its earlier scheme."[29] The dissenting opinion did not agree. It maintained that the purpose of the original act was to provide for removal other than post-judgment removal and that the excision of the post-judgment removal provision did not amount to "major surgery" as the majority maintains.[30]

Another argument adopted by the majority opinion in *Baines* is that there must be "vertical unenforceability,"[31] that is, the petitioner must show that the right would also be denied in the state

[22] 100 U.S. at 320; 201 U.S. at 31.
[23] 357 F.2d at 765.
[24] *Id.* at 784.
[25] 347 F.2d 679 (5th Cir. 1965) (removal allowed on facts almost identical to *Baines*).
[26] *Id.* at 681.
[27] REV. STAT. § 641 (1875).
[28] 357 F.2d at 768.
[29] *Ibid.*
[30] *Id.* at 778.
[31] *Id.* at 770.

appellate courts. This argument was rejected by the dissenting opinion, which insisted that even if this were true, when rights are denied prior to trial by the arrests and prosecutions "vertical unenforceability" has no application and the question is mooted.[32]

The dissent also relied upon the mood of the Thirty-ninth Congress, which enacted the original Civil Rights Removal Act in 1866, and the Eighty-ninth Congress, which enacted the provision for appellate review in 1964. It maintained that the Eighty-ninth Congress in providing for appellate review intended that federal courts re-examine the restrictions on removal established by *Rives* and *Powers*.[33] But the majority disagreed, saying indications of this were "minority expressions of an expectation of judicial reconsideration of congressional intent . . . not the equivalent of congressional redefinition of its intention."[34]

President Andrew Johnson, after once vetoing the original Civil Rights Act of 1866, expressed concern over what he termed the broad effect of the bill. In contrast, Senator Trumbell, the bill's manager, in a speech to the Senate insisted that "there would be no pretrial removal even in the face of a discriminatory state statute."[35] The majority took Trumbell's remark to mean that Con-

[32] *Id.* at 787. The dissenting opinion points out that

> after their removal petitions had been filed in the federal district court, two of the present petitioners were tried in the Corporation Court of Danville, fined, and sentenced to 45 to 90 days for their participation in the demonstrations. The conduct of these two trials affords a striking illustration of the treatment to be expected by these petitioners in the state courts. Policemen were stationed at every corner of the room; lawyers were searched on entering and leaving the courtroom; and petitioners were required to appear in court from day to day for roll call, although the prosecutor could have had no expectation of trying more than a few of them on any one day. Thus any organized protests were effectively silenced and the defendants' ability to earn a living impaired. Then, all the cases were transferred to various courts throughout the state, some as far as 250 miles away.
>
> The assumption that these Negroes' rights could be vindicated in the state courts was dramatically undermined by a ruling that flatly barred constitutional defenses to the charges against the demonstrators. The presiding judge announced from the bench, prior to taking of any evidence, that he would not permit any such defense to be raised. By stripping appellants of any opportunity to show in the record that their conduct was protected from state interference, this prohibition shows a clear inability to enforce their rights in the local tribunals.

Id. at 773-74.

[33] *Id.* at 788.

[34] *Id.* at 762.

[35] CONG. GLOBE, 39th Cong., 1st Sess. 1759 (1866) [covering 1833-1873].

gress never contemplated pretrial removal,[36] but the dissent maintained that the President was concerned only about the criminal liability of the state court judges under the act[37] and that Senator Trumbull was replying to Johnson in reference only to this aspect of the statute. "The Senator did not say, as the majority would infer, that these sections could not be brought into play by the action of . . . sheriffs and policemen . . . *prior* to the court proceedings."[38]

Dissenting Judges Bell and Sobeloff would hold these cases removable under subsection 1443(1) if "they have been denied these rights by state officials prior to trial. . . ."[39]

Part of the reason for the wide divergence in the opinions can be traced to the long period of time in which the problems remained dormant because of the lack of appellate review and the futility of attempting to reach conclusions about century-old congressional mood or intent. There seems to be some merit to the argument of the dissenters that the Eighty-ninth Congress meant for the federal courts to re-examine their position in regard to removal when it passed the proviso for appellate review of an order to remand. Whether or not this be the case, the conflict in the circuit courts necessitates clear explanation of the *Rives* and *Powers* opinions by a modern Court.

BILLY R. BARR

Securities Regulations—Civil Liability Under Section 17(a) of the Securities Act and Rule 15c1-7 of the Exchange Act

In the expanding area of securities regulations, the Securities Act of 1933[1] and the Securities Exchange Act of 1934,[2] together with the rules promulgated thereunder, have been used increasingly as bases for finding civil liability for violations thereof. While sections 11, 12(1), and 12(2)[3] of the Securities Act and sections

[36] 357 F.2d at 767.

[37] Section 2 of the original act of 1866, now 18 U.S.C. § 242 (1964), provided that any state official who "shall subject or cause to be subjected any inhabitant . . . to the deprivation of any right secured or protected by this act . . . shall be guilty of a misdemeanor."

[38] 357 F.2d at 783.

[39] *Id.* at 773.

[1] 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a-77bb (1964).

[2] 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78a-78jj (1964).

[3] 48 Stat. 82, 84 (1933), as amended, 15 U.S.C. §§ 77k, 77*l* (1964).

9(e), 16(b), 18, and 29(b)[4] of the Exchange Act expressly provide for civil remedies, liabilities in civil actions have been implied under other sections and rules.[5]

A recent decision extended a civil remedy to yet another rule under the Exchange Act. In *Newkirk v. Hayden, Stone & Co.*[6] a federal district court allowed recovery of damages under section 17(a) of the Securities Act[7] and rule 15c1-7[8] promulgated under section 15(c)(1) of the Exchange Act.[9] Plaintiff, a school teacher, had transferred his life savings to an account with defendant brokerage house. McNutt, a salesman of defendant, was to trade the account intending to make short-swing profits for plaintiff.

[4] 48 Stat. 889, 896, 897, 903 (1934), as amended, 15 U.S.C. §§ 78i, 78p, 78r, 78cc (1964).

[5] J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (sections 14(a) and 27 of the Exchange Act); Goldenburg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959) (section 7 of the Exchange Act); Standard Fruit & S.S. Co. v. Midwest Stock Exch., 178 F. Supp. 669 (N.D. Ill. 1959) (section 12(f) of the Exchange Act); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949) (section 17(a) of the Securities Act); Hawkins v. Merrill Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark. 1949) (section 11(d)(2) of the Exchange Act and Rule 17a-5); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (section 10(b) of the Exchange Act and Rule 10b-5). For a full discussion of expressed and implied civil liabilities under the Securities Act, the Exchange Act, and the rules pursuant thereto, see also Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM. L. REV. 12 (1966).

[6] CCH FED. SEC. L. REP. ¶ 91,621. (S.D. Cal. Sept. 30, 1965).

[7] 48 Stat. 84-5 (1933), 15 U.S.C. § 77q (1964). Section 17(a) of the act provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communications in interstate commerce or by the use of 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.

[8] C.F.R. § 240.15c1-7 (1964) Section (a) provides:

> The term "manipulative, deceptive, or other fraudulent device, or contrivance", as used in section 15(c) of the act, is hereby defined to include any act of any broker or dealer designed to effect with or for any customer's account in respect to which such broker or dealer or his agent or employee is vested with any discretionary power any transactions of purchase or sale which are excessive in size or frequency in view of the financial resources and character of such account.

[9] 52 Stat. 1075 (1938), 15 U.S.C. § 78o(c)(1) (1964).

Plaintiff was not familiar with the sophisticated maneuvers used in a trading account; therefore, he relied heavily on McNutt to manage the account in plaintiff's best interests. McNutt effected numerous transactions in the account over a three-month period, generating 2,722.55 dollars in commissions and causing capital losses of 2,245.57 dollars. In view of the fact that the account when opened contained a net equity of 8,439.65 dollars, the court held such heavy trading to be excessive and awarded damages equal to the amount of commissions charged.

