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COMMENTS

CONSTITUTIONAL LAW—CIVIL RIGHTS—SUBSTITUTION OF PRIVATE TRUSTEES FOR MUNICIPALITY DOES NOT EXCLUDE PUBLIC PARK FROM FOURTEENTH AMENDMENT PROTECTIONS*

Can a municipality as trustee of a charitable trust administer a trust in a discriminatory manner? If not, can the municipality resign as trustee and necessitate the appointment of private trustees? If so, can the private trustees administer the trust in a discriminatory manner as provided in the trust instrument? These are among the important questions considered by the United States Supreme Court in the case of *Evans v. Newton.*

The facts were not in dispute. In 1911, Senator Augustus O. Bacon devised a tract of land to the city of Macon, Georgia to be used as a park and pleasure ground for white people only. The city kept the park segregated for some years but in time allowed Negroes to use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis. In 1964, the city resigned as trustee and the court appointed three individuals to the positions. The Supreme Court of Georgia affirmed the appointment, holding that Senator Bacon had the right to bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that there is an undisputed power to appoint new trustees so that the purpose of the trust would not fail.

The United States Supreme Court, reversing and remanding the case to the Georgia court, held that the “public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.” Since the only issue raised by the parties was the validity of the appointment of the private trustees, the Court departed from the established rule of avoiding constitutional questions unless presented by the

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record. This decision, however, made unnecessary a later decision when and if the private trustees attempt to operate the park in a segregated manner.

The most difficult question facing the Court was whether the racial discrimination anticipated in the operation of Baconsfield Park by the private trustees falls within the purview of the constitutional prohibitions. Since the Civil Rights Cases it has been settled that the fourteenth amendment forbids only discrimination which "may fairly be said to be that of the States." In Burton v. Wilmington Parking Authority the court said that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." State action—action by the government which brings the discrimination within the purview of the fourteenth amendment—is a term of shifting content. Its application requires two elements: (1) governmental action in fact, and (2) such action in a context of sufficiently grave social implications to persuade the court of the necessity of federal correction. The courts have gone to great lengths to find these elements whenever the situation demanded. They have had very little difficulty in finding state action when the city owned or operated the facility, leased the property, compelled the discrimination by statute or

5. U.S. Const. amend. XIV.
6. 109 U.S. 3 (1883).
10. Watson v. City of Memphis, 373 U.S. 526 (1963); Griffin v. Board of Supervisors, 339 F.2d 486 (4th Cir. 1964); New Orleans City Park Improvement Ass'n v. Dettiege, 252 F.2d 122 (5th Cir. 1958); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956); Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955); Dawson v. City of Baltimore, 220 F.2d 386 (4th Cir. 1955); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948).
ordinance,\textsuperscript{12} delegated certain powers and rights,\textsuperscript{13} had a reversion to the property\textsuperscript{14} or contributed funds to the institution.\textsuperscript{15} State action has also been found when courts have tried to enforce discriminatory provisions in an agreement between private individuals\textsuperscript{16} or to award damages for breach of such an agreement.\textsuperscript{17} There are a number of other decisions, however, where the governmental action was more nebulous and the connecting link more questionable. In establishing a balancing test, the Court in Burton v. Wilmington Parking Authority said that “only by sifting facts and weighing circumstances can the non-obvious involvements of the State in private conduct be attributed its true significance.”\textsuperscript{18} An example of this principle is the case of Terry v. Adams,\textsuperscript{19} where a half-century old political organization that excluded Negroes from its membership, conducted a straw primary prior to the statutory primary. Even though no connection with the governmental function could be established, the Court noted that a victory in the straw primary was tantamount to victory in the regular election, and held that the “inaction” of the state in permitting the use of any device that produced the equivalent of the regular election was a violation of the fifteenth amendment. In Marsh v. Alabama,\textsuperscript{20} the Court reversed the conviction of a woman arrested on the streets of a company-owned town for handing out religious literature. A state statute provided that it was a crime to enter and remain on the premises of another after having been warned not to do so. The Court held that a state is not justified in permitting a corporation to govern a community so as to restrict fundamental liberties. It

\begin{itemize}
\item \textsuperscript{12} Buchanan v. Warley, 245 U.S. 60 (1917) (municipal ordinance making it unlawful to move to certain areas depending on race); Strauder v. West Virginia, 100 U.S. 303 (1880) (statute preventing Negroes from serving on jury).
\item \textsuperscript{13} Smith v. Allwright, 321 U.S. 649 (1944) (delegation to a party of the power to fix the qualifications of primary elections); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (operated under agency authorized by Congress).
\item \textsuperscript{14} Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962) (revisionary clause sufficient complete present control and interest making the discrimination state actio as to deny equal protection of the laws as guaranteed by the fourteenth amendment).
\item \textsuperscript{15} Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945).
\item \textsuperscript{16} Shelley v. Kraemer, 334 U.S. 1 (1948) (attempted enforcement of a racially restrictive covenant).
\item \textsuperscript{17} Barrows v. Jackson, 346 U.S. 249 (1953).
\item \textsuperscript{18} 365 U.S. 715, 722 (1961).
\item \textsuperscript{19} 345 U.S. 461 (1953).
\item \textsuperscript{20} 326 U.S. 501 (1946).
\end{itemize}
should be noted that the state did not condone the constitutional violation but was only concerned with the protection of property rights. It would seem that had the conviction concerned a privately owned farm as opposed to a privately owned town, no constitutional question would have been presented. Apparently the deciding factor was the character of the premises concerned as opposed to the presence or absence of state action.