Rule 15c1-7 is violated only where the account is discretionary. In finding the plaintiff's account to be discretionary, the court did not restrict itself to the formality of requiring "prior written authorization" by the customer.[10] Instead, the court applied a more practical test by looking to the customer's naivete and the degree of reliance placed upon McNutt's advice. Such a position is in line with decisions rendered by the SEC.[11]

The court in the principal case appeared to have little difficulty in finding an abuse of discretion in the actions of the salesman. The court rested its holding on the unusually large amount of commissions generated, the total value of the transactions (158,000 dollars) that took place in the three-month period, and the proportion of the salesman's total commissions represented by this single account (seventeen per cent). This reasoning is consistent with holdings of the Commission in cases dealing with churning—excessive trading—of customers' accounts.[12]

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[10] N.Y. Stock Exch. Rule 408, CCH N.Y. STOCK EXCH. GUIDE ¶ 2408. A salesman has discretionary power over a customer's account where "the prior written authorization of the customer has been received." Where such authorization is given, a salesman may trade the account for the customer's benefit without receiving specific orders from the customer.

[11] The Commission in Norris & Hirshberg, Inc., 21 S.E.C. 865, 870 (1946), held that an account was discretionary when a broker-dealer could "dominate the choice of investment and the timing and frequency of transactions. . . ." In E. H. Rollins & Sons, Inc., 18 S.E.C. 347, 380 (1945), the Commission declared that in regard to discretionary accounts the significant determination involves the status between the broker-dealer and the customer. In Behel, Johnsen & Co., 26 S.E.C. 163, 168 (1947), no express discretionary power was conferred on the dealer; however, the Commission found the registrant guilty of churning accounts of its customers. The Commission pointed out that the registrant occupied a position of trust in respect to its customers and should have managed their accounts with their best interest as a guide.

[12] *E.g.*, Shearson, Hammill & Co., CCH FED. SEC. L. REP. ¶ 77,306 (1965); Reynolds & Co., 39 S.E.C. 902 (1960); Walter S. Grubbs, 28 S.E.C. 323 (1948).

Although the traditional remedies for violations of section 17(a) of the Securities Act and rule 15c1-7 have been administrative sanctions imposed by the SEC,[13] the court allowed recovery of damages. It is not entirely clear whether the court based civil liability on a violation of section 17(a) or rule 15c1-7 or both. The general fraud provisions of section 17(a) have been relied upon under somewhat different circumstances to attach civil liability.[14] At the same time, no cases have been reported prior to *Newkirk* in which rule 15c1-7 was premised as a basis for recovery of damages. Nevertheless, it is submitted that the provisions of rule 15c1-7 that specifically prohibit churning are more directly applicable than the general fraud provisions of section 17(a).[15]

Although there is no express provision for civil liability under rule 15c1-7, the decision implying such liability is in keeping with a trend begun in 1946 in *Kardon v. National Gypsum Co.*[16] There the court allowed recovery of damages for a violation of rule 10b-5.[17] The federal district court based its holding on two theories: (1) common-law tort liability as a result of violation of a statute,[18] and (2) the implication of the wording of section 29(b) of the Exchange Act.[19] The former has particular applicability in *Newkirk*. Traditionally, courts have allowed recovery of damages for injuries resulting from violations of statutory enactments.[20] A

[13] Reynolds & Co., 39 S.E.C. 902 (1960) (suspension of registrant and Reynolds & Co. from membership in the National Association of Securities Dealers for thirty days); Behel, Johnsen & Co., 26 S.E.C. 163 (1947) (revocation of registration of registrant and expulsion from membership in the National Association of Securities Dealers).

[14] *E.g.*, Pfeffer v. Cressaty, 223 F. Supp. 756 (S.D.N.Y. 1963). (Action to recover damages for fraudulent misstatements and omissions of material facts in connection with the sale of stock); Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949).

[15] Compare sections quoted in notes 7 and 8 *supra*.

[16] 69 F. Supp. 512 (E.D. Pa. 1946).

[17] 17 C.F.R. 240.10b-5 (1964).

[18] Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

[19] *Id.* at 514. 48 Stat. 903 (1933), as amended, 15 U.S.C. 78cc(b) (1964).

[20] RESTATEMENT (SECOND), TORTS § 286, comment *d* (1965), discussing the situation where a criminal statute does not provide expressly for civil liability, states in part:

> [T]he court is free, in making its own judicial rules, to adopt and apply to the negligence action the standard of conduct provided by such a criminal enactment or regulation. . . . The decision to adopt the standard [of conduct] is purely a judicial one, for the court to make. . . . On the same basis, the court may adopt the standard of conduct laid down by an administrative regulation.

member of a class for whose protection a criminal statute or regulation was designed may sue for damages caused by a breach of such law.[21] The dominating purpose of the Exchange Act and the rules promulgated thereunder is to provide protection for investors.[22] Certainly, a customer whose account has been excessively traded falls within the class of persons to be protected by rule 15c1-7 and the violation of the rule by the salesman constitutes activity from which investors are protected.

Another premise upon which civil liability can be argued is found in the jurisdictional section of the Exchange Act.[23] That section states that the federal district courts "shall have exclusive jurisdiction . . . *of all suits in equity and actions at law brought to enforce any liability or duty* created by this title or the rules and regulations thereunder."[24] Such language would seem to imply that Congress had civil suits for damages in mind when this section was written.[25]

A final argument for civil liability was made by the court in *Newkirk*. Under section 15A(b)(4) of the Exchange Act, the SEC is empowered to bar a broker from membership in the National Association of Securities Dealers for violations of the Act.[26] It would seem that allowing recovery of damages in a private action would constitute a less drastic result and might be preferable in some situations.

The principal argument posed against the extension of civil liability is the maxim, *expressio unius est exclusio alterius, i.e.*, since Congress neglected to make express provisions for civil liability, it intended that there be none.[27] This doctrine was severely limited as a rule of construction in *SEC v. C. M. Joiner Leasing*

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[21] *Id.* at § 286; Comment, 59 YALE L.J. 1120, 1134-35 (1950).

[22] 14 U. CHI. L. REV. 471, 474-75 (1947); Comment, 59 YALE L.J. 1120, 1133 (1950). The author of the former note suggests that

> each section of the several federal securities acts in which certain conduct is made unlawful, and in which no exclusive remedy is provided, might become the basis of civil actions of the type under discussion, provided the section is designed for the protection of investors.

14 U. CHI. L. REV. at 478.

[23] 48 Stat. 902 (1934), as amended, 15 U.S.C. § 78aa (1964).

[24] 48 Stat. at 902-03; 15 U.S.C. at § 78aa. (Emphasis added.)

[25] Lowenfels, *supra* note 5, at 18-19.

[26] 52 Stat. 1070 (1938), 15 U.S.C. § 78*o*-3(b)(4) (1964).

[27] Comment, 59 YALE L.J. 1120, 1133 & n.68 (1950).

Corp.,[28] where the Court stated that the rule must be "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose. . . ."[29] Since the dominating purpose of the Exchange Act is to protect investors,[30] and since section 28(a) of the act provides that remedies created by the act shall be in addition to those available in law or equity,[31] it would seem that *expressio unius est exclusio alterius* has little or no applicability to a construction of the Exchange Act.

The court in *Newkirk*, while allowing liability for damages in a civil action, left several questions open for later clarification. For example, to what extent does a heavy loss in an account influence the court in its finding of an abuse of discretion? It would seem that at least some attention should be directed toward the general market trend during the period, since a broker-dealer should not be made to bear the burden of errors of judgment. To hold otherwise would allow the court to take advantage of hindsight in second-guessing the broker-dealer. At the same time, should the court take notice of the caliber of securities traded in a discretionary account? If so, then possibly the measure of damages should go beyond the commissions earned when it is shown that the particular securities traded were highly speculative and of doubtful value. Assuming commissions earned to be the correct measure of damages, would a recovery be allowed where an account, shown to have been excessively traded, has yielded a net *profit*? Although a case involving such a situation would be unlikely to arise, it must be remembered that the commissions charged still represent a reduction in the equity of the account. Where a reckless and willful disregard for the customer's interests is displayed by a broker-dealer while churning an account, should the court allow a recovery of punitive damages?[32] While the decision in *Newkirk* seems to be in line with the prevailing trend of the courts, the traditional application of tort liability for statutory violations, and the dominating purpose of the Exchange Act, it is evident that further decisions will be necessary

[28] 320 U.S. 344 (1943).
[29] *Id.* at 350.
[30] See note 22 *supra*.
[31] 48 Stat. 903 (1934), as amended, 15 U.S.C. § 78bb (1964).
[32] An award of punitive damages would be highly unlikely since § 28 of the Exchange Act expressly prohibits a recovery under the act in excess of actual damages sustained. 48 Stat. 903 (1934), as amended, 15 U.S.C. § 78bb(a) (1964).

to delineate the scope of and grounds for civil liability under rule 15c1-7.

CHARLES E. ELROD, JR.

Taxation—Charitable Deductions—Bequest for Benefit of Employees

The majority shareholder of a corporation made a bequest of forty per cent of his residuary estate to a testamentary trust to provide pension payments to the employees of the corporation. Employees employed prior to, or at the time of, decedent's death who retired after twenty-five years of service were to receive monthly pension payments of not more than 125 dollars.[1] Yearly trust income in excess of that needed for pension payments was to be paid over to an employees' trust fund created by the corporation in 1946 for pension purposes. Upon the death of the last surviving employee-beneficiary, the trustees of the testamentary trust were to terminate it by paying 2,000 dollars to each of three named hospitals and the remainder of the income and corpus to the employees' trust fund. If the employees' trust fund was not in existence, the income and corpus was to be divided equally among the three hospitals.

After the Commissioner of Internal Revenue refused to allow the decedent's bequest to the trust as a charitable deduction, the decedent's estate paid the asserted estate tax deficiency and sued in a federal district court for a refund. The district court,[2] relying on an earlier Third Circuit decision,[3] held that the bequest was charitable and qualified for a deduction under section 812(d) of the 1939 Internal Revenue Code (the predecessor of section 2055 of the Internal Revenue Code of 1954). The court found that sufficient public benefit flowed from the trusts to make them charitable, the beneficiaries of the trusts were ascertainable, and the discretion vested in the trustees was limited to disbursements for charitable purposes. On appeal, in *Watson v. United States*[4] a divided Third Circuit reversed and held that the testamentary trust was not charitable. The majority of the court found that the trust benefited the

[1] The exact amount was to be determined by subtracting from $125 the amount of Social Security benefits and corporate pension payments received by an employee. Corporate officers and directors were not to receive pension payments.

[2] Watson v. United States, 63-2 U.S. Tax Cas. 90, 379 (D.N.J. 1963).

[3] Gimbel v. Comm'r, 54 F.2d 780 (3d Cir. 1931).

[4] 355 F.2d 269 (3d Cir. 1965).

corporation as well as the employees, represented compensation to the employees, and was an ordinary pension trust which Congress distinguished from charitable organizations by sections 401(a), 501(a) and 501(c)(3) of the Internal Revenue Code of 1954. The court prefaced its reasoning with the statement, "We are not here dealing with an impoverished class."[5] The court also held that a New Jersey Superior Court's holding that the testamentary trust was charitable[6] was not binding in a federal tax determination.

A concurring opinion underscored the majority's holding that local definitions of charity are not binding in federal tax determinations. A dissenting judge, taking an opposite view of the effect of local law, expressed the opinion that the finding of the New Jersey Superior Court was binding and precluded independent consideration of the issue in the tax case. Another dissenting judge would have affirmed on the reasoning and findings of the district court.

Prior to the *Watson* decision, it was generally believed that gifts and bequests for the benefit of employees could result in charitable deductions under the federal income and estate taxes. A long line of cases had held that gifts providing retirement or welfare benefits to employees were in the public interest and should be encouraged.[7] The majority in *Watson* refused to follow these precedents and indicated that such gifts and bequests are no longer charitable in the Third Circuit.

In applying section 812(d) the *Watson* court divided on two points: the effect of local law and the characterization of employee pension trusts.

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[5] *Id.* at 271.

[6] Passaic-Clifton Nat'l Bank & Trust Co., Super. Ct. Ch. Div. Essex County C458-55, April 22, 1957. The court held that both the testamentary and the employees' trusts were charitable and therefore not subject to the New Jersey Rule Against Perpetuities. In an unrelated action, Watson v. Brower, 24 N.J. 210, 131 A.2d 512 (1957), the New Jersey Supreme Court, in ruling on the use of the word "retire" in the testamentary trust, noted that the trust was intended to benefit the corporation as well as the employees.

[7] Harrison v. Barker Annuity Fund, 90 F.2d 286 (7th Cir. 1937); Gimbel v. Comm'r, 54 F.2d 780 (3d Cir. 1931); Eagan v. Comm'r, 43 F.2d 881 (5th Cir. 1930); Mutual Aid & Benefit Ass'n v. Comm'r, 42 F.2d 619 (3d Cir. 1930); Estate of Leonard O. Carlson, 21 T.C. 291 (1953); T.J. Moss Tie Co., 18 T.C. 188 (1952), *petition to review docketed and dismissed on motion of petitioner and consent of respondent,* 201 F.2d 512 (8th Cir. 1953); Estate of Lillian D. Wald, 13 P-H Tax Ct. Mem. 855 (1944); Estate of Carolyn E. Gray, 2 T.C. 97 (1943); Proctor Patterson, 34 B.T.A. 689 (1936); John R. Sibley, 16 B.T.A. 915 (1929).

I. Effect of Local Law

The role of local law in federal tax litigation has been kept at a minimum in an endeavor to achieve nationwide uniformity in federal taxation. The Supreme Court set forth the guidelines in *Burnet v. Harmel*[8] when it declared that the Internal Revenue Code should "be interpreted so as to give a uniform application to a nationwide scheme of taxation."[9] Following this idea, the Court in *Lyeth v. Hoey*[10] held that property that an heir received under a will compromise was acquired by "inheritance," as that term is used in the income tax, and was therefore exempt from the income tax despite the fact that under the local state law the heir acquired the property by a contract with the legatee named in the decedent's will. The Court said:

> Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law. . . . There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the differing views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule.[11]

Although the federal estate tax exempts gifts to charity, it does not define "charitable."[12] It would be possible to determine whether a bequest was charitable by recourse to the state law governing the bequest, but this would mean that a bequest by a decedent domiciled in one state might be charitable and deductible for purposes of the federal estate tax, while an identical bequest by a decedent domiciled in another state would not be charitable and deductible. In other words, this would lead to the lack of uniformity that the Supreme

[8] 287 U.S. 103 (1932).
[9] *Id.* at 110.
[10] 305 U.S. 188 (1938).
[11] *Id.* at 194.
[12] Lowndes & Kramer, Federal Estate and Gift Taxes 352 (2d ed. 1962); 4 Mertens, Law of Federal Gift and Estate Taxation 345 (1959).