Possibly a further extension of the state action doctrine is the case of Shelley v. Kraemer,21 which held that a state court may not enforce a racially restrictive covenant in an agreement between private parties affecting private property. Whether Shelley will be confined to its facts or stand for the broader proposition that any form of judicial action in aid of private discrimination is prohibited state action is not known. The 1964 case of Griffin v. Maryland22 is a good indication, however, of the Court's attitude and the present trend. In this case the Supreme Court reversed the conviction for trespass of five Negroes who were arrested by a deputy sheriff under the authority of the owner of a private amusement park. The Court held that the action by an individual who is possessed of state authority and purports to act under that authority, is state action. Griffin could be a very important decision since the Court did not go so far as the judicial action in Shelley to find state action, but only to the mere arrest of the trespassers.

The exact holding in Evans is uncertain since the only issue certified to the Supreme Court was the substitution of private trustees for the city of Macon. In view, however, of In re Girard College Trusteeship23 the holding is probably not to be construed as reversing the appointment of the private trustees, but only that given the appointment, the private trustees could not operate Baconsfield Park in a discriminatory manner. This holding was based to some extent on an assumption by the Supreme Court that the municipality was involved in the operation of the park: "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park

23. In re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958), cert. denied, 357 U.S. 570 (1958). The court substituted private individuals as trustees in place of Board of City Trusts in order to carry out intent of testator after the Supreme Court held that the Board, being a state agency, could not administer orphanage in discriminatory manner.
from the public to the private sector.”24 Since the fact of the city’s involvement or non-involvement in the park will be a matter later litigated on remand, the remaining discussion will assume a finding of non-involvement except the tax exemption granted to charitable trusts. The remaining question then is whether the Court’s holding was in reality based on the city’s assumed involvement or whether the decision would have been the same if there had been in fact no involvement on the part of the city.

Recalling the Court’s proficiency in finding state action, this requirement presents little difficulty in this situation. In a testamentary trust, the power to dispose of property at death is a privilege granted by the state and supervised through probate and administration by courts and judicially appointed fiduciaries. Furthermore, a charitable trust becomes operative only after a court has found either specifically or by inference that it is charitable.25 It is likely that such state involvement in sanctioning a discriminatory provision in a trust would be sufficient state action to invoke constitutional protection considering that the Court in Terry and Marsh held that the states “inaction” in permitting the discrimination was sufficient.

Therefore, conceding state action in any given case, the problem becomes a weighing of the individual’s right to discriminate against the constitutionally required public concern against discrimination.26 The right to discriminate can be measured by its effect on the community, and whether it is incidental and harmless or touches the essentials of democracy.27 Two elements seem to be important in determining whether the use is public or private and subject to the fourteenth amendment prohibitions: First, is the activity one which is commonly undertaken by the state; and second, is the activity open to the public or a large segment thereof?28

24. 86 Sup. Ct. 486, 489-90 (1966). (emphasis added.) This assumption was not based on any facts presented in the record. As a matter of fact, Senator Bacon left other property in trust precisely in order to maintain Baconsfield Park and an inference that the park was privately maintained in all respects could be more readily drawn. See 86 Sup. Ct. 486, 489 (1966) (dissenting opinion).
25. Clark, supra note 9, at 1003-04.
27. Clark, supra note 9, at 1014.
The controlling factor is the nature of the function performed and a collateral or apparent state connection with a private litigant merely presents an additional factor which contributes to an effective weighing and balancing of interest within the permitted latitudes of due process and equal protection. The trend seems to be toward a more sensible road of evaluating the constitutional issue on the merits rather than letting the accident of state action make the determination. In Evans, the Court said:

[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations . . .

The service rendered even by a private park of this character is municipal in nature . . . and . . . a park . . . is more like a fire department or police department that traditionally serves the community.

[T]he . . . public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.

Thus the case more clearly seems to be holding that the park cannot be operated in a discriminatory manner by the private trustees regardless of the city's involvement or non-involvement in the operation of the park. The length of time the park has existed, the public character of the park, the municipal purpose of the park, the service rendered to the community by the park, and the momentum it acquired as a public facility, weighed against the purpose and result of discrimination will surely yield a desegregated Baconsfield Park.

Thus concluding that the park cannot be operated in a discriminatory manner, the problem arises as to the disposition or

33. Id. at 490.
34. Id. at 489-90.
use of the property since the trust cannot be administered as directed.35

The doctrine of cy pres is a saving device often applied to charitable trusts so that when the precise intention of the settlor cannot be carried out, his intention can be fulfilled as near as possible.36 This doctrine, which is recognized in Georgia,37 is defined in the Restatement of Trusts:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.38

Generally, before the cy pres doctrine will be applied three prerequisites must be met: (1) The court must find that the gift created a valid charitable trust; (2) it must be established that it is to some degree impossible or impractical to carry out the specific purposes of the trust; and (3) there must be a general charitable intention.39 The first two of these are met in the Evans case. The requirement of a general charitable intention has given

35. The pertinent part of Senator Bacon's will read as follows:
[1]n trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the city of Macon to be by them forever used and enjoyed as a park and pleasure ground ... the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized .... I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common.