Court sought to avoid in *Lyeth v. Hoey*. The majority of the court in the *Watson* case may have acted properly in refusing to be bound by state decisions holding the trust charitable. The term "charitable" in a federal tax statute may like "inheritance" in the federal income tax be a term that should be defined by a uniform federal definition. It seems apparent, however, that if the federal courts are not going to be bound by the law of a particular state in defining the term "charitable," they should not eschew the common law entirely. There are basic common-law conceptions about what are charitable purposes that might well be used as the foundation for a uniform federal tax definition of charitable. If the majority in the *Watson* case derived its decisions from any such general principles, it failed to articulate clearly either the principles or the nexus between them and its conclusion.

II. Employee Trusts

The *Watson* decision rests primarily upon a finding that Congress did not intend for employee pension trusts to be charitable organizations within the meaning of the Code. Apparently the court reasoned that Congress by expressly providing for the tax treatment of pension trusts in sections 401(a) and 501(a) excluded employees' pension trusts from charitable organizations under section 501(c)(3). This finding was based in part on Revenue Ruling 56-138,[13] which the majority found to be on all fours with the facts in *Watson*. In that ruling a corporation sought to deduct as charitable contributions payments to a trust organized and operated by the corporation to provide pensions to retired employees and benefits to certain employees who were to be selected by an executive committee. The Commissioner ruled that trusts organized primarily for the purpose of paying pensions to retired employees were not organized exclusively for charitable purposes within the meaning of section 501(c)(3) and were, therefore, not entitled to an income tax exemption under section 501(a). Section 401(a), as well as Revenue Ruling 56-138, deals specifically with one type of pension trusts—pension trusts created and funded by a corporate employer. If such a trust meets the many requirements of section 401, it receives favorable tax treatment from other sections of the Code.[14]

[13] 1956-1 Cum. Bull. 202.

[14] Generally, §§ 402 and 403 provide that amounts contributed to quali-

Such trusts are distinguishable from charitable organizations. Section 401 is in no way concerned with pension trusts created and funded by nonemployers. The section has no relevancy to a bequest in trust for the retirement of employees. It is highly improbable that Congress intended the section to have any effect whatever on the tax status of a bequest similar to the one in *Watson*. Whether or not a gift to an employees' trust is charitable would appear to depend upon the circumstances surrounding the gift. Corporate contributions to an employees' trust created by the corporation for the primary benefit of its officer-stockholders might well be viewed differently than a bequest by a disinterested philanthropist to a trust to provide modest retirement benefits for the impecunious employees of a depressed industry.

The *Watson* decision was also grounded on findings that the beneficiaries of the trust were not impoverished and the bequest was not charitably motivated. It is doubtful that the Third Circuit intended to limit the recipients of charitable giving to the impoverished. It is well established that those of modest means as well as paupers are proper objects of charitable trusts.[15] Indeed, a means test is not a necessary ingredient of a charitable trust. Relief of poverty is but one of several charitable purposes recognized by the law.[16]

Apparently the court in *Watson* felt that the fact that the decedent had been the majority shareholder of the corporation established a lasting employer-employee relationship between him and the employees that survived his death. On the basis of this relationship the majority found that the bequest was intended to and did benefit both the employees and the corporation. In attributing selfish designs to the decedent, the majority overturned the finding of the district court that he was charitably motivated.

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fied pension plans by employers will not be taxed to the employees until distributed pursuant to the plan. Employers are allowed, within prescribed limits, an immediate deduction from gross income for contributions to qualified pension plans under § 404.

[15] Bowditch v. Attorney Gen., 241 Mass. 168, 134 N.E. 796 (1922); Gibson v. Frye Institute, 137 Tenn. 452, 193 S.W. 1059 (1916); New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 91 N.E. 385 (1910); Godfrey v. Hutchins, 28 R.I. 517, 68 Atl. 317 (1907); RESTATEMENT (SECOND), TRUSTS § 374, comment *g* (1959); BOGERT, TRUSTS 145 (4th ed. 1963); 4 SCOTT, TRUSTS § 374.11 (2d ed. 1956).

[16] See generally RESTATEMENT (SECOND), TRUSTS §§ 368-74 (1959); BOGERT, TRUSTS §§ 57-64 (4th ed. 1963); 4 SCOTT, TRUSTS §§ 368-74 (2d ed. 1956).

Prior cases consistently had held that organizations dedicated to the well-being of employees could be charitable for tax purposes.[17] Gifts and bequests for the retirement or welfare of employees were deemed to be in the public interest and were to be encouraged.[18] The courts did not deny charitable deductions because of selfish motives of the donor, the lack of need of some of the benefited employees, or the promised benefits inducing employees to work longer and harder.[19]

Scott, Bogert and the *Restatement of Trusts* indicate that trusts for the aid and relief of employees can be charitable.[20] Bogert states that employee pension trusts can be charitable,[21] but comment 375(g) of the *Restatement,* without citing authority, flatly asserts that employee pension trusts are not charitable.

Although the weight of authority is stacked against the *Watson* decision, much of the authority is a product of the depression years. Perhaps the tax status of employee pension trusts should be re-examined in light of existing social and economic conditions. Certainly with the emergence of Social Security, corporate pension plans, and other forms of old age assistance such as Medicare, the reasons for bestowing tax benefits to encourage private assistance to the elderly are not as obvious as they were thirty years ago. The court would have been on firmer legal footing if it had based its decision on the noncharitable aspects of the employees' trust fund. This trust was to receive unascertainable yearly pour-overs of income from the testamentary trust and the remainder of the corpus and income of the trust on its termination. The employees' trust fund was amendable by collective bargaining, made its trustees subject to the instructions of the board of directors of the corporation and was funded by the corporation. Indeed, it would appear to be exactly the type of trust that section 401(a) would distinguish from charitable organizations. If this trust was not organized for charitable purposes,[22] an unascertainable amount of the bequest to the

[17] See note 7 *supra.*

[18] See 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION 645-47, 650 (1942).

[19] Harrison v. Barker Annuity Fund, 90 F.2d 286 (7th Cir. 1937).

[20] RESTATEMENT (SECOND), TRUSTS § 375, comment *g* (1957); BOGERT, TRUSTS 166 (4th ed. 1963); 4 SCOTT, TRUSTS 2711 (2d ed. 1956).

[21] BOGERT, TRUSTS § 61, at 166 (4th ed. 1963).

[22] The district court found that the employees' trust fund was charitable, Watson v. United States, 63-2 U.S. Tax Cas. 90,379 (D.N.J. 1963), relying in part on Passaic-Clifton Nat'l Bank & Trust Co., Super. Ct. Ch. Div. Essex County C458-55, April 22, 1957, which held that the employees' trust

testamentary trust was not to be used exclusively for charitable purposes, and clearly the deduction should not be allowed.

It is doubtful that the *Watson* case stands for the proposition that a gift to a trust to provide retirement benefits for employees cannot be charitable for federal tax purposes. The deductibility of such gifts appears to depend upon the circumstances surrounding the gift, such as the persons benefited by the trust, the nature and extent of their benefits, the relation between the donor and the beneficiaries of the trust and any possible advantages accruing to the donor from the gift to the trust.

WILLIAM S. LOWNDES

Torts—Parent-Child Immunity

In *First Union Nat'l Bank v. Hackney*[1] the North Carolina Supreme Court held that a parent's common-law immunity to tort claims brought by his unemancipated minor children[2] does not apply to prevent recovery where a wrongful death action is brought by the administrator of one parent against the estate of the other parent, for the benefit of the children.

In *Hackney* the parents of four minor children were killed when the family car ran off a highway and hit a tree. The administrator of the mother's estate brought a wrongful death action against the estate of the father based on his alleged negligence in losing control of the vehicle. The defendant asserted (1) that the children were the real parties in interest *as plaintiffs* since any recovery in the action would go to them as sole distributees of their mother;

fund was charitable for purposes of the New Jersey Rule Against Perpetuities.

[1] 266 N.C. 17, 145 S.E.2d 352 (1965).