38. See RESTATEMENT (SECOND), TRUSTS § 399 (1959).

39. FISCH, supra note 39, at 128.
rise to the most problems and the decisions are to a great extent irreconcilable.

There are no Georgia cases in point and only a few from other jurisdictions with similar factual situations. A general charitable intent has been found despite the fact that the terms of the trust provide that the property be devoted to a particular "purpose and no other purpose." These phrases have been held to merely emphasize the wish of the donor that the property should be devoted to the designated purpose as long as possible or practical and they do not necessarily indicate that the charitable gift shall fail if it ever should become impossible or impractical to carry out the designated purpose. The policy of favoring charities has led the courts, in determining whether the settlor had a general charitable intent, to construe the trust instrument most strongly against the settlor and his heirs. Professor Scott says that where a testator's intention is clear that the property should be applied to a particular purpose which failed, many cases have held that cy pres would not apply. He notes, however, that a majority of jurisdictions would hold otherwise.

Where there is a subsequent failure of the trust after the gift has taken effect, the courts have less difficulty in finding a general charitable intent than when the particular object has ceased to exist before the gift takes effect. Where at the time of the creation of the trust it is possible and practical to carry out the specific provisions of the testator, but in the course of time conditions change so that it becomes impossible or impractical to carry out these directions, the cy pres doctrine is almost invariably applied, and it is rare indeed that the trust is held to fail altogether. The Restatement of Trusts takes the position that as a matter of public policy it might well be that cy pres should always be applied where there is a subsequent failure of the

40. In Howard Sav. Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961), the court struck a limitation to American-born, Protestant, Gentile boys under the doctrine of cy pres. In La Fond v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959), the court refused to apply cy pres where the use of a playground was limited to white children. However in this case the gift had not as yet taken effect as is the situation in Evans v. Newton.

41. See Fisch, supra note 39, at 158. See Scott, Trusts § 399.2 (1939); Restatement, Trusts § 399, comment b (1935).

42. See Fisch, supra note 39, at 158.


44. Fisch, supra note 39, at 153. Restatement (Second), Trusts § 399, comment i (1959).

45. 4 Scott, Trusts § 399.3, at 2844 (2d ed. 1956).
particular purpose and that the property should never revert to the settlor or his estate, the reversion being more undesirable as the period of time grows longer between the creation of the trust and the failure of the particular purpose. Professor Bogert recommends a provision whereby a charitable intent would be presumed to be general unless the settlor expressly negates the application of cy pres. The modern trend seems to be that courts apply a rule that every donor who dedicates property to a specific charitable purpose, institution or organization possesses in addition a broader charitable intent. The only positive way to insure specific desired use of trust property is probably a provision in the instrument that the property is to be used in the manner directed or it shall revert to the settlor or his heirs.

It is difficult to draw any conclusion as to whether Georgia will apply the cy pres doctrine in the Evans case since there is no precedent in Georgia for such a situation; however, it is likely that the court will follow the modern trend and weight of authority to preserve Baconsfield Park as a playground for the public in general.

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46. Restatement (Second), Trusts § 399, comment i (1959).
49. 4 Scott, Trusts § 401.2, at 2864 (2d ed. 1956); Restatement (Second), Trusts § 399, comment c (1959).
CONSTITUTIONAL LAW—RIGHT TO COUNSEL—ACCUSED IN SPECIAL COURT-MARTIAL MUST BE AFFORDED COMPETENT LEGAL COUNSEL*

Until recently the individual safeguards afforded the military accused under the Uniform Code of Military Justice were considered more extensive than those afforded by the civil courts.¹ The increasingly broad interpretation of the Bill of Rights, however, has raised serious doubt as to whether the military accused today is guaranteed all of the protections necessary for fundamental fairness.² The right to the assistance of counsel has been considerably expanded in recent years³ with the result that the civilian accused seems at present to be afforded more protection under the sixth amendment than the military accused.

Although it is well established that military due process is not identical to its civilian counterpart, it has been held that court-martial proceedings must comport with the minimal requirements of constitutional due process to be immune from review in civilian courts.⁴ Gideon v. Wainwright⁵ held that the right of an


4. Burns v. Wilson, 346 U.S. 137 (1953). The Chief Judge of the Court of Military Appeals has written:

Military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code [of Military Justice] add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different.
indigent accused to the assistance of counsel is a fundamental protection of the Bill of Rights, thereby qualifying as a minimal requirement of constitutional due process.  

In the wake of Gideon there has been some confusion as to the indigent military accused's right to be represented by a lawyer at special courts-martial. The Uniform Code of Military Justice provides for the appointment of defense counsel at special courts-martial, but does not set forth any qualifications for such counsel, other than specifying that if the trial counsel happens to be a lawyer the defense counsel must be similarly qualified. The accepted procedure has been for the convening authority of the court-martial to appoint an officer as defense counsel, and the appointment of officers without legal training or experience has only recently been considered a failure to provide adequate counsel.

In the recent case of Application of Stapley an army captain and second lieutenant assigned to represent the petitioner in a special court-martial were held unqualified to act as counsel, resulting in a denial of the petitioner's right to the assistance of

Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225, 232 (1961). If Judge Quinn's opinion were the law we might not have the problem dealt with in this paper. More indicative of the present state of military due process is Mr. Justice Black's observation that "it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." Reid v. Covert, 354 U.S. 1, 37 (1957).


6. It has been observed that the Supreme Court and the Court of Military Appeals believe that military personnel are protected by fundamental constitutional rights, and that the right to the assistance of counsel is among those rights considered fundamental. Christensen, Pretrial Right to Counsel, MIL. L. Rev., 1964 (DA Pam 27-100-23, 1964), p. 29, n.162, 163.