[2] Parent-child immunity to negligence claims of each other was an innovation of American courts. The first precedent for the rule was Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), where the court reasoned that:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

Id. at 711, 9 So. at 887.

"Parental authority" and the "security of the home" were two of the policy reasons which convinced a majority of the North Carolina court to adopt the parent-child immunity rule in Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

(2) that the children were the real parties *defendant* as sole legatees under their father's will, and since the children were both plaintiffs and defendants in the action, the suit would be futile; and (3) that the children should not be permitted recovery from the estate of a parent under North Carolina's wrongful death statute because of the parent's immunity to negligence claims brought by his unemancipated minor children. This note will be limited primarily to the impact of *Hackney* upon the doctrine of parent–child tort immunity, and the other questions raised by the case will be referred to only briefly.

In disposing of the first defense, the court held, on the basis of existing authority, that a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence;[3] that if such injuries cause her death, her personal representative can maintain a wrongful death action against her husband or his estate;[4] and that in such action the persons entitled to the recovery (here, the children) are *not* the real parties in interest.[5] With respect to defendant's contention that the children were the real parties in interest *as defendants* because they were the beneficiaries of their father's estate, the court answered that there was no showing that any of the general distributable assets of their father's estate would be required to pay any judgment plaintiff might recover. It took judicial notice that "automobile liability insurance is a fact of present day life"[6] and said that absent an allega-

[3] N.C. GEN. STAT. §§ 52-10, -10.1 (Supp. 1965); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923).

[4] N.C. GEN. STAT. § 28-173 (Supp. 1965); King v. Gates, 231 N.C. 537, 57 S.E.2d 765 (1950).

[5] The court said the children were not the real parties in interest *as plaintiffs* within the meaning of that term as used in N.C. GEN. STAT. § 1-57 (1953), that they had no right of action for the death of their mother under authority of Howell v. Board of Comm'rs, 121 N.C. 362, 28 S.E. 362 (1897), and that the right of action vested in their mother's personal representative, Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963). In distinguishing the wrongful death cases of Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947), and In the Matter of Estate of Ives, 248 N.C. 176, 102 S.E.2d 807 (1958), the court said these cases were based on the proposition that no person will be permitted to profit from his own wrongdoing. It reasoned that the basic principle on which *Davenport* and *Ives* were decided was inapplicable in the instant case since there was no allegation that the children were in any way responsible for their mother's death.

[6] 266 N.C. at 22, 145 S.E.2d at 357. The court said:

> Automobile liability insurance is a fact of present day life which defendant may not ignore. It is a matter of common knowledge that

tion that the father did not have liability insurance sufficient to safeguard the general assets of his estate in the event of a judgment against the estate, "it does not appear that use of any of the general distributable assets . . . would be required to pay, in whole or in part, such judgment."[7] Thus the children were not shown to be the real parties defendant.

In sustaining the striking of the third defense, the court noted that the present action did not involve the right of an unemancipated minor to sue the parent because of injuries to such child caused by the parent's actionable negligence. It stated that this action was brought by the administrator of the wife's estate to recover for *her* wrongful death and therefore the doctrine of parent–child tort immunity was inapplicable in the context of this case.[8] As an alternate ground for decision, however, the court said that since both the mother and father were dead, there was no parent–child relationship that would be disturbed by the suit.[9] "In this factual situation," the court added, "according to the weight of authority and sound reason, the immunity doctrine has no application."[10]

North Carolina is in accord with the majority of jurisdictions in refusing to permit tort actions between parents and their unemancipated minor children.[11] Parent–child suits are permitted when

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millions of car owners purchase automobile liability insurance. G.S. § 20-309 requires every owner of a motor vehicle, as a prerequisite to the registration thereof to show "proof of financial responsibility" in the manner prescribed by G.S. Chapter 20, Article 9A.

. . .

A liability policy purchased by the husband-father would constitute a valuable asset. During his lifetime, it would protect him in respect of his personal liability and preserve his general estate from depletion; and, upon his death, such policy would constitute a valuable asset of his estate and safeguard the general assets of his estate for distribution to the beneficiaries.

Id. at 22-23, 145 S.E.2d at 357.

The instant case is one of a very limited number of North Carolina cases in which the presence of liability insurance was a determinative factor. Another such case is In the Matter of Estate of Miles, 262 N.C. 647, 138 S.E.2d 487 (1964), where the court ruled that an automobile liability insurance policy was enough of an unadministered asset of a decedent's estate to justify reopening such estate to permit a wrongful death action to be brought against the administratrix, c.t.a., of the estate.

[7] 266 N.C. at 23, 145 S.E.2d at 357.

[8] *Id.* at 24, 145 S.E.2d at 358.

[9] *Id.* at 27, 145 S.E.2d at 360.

[10] *Ibid.*

[11] See 3 LEE, NORTH CAROLINA FAMILY LAW § 248 (3d ed. 1963) [hereinafter cited as LEE].

the cause of action is based on contract[12] or on a property right[13] but are not permitted when the action is based on a personal injury, whether such injury was caused by negligence[14] or by a willful or malicious act.[15] The immunity that the parent has from suit by the minor children in personal injury cases arises from a disability to sue and not from a lack of violated duty.[16] The immunity is said to be cased upon a public policy to protect family harmony and parental discipline.[17]

In recent years there has been a growing judicial inclination to find the immunity doctrine inapplicable where there is no family relationship, harmony, or parental authority or discipline to be preserved.[18] Until *Hackney* the North Carolina Supreme Court had steadfastly adhered to the traditional view,[19] paying little heed to the maxim that where the reason for a rule ceases, the rule itself

[12] See 39 AM. JUR. *Parties* §§ 88-92 (1942); HARPER, PROBLEMS OF THE FAMILY 565 (1952); 1 HARPER & JAMES, TORTS § 8.11 (1956); PECK, PERSONS AND DOMESTIC RELATIONS § 124 (3d ed. 1930); PROSSER, TORTS § 101 (3d ed. 1963); 4 VERNIER, AMERICAN FAMILY LAWS § 267 (1936).

[13] The court said in Small v. Morrison, 185 N.C. 577, 586, 118 S.E. 12, 16 (1923) (dictum), "The right of a minor child to bring an action against its parent in respect to the latter's dealing with its property is unquestioned. . . ."

[14] Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); see Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949); Wright v. Wright, 229 N.C. 503, 50 S.E.2d 540 (1948); Goldsmith v. Samet, 201 N.C. 574, 160 S.E. 835 (1931); 29 N.C.L. REV. 214 (1951); 11 N.C.L. REV. 352 (1933).

[15] There has been a noticeable trend in recent decisions of other jurisdictions to allow actions for personal injury to a child where such injury resulted from willful or malicious misconduct, but North Carolina has not yet joined this trend although inferences of a desire to do so can be gathered from a number of decisions. See Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Redding v. Redding, 235 N.C. 638, 640, 70 S.E.2d 676, 677 (1952); Goldsmith v. Samet, 201 N.C. 574, 160 S.E. 835 (1931). As to the trend in other jurisdictions, see JACOBS & GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS 945 (4th ed. 1961); 1 HARPER & JAMES, TORTS § 8.11 (1956); PROSSER, TORTS § 101 (2d ed. 1955); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 529-34 (1960); 29 N.C.L. REV. 214 (1951); 35 NOTRE DAME LAW. 467 (1960); 26 Mo. L. REV. 152, 208-09 (1961).

[16] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

[17] Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

[18] Annot., 19 A.L.R.2d 423, 427 (1951).

[19] See, *e.g.*, Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965), where the administrator of a mother was not permitted to sue the estate of her unemancipated minor son for damages for her wrongful death caused by the son's negligence. Although both mother and son were dead and there was no family relationship to be disturbed, the immunity doctrine was still held applicable.

Hackney was an action by the administrator of a deceased parent against the estate of a deceased parent, with recovery going to the children. While it does not fall squarely within any of the categories outlined, it has implications for classes (2) through (7), for if *Hackney* shows an intention by the court to disregard the immunity rule in all cases where there is no relationship to be given immunity protection, then immunity should not be a bar to actions in classes (2) through (7).

Hackney was not an ideal vehicle for the court to use in announcing an intention to disregard the immunity rule in cases where there is no relationship to be given immunity protection. It was not a case of an unemancipated minor suing the estate of a deceased parent for the parent's negligent injury of the child. Such a case would have presented the question in a more clean-cut fashion. *Hackney* was one step removed. The immunity doctrine was urged defensively in an attempt to deny recovery to children in a wrongful death suit brought by the administrator of one deceased parent against the estate of the other. This raised an issue of statutory construction of the wrongful death statute, which the court resolved by saying that the immunity doctrine should not be read into the statute in this fact situation. The fact that *Hackney* was such a difficult case in which to crave out an exception to the immunity rule is perhaps an indication of the court's desire to apply the exception across the board, in all cases where there is no relationship to be protected. However, this interpretation may be too broad, since the court in *Hackney* did not indicate disfavor for any of its earlier decisions where the immunity doctrine was applied even though there was no relationship to be protected.[26]

There also remains to be resolved the impact of *Hackney* upon a line of decisions holding that the administrator of an unemancipated minor child killed by his parent's negligence has no cause of action against the parent for wrongful death.[27] *Hackney* logically points the way to overturning this line of decisions, since the same

[26] Among its earlier decisions was one decided only eleven months before *Hackney*, the case of Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 676 (1965). The court there held that the administrator of a mother may not sue the estate of her unemancipated minor son for her wrongful death caused by the son's negligence.

[27] Capps v. Smith, 263 N.C. 120, 139 S.E.2d 19 (1964); Lewis v. Farm Bureau Mut. Auto. Ins. Co., 243 N.C. 55, 89 S.E.2d 788 (1955); Goldsmith v. Samet, 201 N.C. 574, 160 S.E. 835 (1931).

should cease. In *Hackney,* however, the court took an important first step toward the modern approach. The court examined cases from jurisdictions that have taken a new approach to the problem, found their logic convincing, and held that since the policy reasons on which the immunity doctrine rests did not apply to the factual situation under consideration in *Hackney,* the immunity doctrine itself should not apply. Authorities which the court found to be persuasive include decisions from Tennessee,[20] New Hampshire,[21] Missouri,[22] New Jersey,[23] Pennsylvania,[24] and Louisiana.[25]

Before *Hackney,* the parent's immunity from negligence actions brought by his children conceivably could have extended to the following classes of cases: (1) actions by a living child against a living parent; (2) actions by a living child against the estate of a deceased parent; (3) survival actions by the administrator of a deceased child against a living parent; (4) survival actions by the administrator of a deceased child against the estate of a deceased parent; (5) wrongful death actions by the administrator of a deceased child against a living parent; (6) wrongful death actions by the administrator of a deceased child against the estate of a deceased parent; and (7) actions by a child against a divorced parent, or against a parent whose own action has caused a breakdown of the family unit.

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[20] Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960), where the court said the immunity rule is based solely upon the public policy of preserving domestic peace and tranquility in the family, and since the father in the case at hand had destroyed that peace by murdering the mother, the immunity rule should not be applied.

[21] Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), where the court said the immunity exists only where a suit might disturb the family relations.

[22] Brennecki v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960), where the court said:

> The doctrine of intrafamily immunity from such suits expires upon the death of the person protected and does not extend to the decedent's estate for the reason that death terminates the family relationship and there is no longer in existence a relationship within the reasonable contemplation of the doctrine.

Id. at 73.

[23] Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962), where the court said, "It is self-evident that if the family relationship no longer exists, having been dissolved by death, then the public policy consideration which supports the rule of immunity likewise no longer exists." *Id.* at 297, 176 A.2d at 819.

[24] Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954), holding that the immunity of a living parent from suit by an unemancipated child was a personal defense that died with the father.

[25] Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935).

reason for not reading the immunity into the wrongful death statute in *Hackney* could have been applied there. In none of these cases was there a family relationship that would have been harmed, and the only thing that prevented recovery was a literal and seemingly erroneous interpretation of North Carolina's wrongful death statute, which in pertinent part provides:

> When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor,* the person or corporation that would have been so liable . . . shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent. . . .[28]

The court has denied recovery in this line of cases by reading the parent–child immunity doctrine into the wrongful death statute, saying that the child could not have maintained a suit against its parent had it lived and therefore the terms of the wrongful death statute preclude recovery.[29] The court would not be varying the terms or intent of the statute by applying its newly created exception to the immunity rule in cases where the child was killed by the parent's negligence. North Carolina's wrongful death statute was enacted twenty-two years *before* the doctrine of parent–child tort immunity came into existence[30] and fifty-four years before North Carolina judicially adopted the immunity.[31] It is a fundamental tenet of statutory construction that every statute is to be interpreted in the light of the common law as it was understood at the time of its enactment.[32] At the time of this statute's enactment there was no parent–child tort immunity to prevent a child from suing its parent. Thus the emphasized portion of the statute quoted above did not

[28] N.C. GEN. STAT. § 28-173 (Supp. 1965). (Emphasis added.)

[29] See cases cited note 27 *supra.*

[30] North Carolina's wrongful death statute was enacted by the General Assembly of 1868-69. N.C. Sess. Laws, ch. 113, §§ 70-72 (1869). It was a successor to England's Lord Campbell's Act, which in 1846 created the first statutory right of action for wrongful death. The Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93, §§ 1-6. The doctrine of parent–child tort immunity came into existence twenty-two years after passage of North Carolina's wrongful death act in the case of Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). See Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), for research indicating there was no such immunity prior to *Hewlett v. George.*

[31] North Carolina adopted the immunity doctrine in Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[32] State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944); State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

operate at the time of its enactment to prevent the administrator of a child from suing for the child's wrongful death and should not operate in such a manner now, especially if the court is not going to apply the immunity rule wherever there is no longer any reason for its application. It still remains to be seen, however, whether the court will logically extend *Hackney* to overturn this line of decisions.

A number of writers have urged that either the courts or the legislatures of the several states should abolish parent–child tort immunity[33] in light of "the ever-increasing criticism of the general rule"[34] and the growing number of exceptions to it. Examining the genesis of the rule in 1930, Chief Justice Peaslee of the New Hampshire Supreme Court said the immunity has "not infrequently been advocated with rhetoric rather than by reason"[35] during the course of its evolution. Certainly "family harmony" alone is not an adequate reason for permitting a wrong without a remedy in the parent–child negligence area.

North Carolina was one of the leaders in abolishment of husband–wife tort immunity.[36] While founded on a different theory,[37] this immunity was also supported by the same "family harmony" argument that is said to be an adequate ground for retaining the parent–child immunity. No family disharmony of serious proportion has resulted from abolishment of the former immunity. There is nothing to prevent one minor child from suing his minor brother or sister in tort.[38] Yet surely as much family disharmony would result from this type of action as would result from a suit by a child against a parent. The same "family disharmony" argument could be used to support a rule forbidding suits between parent and child in respect to contract and property rights, but North Carolina and the majority of jurisdictions permit such suits. It has been argued that permitting children to maintain suits against their parents where liability insurance is involved will lead to wholesale collusion and fraud.[39] However, the same argument could be made

[33] See 3 LEE § 248 n.232; 43 N.C.L. REV. 932 (1965).
[34] 3 LEE § 248, at 177.
[35] Dunlap v. Dunlap, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930).
[36] See 2 LEE § 211.
[37] Annot., 43 A.L.R.2d 632 (1955). "At common law, a husband and wife were one, and that one was the husband; a tort by one spouse against the person or character of the other gave rise to no cause of action in favor of the injured spouse." *Id.* at 634.
[38] See 3 LEE § 248, at 178.
[39] See Annot., 19 A.L.R.2d 423, 436 n.7 (1951).

with respect to actions between husband and wife; yet these actions are permitted.[40] In short, the present immunity rule and its exceptions result in cases difficult to determine with any degree of fairness and lead in many cases to injustice. It has been suggested that the simplest way to abolish parent–child tort immunity is to enact a statute doing so. At least one writer has gone so far as to suggest that legislation is the only way.[41] However, it should be remembered that the immunity was a creature of the courts,[42] and what the courts have created they can destroy.