7. A serviceman accused of a crime, whose case has been referred to a court-martial for trial, has for the past seventy-seven years been guaranteed the right to counsel. For the past twelve years, this right has been codified in the Uniform Code of Military Justice. In the case of a general court-martial, the defense counsel is required to be a qualified lawyer, while in a special court-martial counsel is not required to have any legal training or experience. 10 U.S.C. § 827 (1964). In special and summary courts-martial proceedings an accused has the right to retain a lawyer at his own expense, with no provision made to provide retained counsel for the indigent accused. When the accused is advised of his right to retain counsel, due process is satisfied. United States v. Gummels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). See Murphy, The Defense of the Military Accused, 17 S.C.L. Rev. 506, 508-10 (1965); Wilder, Relationship Between Appointed and Individual Defense Counsel, MIL. L. Rev., 1963 (DA Pam 27-100-21 1963) p. 37.

8. The competency of a military accused's counsel was challenged in the following cases: Burns v. Wilson, 346 U.S. 137 (1953); Liner v. Cozart, 174 F.2d 471 (5th Cir. 1949); Duval v. Humphrey, 83 F. Supp. 457 (M.D. Pa. 1949); Ex parte Steele, 79 F. Supp. 428 (M.D. Pa. 1948).
The captain was a veterinarian with two years experience in the army, and the second lieutenant was one year out of college with an academic background in history and political science. Both of these officers had substantially no legal training, but were appointed as defense counsel since they were officers in the United States Army. The petitioner twice requested a lawyer, but could not afford to retain civilian counsel and the convening authority, in view of the accepted practice of appointing officers to act as defense counsel in special courts-martial, refused to provide legally qualified counsel. The petitioner was convicted of the charges brought against him, and subsequently requested a writ of habeas corpus from a federal district court. Granting the writ the court held: "The services of 'defense counsel' did not constitute the assistance of counsel, in any proper sense." The court was careful, however, to limit its holding to the facts of the case, which were at best unusual—the appointed counsel were without any experience in court-martial procedure and the charges brought against the petitioner were exceptionally serious for a special court-martial. Stapley, though holding the appointed officers unqualified to act as counsel, did little to clarify the qualifications required of defense counsel in special courts-martial.

The history surrounding the Bill of Rights up until the last drafts were sent to Congress gives some support to the view that the sixth amendment was intended to apply to cases arising in the land and naval forces. On the basis of such history one writer, Gordon D. Henderson, has concluded that the protections afforded by the first ten amendments should be included in military due process. After first determining that the application

10. The petitioner was considered by the court to be an indigent defendant. Although there seems to be no standard for determining indigency in the military, there is much authority on civilian indigency and the right to counsel. Annot., 93 A.L.R.2d 747 (1964) ; Annot., 55 A.L.R.2d 1072 (1957).
11. Application of Stapley, supra note 9, at 319.
12. The petitioner was charged with violation of §§ 86, 90, 117, 123, and 124 of the Uniform Code of Military Justice which involved not only breaches of military orders and discipline, but also repeated acts of fraud in the issuance of checks, which, if established, could have constituted felonies in a civil court and all of which imputed moral turpitude. Application of Stapley, supra note 9, at 318. Special courts-martial may adjudge any punishment not forbidden by the Uniform Code of Military Justice except death, dishonorable discharge, dismissal, confinement in excess of six months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. 10 U.S.C. § 819 (1964). It can be seen that special courts-martial may adjudge severe punishment, making the need for legally-qualified defense counsel critical.
of the Bill of Rights depends upon the construction given the fifth and sixth amendments, he observes that the language of the fifth amendment denies to the military accused the right to a grand jury indictment. By specifically excepting a provision of the amendment it seems obvious that the framers intended the remaining provisions of the amendment to apply in military prosecutions. In the sixth amendment, however, there is no specific exception to the right to a trial by jury, but it is clear that juries were not intended to be required in military proceedings. This inconsistency can be reconciled only if the framers intended the exception in the fifth amendment to apply to the jury provision in the sixth amendment, and their failure to write an exception into the sixth amendment can be explained only as oversight or poor draftsmanship. If such an exception were intended to be written into the sixth amendment by its drafters, the right of the indigent military accused to the assistance of legally-qualified counsel might be more certain. However, the failure of the early judiciary to recognize the right of military accused to counsel raises considerable doubt as to whether such a right was originally intended to apply to military trials.

Furthermore, treatises on military law failed to confirm the right of a military accused to the assistance of counsel. These treatises, as well as the first military codes concurred with Blackstonian common-law notion that the judge acted as counsel for military prisoners, and that there was no place for defense counsel in court-martial proceedings. These obsolete concepts of military due process serve only as reflectors of the original intent of the sixth amendment, but as such seem to refute the theory that the framers and their contemporaries intended the right of counsel to apply to the military accused.

In taking issue with the proposition that the right to counsel be included in military due process another writer, F. B. Wiener,

14. Id. at 304.

15. There are no complete proceedings of trials by American Army courts-martial prior to 1801 now in existence since all of the War Department files were destroyed in 1800. 1 American State Papers Miscellaneous 232, 603 (1834). The earliest complete proceedings date from 1808. 2 & 3 Proceedings of Courts-Martial, War Office 131-488 (ms. in National Archives), reprinted in 3 Wilkinson, Memoirs of My Own Times (1816).


17. Articles of War, Art. 69, Chap. 20, 2 Stat. 367 (1806).
reprimands Henderson for misreading his authority. He notes that three early American presidents—James Madison, John Quincy Adams, and James Monroe—had opportunity to affirm the right of a military accused to counsel but failed to do so when the right to counsel was denied in a number of widely publicized military trials. The failure of President Madison to disapprove the practice of denying counsel in courts-martial has added significance since he had earlier participated in the drafting of the sixth amendment. Wiener’s observations give weight to the proposition that the original intent did not favor including the right to counsel in military due process. It is unfortunate, however, that Wiener could not have foreseen the Gideon decision before he summarized that the right to counsel today is “a right only recently won, and that not universally nor in all cases.” Although the effect of Gideon has not yet been fully appreciated, it has at least rendered Wiener’s summary obsolete.