THOMAS J. BOLCH

Workmen's Compensation—Average Weekly Wage—Combination of Wages

Barnhardt had been working during the days for National Cash Register Company, at an average weekly wage of 68 dollars, and during the evenings for Yellow Cab Company, at an average weekly wage of 26 dollars. He sustained a compensable injury while working for Yellow Cab. In *Barnhardt v. Yellow Cab Co.*[1] the North Carolina Supreme Court held that it was error for the Workmen's Compensation Commission to have combined the wages earned from both employers in fixing the compensation at 37.50 dollars per week (the maximum) and that the compensation should have been limited to 16.14 dollars per week, sixty per cent of the average wage earned from Yellow Cab.

North Carolina's Workmen's Compensation Act provides that an employee is to be compensated for sixty per cent of his average weekly wage, up to a maximum of 37.50 dollars per week, for a period not exceeding 400 weeks.[2] Average weekly wage is defined as the average of the employee's wages earned over a period of a year in the employment in which he was working at the time of the injury.[3] When the employment is casual or for a shorter period than a year, the statute authorizes consideration of the average weekly wage of employees in the same class of employment or an

[40] Dunlap v. Dunlap, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930).
[41] See Castellucci v. Castellucci, 188 A.2d 467, 469 (R.I. 1963).
[42] See note 2 *supra*.

[1] 266 N.C. 419, 146 S.E.2d 479 (1966).
[2] N.C. GEN. STAT. § 97-29 (1965).
[3] N.C. GEN. STAT. § 97-2(5) (1965).

averaging of the wages of the injured employee over the shorter period of time, provided the results are fair and just to both parties.[4] If because of exceptional reasons these methods would be unfair to either party, other methods may be used "as would most nearly approximate the amount the employee would be earning were it not for the injury."[5]

Since the statute contains no express authorization for combination of wages, the court said it would be exceeding the limits of judicial interpretation to allow it.[6] Furthermore, the court read the statute as allowing consideration of only those wages earned in the employment "in which the employee was injured."[7] The actual language of the statute directs consideration of the wages in the employment "in which the employee *was working at the time of the injury.*"[8] It does not seem that this language necessarily restricts the consideration to wages earned from the employment at the very moment of the injury. If a specific limitation had been intended, the legislature could have said simply that the compensation should be sixty per cent of the wages earned from the employer liable for the compensation. Since the statute twice directs results fair and just to both parties[9] and allows the use of methods that would most nearly approximate the amount the employee would be earning were it not for the injury,[10] the statute ought to be interpreted to allow a combination of wages where it is necessary in order to obtain fair results.

The statute directs that compensation awarded to a volunteer fireman is to be based on the average weekly wage in the employment in which the volunteer principally earned his livelihood.[11] The court viewed this provision as evidence of legislative intent not to allow any combination of wages.[12] The court may have reached this conclusion on either of two grounds. It might have thought this provision to be directed at the situation where a volunteer is working for two employers in addition to his service as a volunteer and legislative intent thus to be specifically to limit the basis of

[4] *Ibid.*
[5] *Ibid.*
[6] 266 N.C. at 429, 146 S.E.2d at 486.
[7] 266 N.C. at 428, 146 S.E.2d at 485.
[8] N.C. GEN. STAT. § 97-2(5) (1965). (Emphasis added.)
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] 266 N.C. at 428, 146 S.E.2d at 485.

compensation to the wages earned from one of those employers, that is, the one from whom the volunteer principally earns his livelihood. But it seems strange that the legislature would have anticipated and dealt with this particular case of concurrent employment while leaving so much ambiguity in the other sections. On the other hand, the court might have thought that the legislature classifies the service as a volunteer as an employment and that wages from only the employment in which the volunteer principally earned his livelihood should be considered in computing his compensation. However, a volunteer fireman ordinarily receives no wages in that capacity, so ordinarily there would be no problem of combination. Since volunteer firemen are not included in the definition of "employee"[13] and the methods for computation of average weekly wage refer to "employees,"[14] the legislature could have thought this section necessary to provide a basis of compensation for such volunteers who are given the right to compensation elsewhere in the General Statutes.[15]

The problem of computation of average weekly wage where there is concurrent employment (employment at two jobs with two employers) has been resolved in three ways in jurisdictions. Some courts have allowed consideration of only those wages earned in the employment in which the injury occurred.[16] Others have held that wages may be combined to the extent that such wages are earned in related or similar employment[17] but that no such combination is permitted where the employments are unrelated or dissimilar.[18]

[13] N.C. GEN. STAT. § 97-2(2) (1965).
[14] N.C. GEN. STAT. § 97-2(5) (1965).
[15] N.C. GEN. STAT. § 69-25.8 (1965).
[16] Walters v. Greenland Drilling Co., 184 Kan. 157, 334 P.2d 394 (1959); Black Star Coal Co. v. Hall, 257 Ky. 481, 78 S.W.2d 343 (1935); Stephens v. Catalano, 7 So. 2d 380 (La. 1940); Crower v. Baltimore United Butchers Ass'n, 206 Md. 606, 175 A.2d 7 (1961); Buehler v. University of Mich., 227 Mich. 648, 270 N.W. 171 (1936); Knight v. Cohen, 56 N.J. Super. 516, 153 A.2d 334, *aff'd*, 32 N.J. 497, 161 A.2d 473 (1959); De Asis v. Fram Corp., 78 R.I. 249, 81 A.2d 280 (1951).
[17] St. Paul Mercury Indem. Co. v. Idov, 88 Ga. App. 697, 77 S.E.2d 327 (1953) (retail salesman for three different employers); Texas Employers' Ins. Ass'n v. Hamilton, 95 S.W.2d 767 (Tex. Civ. App. 1936) (common laborer in highway construction and other construction work); Banberger Elec. R.R. v. Industrial Comm'n, 59 Utah 257, 203 Pac. 345 (1921) (electrician for railroad company and for power company).
[18] Murphy & Sons v. Gibbs 137 So. 2d 553 (Fla. 1962) (restaurant employee and operator of invoice producing machine); Welding & Iron Works v. Renton, 145 So. 2d 876 (Fla. 1962) (truck driver and shipping clerk); Harris Meat & Produce Co. v. Brown, 177 Okla. 317, 59 P.2d 280

Still other courts have reasoned that the policy of compensation requires a determination of average weekly wage based on all the employee's wages from all employers at the time of the injury.[19]

In Massachusetts where earlier court decisions had not allowed the combination of wages,[20] the statute was amended to provide expressly for combination.[21] Other states now have similar provisions.[22] The federal Longshoremen's and Harbor Workers' Compensation Act[23] has been interpreted to allow a combination of wages.[24] As early as 1906 the English statute allowed this combination.[25]

The policy question in *Barnhardt* is simple. Should an employee be compensated for his *actual* loss of wages, although not all of his wages are earned in the employment in which he was injured? The Court said it seemed reasonable that the legislature would relate the compensation to the wages paid by the employer in whose employment the injury occurred.[26] If the over-all policy of the act is to compensate the employee for at least a portion of all pecuniary loss occasioned by a compensable injury, whether such

(1936) (machine repairman and bookkeeper); Graham v. Glouschester Furniture Co., 169 Va. 505, 194 S.E. 814 (1938) (steeplejack and mechanic).