Today, in view of the Gideon rationale and the modernized Uniform Code of Military Justice, the original intent of the drafters of the sixth amendment seems to be only of academic value. The Uniform Code of Military Justice has expressly provided for the appointment of counsel at special courts-martial and Gideon has established that the right of an indigent accused to the assistance of counsel is within the minimal requirements of due process. Although some type of representation is thereby guaranteed every accused, the competency of defense counsel in special courts-martial is a yet unresolved issue—should such counsel be required to have some legal training or experience?

In civil jurisprudence “counsel” has always been a synonym for a member of the legal profession, and the entrance requirements to that profession require an extensive knowledge of the law. On the other hand, “counsel” in a special court-martial is not required to have had any training or experience in the law. Thus, although the accused is guaranteed representation in a special court-martial, such “counsel” may be as ignorant of the law as is the accused. Such representation is in the nature of a sham and certainly does not constitute the right to counsel as contemplated in the sixth amendment. It seems that the only way

19. Id. at 5.
to prevent such cases of the "juridically blind leading the blind" and to insure adequate representation in special courts-martial is to establish minimum qualifications for the defense counsel. In Stapley the court was careful to restrict its decision to the facts, but in holding that the representation allowed the accused amounted to a "mockery," the court stated:

[I]t is no longer either reasonable or necessary, if it ever were, to deem any officer qualified to act as defense counsel for an accused merely because he is an officer; nor is it either reasonable or necessary to limit the availability of qualified defense counsel to cases in which the prosecution is represented by qualified counsel.22

By this dictum, the court seems to be advocating a policy requiring the defense counsel in a special court-martial to have at least some training and experience,23 but not restricting such counsel to lawyers. The court's language implies that the civilian accused who is guaranteed the assistance of a lawyer is entitled to more protection under the sixth amendment than is the military accused.

The expressions of the Court of Military Appeals, the highest military court of review, indicate the military accused in a special court-martial is not guaranteed the right to legally-trained counsel.24 It should be noted, however, that the Court of Military Appeals stated in United States v. Clay,25 that it would give the provisions of the Uniform Code of Military Justice the same meaning as has been given corresponding constitutional provisions. Despite this assertion the Court of Military Appeals has not yet adopted the Gideon rationale as the interpretation of the Code's provisions for counsel, and it seems doubtful that such an interpretation will be compelled by the dictum in Clay. The court's reasoning in denying the right of the military accused to legally-trained counsel is that military ex-

22. Application of Stapley, supra note 9, at 321.
23. The court felt that an appointed counsel should possess at least "minimal qualifications to rationally advise on substantive and procedural legal problems ... ." Ibid.
pediency dictates that all the rights of the civilian accused cannot be made available to the military accused. By this reasoning, if the military accused is to be guaranteed the right to legally-trained counsel at special courts-martial this guarantee must not impair the "expediency" of the military establishment. However, the power to curtail constitutional rights in the name of military necessity is kept in check by civil courts and the writ of habeas corpus. Burns v. Wilson made it clear that when a court-martial results in a deprivation of the accused's constitutional rights, a federal district court has jurisdiction and may declare the conviction void by issuing a writ of habeas corpus. The writ has therefore reserved to the civil courts the ultimate decision in determining the constitutional rights of the accused.

Chief Justice Warren has recognized the uneasy relationship between the military and the Bill of Rights. He feels that a modification of the traditional theory of military autonomy has been necessitated by the growth of the military establishment to its present size. At Washington's inauguration the armed forces totalled six hundred and seventy-two men; today, millions of citizens are serving in a military capacity, and the size of the military establishment is increasing at a rapid rate. Now more than ever the principle of civil supremacy should be emphasized, and the military establishment reminded that the Bill of Rights is the supreme law of the land. In advocating the inclusion of the minimal requirements of civilian due process in military due process, Mr. Justice Warren refers to the "vertical reach" of the Bill of Rights; however, the Chief Justice doesn't elaborate on the distinctions between civilian and military varieties of due process.

Although the Supreme Court extended habeas corpus review to include the denial of constitutional rights in 1938 it was

26. The protections of the Bill of Rights "which are expressly or by necessary implication inapplicable" are not available to members of the armed forces. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 246, 247 (1960).

27. 346 U.S. 137 (1953). The Supreme Court indicated that the Bill of Rights applied to the military accused, but held that the denial by courts-martial of constitutional rights should be considered on the merits by civil courts only if military authorities have not given them adequate consideration, stating that "it is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." Id. at 144. However, the court did not explain what was meant by "fair consideration." See also Griffiths v. United States, 172 F. Supp. 691 (Ct. Cl. 1959).


29. Johnson v. Zerbst, 304 U.S. 458 (1938). In 1950, however, the Supreme Court seemed to overlook Zerbst and held that the scope of civil court review of courts-martial should not extend to constitutional questions. Hiatt v. Brown, 339 U.S. 103 (1950). Hiatt was overruled by Burns v. Wilson, supra note 27.
not until 1953 that the Supreme Court held that court-martial proceedings could be challenged through habeas corpus actions brought in civil courts if those proceedings denied the petitioner fundamental constitutional rights.\(^{30}\) Civil courts have been reluctant to review court-martial proceedings even where there has been a constitutional question involved since civil courts have traditionally taken a "hands-off" attitude toward military proceedings.\(^{31}\) The first civil court cases which confronted the issue of the right to legally-qualified counsel in courts-martial evaded ruling on the issue,\(^ {32}\) and it was not until 1965 that a civil court squarely met the right to counsel issue in the *Stapley* case.\(^ {33}\) The stage is set for a Supreme Court ruling on the issue, and if Mr. Justice Warren’s opinion represents that of the majority, the *Stapley* decision is likely to be accepted and expanded.

In conclusion, the right of the indigent military accused in a special courts-martial to the assistance of legally-qualified counsel is as yet uncertain. An historical analysis of the sixth amendment indicates that the right to the assistance of counsel was not originally intended to be made available to the military accused, but recent cases and the Uniform Code of Military Justice indicate otherwise. The *Stapley* decision at best provides only a negative standard, and that standard is without precedent or affirmation. It is likely that the Supreme Court will find it necessary to furnish more definite standards for military due process in accord with the proposition that our citizens in uniform must not be stripped of their basic rights simply because they have doffed their civilian clothes. Thus it is probable that the right of an indigent accused to the assistance of counsel as established in *Gideon* will be extended to guarantee the indigent military accused the right to legally-qualified counsel before a special court-martial.

RUDOLPH C. BARNES, JR.

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31. Civil courts were limited to a very narrow power of review following *Ex parte Vallandigham*, 68 U.S. 243 (1863); that this policy has clearly been changed is indicated by Johnson v. Zerbst, *supra* note 29, and Burns v. Wilson, *supra* note 27.
LABOR LAW—LOCKOUTS—RETURN TO THE COMMON LAW RULING THAT A LOCKOUT BY A SINGLE EMPLOYER IS A LEGITIMATE BARGAINING DEVICE*

A lockout has been defined in general as the closing of a place of employment or the "cessation of the furnishing of work to employees by an employer in order that he may secure for himself more desirable terms of employment." At common law it was viewed as a legitimate device which could be used by an employer to coerce his employees into agreeing to certain terms and conditions of employment which he might desire. Because lockout powers were virtually unlimited, it could be used for almost any purpose, even to the disparagement of unionism. One of the principal reasons for the historical recognition as a right fettered only by an employer's discretion was that the power to lockout was viewed as a corollary to the employee's right to strike. After nearly a quarter of a century of restricting the use of bargaining lockouts, the United States Supreme Court recently returned substantially to the common law view in American Ship Bldg. Co. v. NLRB.4

The validity of the bargaining lockout was never seriously doubted until the enactment of the Wagner5 and the Taft-Hartley Acts. Even though the Wagner Act was completely silent on the subject and the Taft-Hartley Act neither authorized nor prohibited it, labor litigation following this legislation began to restrict and categorize it. Three different types of lockouts emerged and were subsequently labeled: (1) the defensive mult-

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1. Iron Molders v. Allis-Chalmers Co., 166 Fed. 45, 52 (7th Cir. 1908) (concurring opinion).
4. 380 U.S. 300 (1965). Lockouts called to defeat unionism are still prohibited. See text accompanying note 16, infra.
employer lockout, (2) the defensive economic lockout, and (3) the offensive bargaining lockout.

The defensive multi-employer lockout was an exception to the rule created by the National Labor Relations Board that bargaining lockouts were generally invalid. This exception was expressed in NLRB v. Truck Drivers Local No. 449,9 popularly known as the Buffalo Linen case, in which the Supreme Court said that all members of a group of employers who had banded together for the common purpose of collective bargaining10 were free to lockout in order to avoid the union “whipsaw.” This is a method by which each employee-member of an individual unit would strike separately and successively in order to force the employer to accept the demands of the union or lose his business to his operating competitors. Thus, in circumstances in which the integrity of the multi-employer unit was threatened, the Board was required to permit the use of the lockout, and a partial resurrection of the bargaining lockout was effected. This case left open, however, the crucial question of whether a single employer could use the bargaining lockout in the same manner in which the union uses the strike.

Another exception to the general invalidity of lockouts was the defensive economic lockout. The Board permitted an employer to shut down his plant operations in order to safeguard against loss where there were reasonable grounds for believing that a strike was threatening or imminent.11 All that was necessary was for the employer to show that union activity was actually or potentially detrimental to his organization.12 International Shoe Co.13 justified the use of a lockout by a single employer when it was used for economic purposes provided the employer was not motivated by any animus against the union or its employees therein. The Board said that a “union, which chose to use an economic weapon within its control, cannot rightly complain because the employer saw fit to follow suit.”14 This

10. Such a group is generally referred to as the multi-employer bargaining unit.
12. Betts-Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951) (to avoid accepting new repair orders from customers requiring prompt service); International Shoe Co., 93 N.L.R.B. 907 (1951) (to avoid work stoppage); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (to avoid material spoilage); Link-Belt Co., 26 N.L.R.B. 227 (1940) (to prevent a sitdown strike.)
14. Id. at 911.
case follows the earlier broad language of *Pepsi-Cola Bottling Co.* that "an employer may lawfully discontinue or reduce operations for any reason whatsoever . . . provided only that the employer's action is not motivated by a purpose to interfere with and defeat its employee's union activities."\(^ {16} \)

The final category into which the courts have classified lockouts is the bargaining lockout. From the outset, a distinction should be made between true bargaining lockouts, which are attempts to check the union's power to strike within the framework of collective bargaining,\(^ {17} \) and lockouts designed to frustrate organizational efforts, undermine the bargaining representative, or evade the duty to bargain.\(^ {18} \) In the latter situation, the basic vice is not the lockout, but the fact that its purpose is plainly incompatible with the right to organize and bargain collectively.