[19] Wells v. Industrial Comm'n, 63 Ariz. 264, 161 P.2d 113 (1945); Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491 (1916); Baily v. Farr, 66 N.M. 162, 344 P.2d 173 (1959).

The North Carolina court discussed McCummings v. Anderson Theatre Co., 225 S.C. 187, 81 S.E.2d 348 (1954), where the court affirmed an award based on wages from all employers. But the South Carolina court expressly stated that since no other method was offered on appeal its decision did not constitute authority for computation of average weekly wage by consideration of wages earned in other employment.

[20] Quebec's Case, 247 Mass. 80, 141 N.E. 582 (1923); King's Case, 234 Mass. 137, 125 N.E. 153 (1919); Marvin's Case, 234 Mass. 145, 125 N.E. 154 (1919).

[21] MASS. ANN. LAWS ch. 152, § 1(1) (1965). "In case the injured employee is employed in the concurrent service of more than one insured employer or self insurer, his total earnings from the several insured employers or self insurers shall be considered in determining his average weekly wage." Note that the wages from only insured employers or self-insurers may be considered. The same limitation has been established by court decision in Kansas. Walton v. Electric Serv. Co., 121 Kan. 480, 247 Pac. 846 (1926). The present Kansas rule does not allow any combination of wages in cases of concurrent employment. Walters v. Greenland Drilling Co., 184 Kan. 157, 334 P.2d 394 (1959).

[22] CAL. LABOR CODE § 4453; ME. REV. STAT. ANN. tit. 39, § 2(2)(1) (1964); PA. STAT. ANN. tit. 77, § 482 (Supp. 1965).

[23] 62 Stat. 603 (1948), 33 U.S.C. § 910 (1964).

[24] Liberty Mut. Ins. Co. v. Britton, 233 F.2d 699 (D.D.C. 1956).

[25] Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, § 13.

[26] 266 N.C. at 427, 146 S.E.2d at 485.

loss be in the form of medical expenses or wages lost,[27] it should not matter where the wages are earned. At least one court has acknowledged this to be the policy of workmen's compensation.[28]

The court thought increased compensation resulting from allowing a combination of wages would be unfair to the employer and his insurance carrier because insurance premiums are based on the amount of wages paid by the employer.[29] If a combination of wages is allowed the increased cost would be borne in the same manner as increased cost of medical treatment,[30] and the final result would be a shifting of the loss to the industry as a whole and its customers, and not to the individual employer or his insurance carrier.[31] Although the employer of a part-time employee would pay a smaller premium than he would if the same employee were full-time,[32] com-

[27] See N.C. GEN. STAT. § 97-25 (1965), which authorizes compensation for medical expenses without regard to the amount of wages earned; N.C. GEN. STAT. § 97-25 (1965), which fixes the compensation for loss of wages of North Carolina National Guardsmen at the maximum of $37.50 without regard to actual wages earned; N.C. GEN. STAT. § 97-2 (1965), which provides that veteran trainees are entitled to consideration of subsistence allowances paid by the United States Government in computing their average weekly wage and that volunteer firemen are entitled to consideration of their average weekly wage in their principal employment for calculation of compensation.

[28] See State *ex rel.* Munding v. Industrial Comm'n, 92 Ohio St. 435, 11 N.E. 299 (1915): "[T]he theory upon which compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way . . . that . . . this economic loss should be borne by the industry. . . ." *Id.* at 450, 11 N.E. at 303.

[29] 266 N.C. at 427, 146 S.E.2d at 485.

[30] Premiums are determined by multiplying each $100 of the employer's annual payroll by the basic rate for his industry classification over a three-year period. The basic rate is determined by reference to the incurred losses in the classification over the same period. Payments for loss of wages as well as payments for medical expenses are included in the incurred-loss factor. An increase in either type of payment would result in an increase in the incurred losses. Assuming the premiums remained constant, an increase in the basic rate would be required. See REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 239 (1947).

[31] See note 30 *supra*. The adjustment would be made in the basic rate which is applicable to all firms in the industry classification. Assuming the employer's payroll remained constant, his only increase would be in the basic rate so that it would be shared by the industry as a whole.

[32] Part-time employment means that the employer's annual payroll would be smaller. Therefore, when it is multiplied by the basic rate for his classification his total premium would be smaller than it would have been if the same employee had been employed full-time. The smaller premium is paid because there is less exposure to the risk that any compensation will have to be paid. The same principle would be applicable in the case of compensation for loss of wages. The smaller premium would be paid because of

pensation for medical treatment for the employee would not be limited because of the part-time employment.[33] For purposes of premium computation, wages merely measure the exposure to the risk of compensation. In so far as actual compensation is concerned, wages measure the pecuniary loss to the employee. Since the loss of wages earned in other employment is just as much a part of the pecuniary loss as medical expenses and loss of wages earned in the employment in which the injury occurred, such wages should be considered in computing the average weekly wage. In any event the maximum that the employee will recover is 37.50 dollars per week,[34] so there appears no valid reason for denying compensation at least for the allowable percentage of all wages earned immediately prior to the injury.

In 1940 only 26.4 per cent of the estimated wage loss in North Carolina was compensated.[35] In 1952 the percentage fell to 22.1.[36] Though there have been increases in the maximum allowable compensation since 1952,[37] it is apparent that even today the statute places much of the loss on the employee. In June 1964, the average weekly wage in manufacturing in North Carolina was 72.10 dollars.[38] Sixty per cent of this would be 43.26 dollars, but the actual compensation is limited to the maximum of 37.50 dollars per week, leaving 34.60 dollars uncompensated. Of course employees earning above-average wages would incur a larger uncompensated loss while those earning below-average wages would incur a smaller uncompensated loss.

The court recognized the injustice in the application of the statute in *Barnhardt,* but concluded that the remedy required legis-

less exposure to the possibility that the compensation would have to be paid at all, not because the possible compensation payments would be expected to be smaller. See REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 239 (1947).

[33] See N.C. GEN. STAT. § 97-25 (1965). No distinction is made between part-time employees and full-time employees for purposes of compensation for medical expenses.

[34] N.C. GEN. STAT. § 97-29 (1965).

[35] From a theoretical computation of Professor Arthur H. Reede as reported in SOMERS & SOMERS, WORKMEN'S COMPENSATION 81 (1954).

[36] *Ibid.*

[37] The maximum weekly payment was increased from $24 to $30 in 1951, N.C. Sess. Laws 1951, ch. 70, § 1; from $30 to $32.50 in 1955, N.C. Sess. Laws 1955, ch. 1026, § 5; from $32.50 to $35 in 1957, N.C. Sess. Laws 1957, ch. 1217, § 1; and from $35 to $37.50 in 1963, N.C. Sess. Laws 1963, ch. 604, § 1.

[38] N.C. DEP'T OF LABOR, BIENNIAL REPORT 8 (1964).

lative action.[39] The legislature should amend the act to allow a combination of wages where there is concurrent employment.[40] Until this is done the interpretation in *Barnhardt* increases the pecuniary loss falling on the employee, contrary to what appears to be the basic policy of the act.[41]

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[39] 266 N.C. at 428, 146 S.E.2d at 485.

[40] It is suggested that the following provision be inserted between the third and fourth paragraphs of N.C. GEN. STAT. § 97-2(5) (1965): "If the employee were working under concurrent contracts with two or more employers immediately prior to the accident, his wages from all such employers shall be considered in computing his average weekly wage.

[41] Indicating its continued concern over the result, the court has applied the rule announced in *Barnhardt* in a later case. Joyner v. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).