The Board's initial position regarding the true bargaining lockout was that it was an unwarranted and unjust exercise of power by an employer.\(^ {19} \) This position was shaken in 1962 in *NLRB v. Dalton Brick & Tile Corp.*\(^ {20} \) which held valid a single employer's right to lockout upon reaching an impasse in bargaining negotiations. This decision further stated that the use of economic bargaining weapons was legal unless motivated by anti-union animus, and that a reasonable basis for finding this must first be shown before an inference of improper motive can be drawn. If the employer was merely "trying to make a better bargain through the use of its economic arguments reinforced by the pressure of work stoppage,"\(^ {21} \) no violation was committed.

This distinction between the bargaining lockout, which is designed to reduce the union's pressure by depriving it of the initiative with respect to the timing of a shutdown, and the economic lockout, which is designed to avoid the consequences of the union's exercise of this initiative, is often difficult to visualize, and many times was not recognized by the courts. Both situations may involve losses to employees, and both may also involve

\(^ {15} \) 72 N.L.R.B. 601 (1947).
\(^ {16} \) Id. at 602.
\(^ {17} \) Leonard v. NLRB, 197 F.2d 435 (9th Cir. 1952); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951).
\(^ {19} \) Charles Cushman Co., 15 N.L.R.B. 90 (1939), aff'd, 111 F.2d 681 (1st Cir. 1940).
\(^ {20} \) 301 F.2d 886 (5th Cir. 1962).
\(^ {21} \) Id. at 898.
attempts to protect the economic integrity of a company without any attempt to avoid the bargaining process. The distinction was recognized by three cases\(^{22}\) which confirmed the National Labor Relations Board's historic prohibition against single employer bargaining lockouts.\(^{23}\) The general rationale of these three decisions was that the employer's initiation of a lockout to achieve a bargaining objective interfered with the employee's right to strike. This was the status of the law until 1965.

In that year the United States Supreme Court established in American Ship Bldg. Co. v. NLRB once and for all the general validity of the bargaining lockout.\(^{24}\) In this case the employer temporarily laid off his employees solely to enhance his bargaining position after an impasse in employment negotiations had been reached. The Board's position was that lockouts presumptively infringed upon collective-bargaining rights of employees in violation of section 8(a)(1), and a lockout, with its consequent layoff, amounted to a discrimination within the meaning of section 8(a)(3).\(^{25}\)

Section 8(a)(1)\(^{26}\) states that "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Board's holding was premised on the fact that the lockout interfered with the right to bargain collectively and the right to strike, which are guaranteed by section 7.\(^{27}\) It felt that the use of this lockout "punished" the employees for the presentation of an adherence to demands made by their union's representatives, and provided the employer with the opportunity to close down his operation before a strike could be held. Thus, when and if the union decided to strike it would have nothing to strike against. This view, in effect, would mean that "the right to strike" encompassed not only this right per se, but also the right to exclusive control of the timing and duration of strikes calculated to influence the result of collective bargaining. The Supreme Court, however, rejected this comprehensive view and held that the "right to strike" is the right to cease work—nothing

\(^{22}\) Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964); Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40 (3d Cir. 1959).

\(^{23}\) See text accompanying note 19, supra.

\(^{24}\) 380 U.S. 300 (1965).

\(^{25}\) Id. at 306.


more. Justice Stewart, writing the opinion of the Court, stated that even though the union's bargaining position would be undoubtedly greatly enhanced if the Board's elastic interpretation of section 7 were followed, the employer's use of a lockout solely to support a legitimate bargaining position is not in any way inconsistent with the right to strike.

Section 8(a)(3), the other section declared by the Board to have been violated, prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. There is no violation of this section unless improper motive on behalf of the employer can first be shown. The intent which motivated the lockout and not the overall result is the determining factor to be considered. The simple fact that the ultimate outcome of a particular lockout might discourage membership in unions does not necessarily show that the lockout was called for this particular purpose. This necessary anti-union animus cannot naturally be inferred from the calling of the lockout itself, but must be shown from extenuating circumstances or outside factors which indicate that the employer called the lockout for the purpose of discouraging union membership or for discriminating against the union in some other manner. Where the sole objective of the employer was to reach a fair solution to the labor dispute which existed between himself and his employees, no violation of section 8(a)(3) can be shown. The Supreme Court said that this is the only possible manner in which this section could be construed in order to afford the employer due protection in his right to manage his enterprise.

This decision not only settled the question as to the validity of the bargaining lockout by a single employer, but also set forth some limitations on the Board which had not theretofore been defined. Previously, the Board had denied the use of the lockout to an employer because this would give him "too much power," for the employee's right to strike had been, in the Board's opinion, sufficiently counterbalanced by means such as the power to substitute new working conditions upon the expiration of his contract with the union, to stockpile and subcontract, and to permanently replace employees who have gone on strike. The Su-

premature Court rejected this evaluation and limited the Board's authority to determine national labor policy by balancing the competing interests of labor and management when dealing with bargaining lockouts, in the absence of a finding of unfair labor practice.

The American Ship Building case was recently reinforced by a decision from the Ninth Circuit, NLRB v. Golden State Bottling Co. The records of both of these cases show that there was a long and satisfactory history of collective bargaining; that the bargaining extended over a period of many months and resulted during that period of time in proposals and counterproposals, compromises and agreements on issues that the bargaining was at all times done in good faith; and, that finally, an impasse resulted. After extended negotiations and futile attempts to reach an agreement, the Golden State Bottling Company "locked out" its employees until they would agree to sign an employment contract. At this point, the union members began to disagree among themselves and subsequently split into two factions—those willing to accept the proposed terms of the employment contract, and those who still rejected them. At the suggestion of the plant manager, the "willing to work" faction met and elected new bargaining officers who signed the proposed contract and work was resumed. The Board held that the Golden State Bottling Co. was guilty of violation of sections 8(a)(1), 8(a)(2), and 8(a)(3) of the National Labor Relations Act.

The court of appeals was quick to apply the judicial reasoning of American Ship Building in regard to sections 8(a)(1) and 8(a)(3). These two sections are not violated unless there exists a supportable finding of unlawful intent on the part of the employer to injure the labor organization or to evade his duty to bargain collectively or to discourage membership in the particular union involved in the controversy. Thus, further emphasis is placed on the requirement that anti-union animus must be present before an improper lockout situation will exist.

Section 8(a)(2) states in part: "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization . . . ." The Board found that this section had also been violated because the union split into two factions with one faction electing new offi-

32. 333 F.2d 667 (9th Cir. 1965).
cers and accepting the employer's proposals. The Board characterized these events as an interference with the administration of the union. On review, the court of appeals disagreed with this finding. Even though the effect of this lockout was to disrupt the orderly internal functioning of the union, it was still a lawful act. The employer's refusal to allow his employees to work did not necessarily destroy the union's capacity for effective and responsible representation, for this was merely one of the many possible results which might have occurred because of the lockout. In order to sustain the holding of the Board, one of two requirements must be conclusively shown—either that the employer was wrongfully motivated in the exercise of his right to refuse work to his employees, or that the disruption of the union was a necessary consequence of his actions.

This case is not actually as strong as it might appear. The court concluded by finding that Golden State had interfered with the administration of the union by the plant manager suggesting to one of the two union factions that they elect their own representatives, and by negotiating with these newly elected representatives. In other words, this plant manager sought the bargaining benefits of a lockout but was unwilling to assume the burdens. His duty was to leave the union alone to work out its own destiny. Absent these peculiar facts, however, the court would have declared Golden State Bottling Company free of all liability.

The function of the bargaining lockout is the same as that of other apparently lawful arrangements designed to counter a possible strike, such as subcontracting, renting machinery to replace strikers, or indeed a publicity campaign to dramatize the evils of allegedly wage-induced inflation. Bargaining lockouts do not involve an attempt to evade collective bargaining or to bust the union any more than a strike is normally intended to bankrupt the employer. The law in this area has moved its full cycle and returned generally to the rulings that existed at common law. Actually, there is no reason why this common law construction should not prevail today, for perhaps the statutory language the courts used to change the common law did not in fact contemplate a change, but to the contrary, arguably embraced the bargaining lockout because the statutes never specifically prohibited it. Whether this cycle will be repeated, or whether the law will become stabilized as it has in other lockout situations, can only be answered by a speculative guess. Unless
the present trend suffers a drastic reversal, subsequent cases will follow the *Golden State Bottling* case and apply the rules of *American Ship Building*.

William W. Wilkins, Jr.
PRACTICE AND PROCEDURE—EXCEPTIONS—INTERPRETATION OF EXCEPTIONS UNDER SOUTH CAROLINA SUPREME COURT RULE 4, SECTION 6*

Appellate practice and procedure present myriad problems to the practitioner and as a practical matter the technical must be dispatched with facility in order to preserve the substantive for hearing. The preparation of exceptions which conform to the requirements of the Rules of the South Carolina Supreme Court,¹ coupled with the court's various determinations of what constitutes such conformity with the "rule for certainty"² have long plagued attorneys within this state. Failure to comply with either the letter of the rule or with the court's interpretation of it has traditionally provided a fertile ground for the dismissal of appeals by the supreme court.

In its entirety, rule 4, section 6 provides that:

Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should not be long or argumentative in form.

The purported consequence of this rule is that the court considers only those matters on appeal which are presented to it by exceptions that are in conformity with the technical requirements of the rule in form and substance. The practical problem arises out of the fact that not every appeal heard by the court has been borne up to it by exceptions which strictly conform to the language of the rule; therefore, a determination of sufficiency in advance of any ruling on the exceptions is difficult.

The consideration of exceptions and the cases which they represent reveals them to have been far from consistent. In many instances the court will have effectively reviewed the record of the pending cause in order to determine whether or not the technical requirements for form and substance of exceptions have been met. Where such a perusal reveals a meritorious assignment of error

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a decision may be rendered on the appeal regardless of the state of the exceptions.

The whole spectrum of appellate procedure is fraught with problems of sundry nature and description, but the scope of this comment will be limited to a consideration of exceptions on appeal—or more particularly, to the rule for certainty in exceptions and the demands of the South Carolina Supreme Court for compliance with it.

A. Boyer v. Loftin-Woodard—Illustration, Not Conclusion

The case of Boyer v. Loftin-Woodard\(^3\) presents a typical illustration of the court's dismissal of an appeal for failure of exceptions to meet the requirements of rule 4, section 6.

The plaintiff's tort action arose out of a one vehicle accident alleged to have occurred as a result of the defendant's negligent interference with the surface of a highway. The defense was predicated on the contributory negligence of the plaintiff in the operation of his truck, and at the proper times during the course of the trial the defendant made motions for a non-suit and directed verdict. The trial judge refused the motions, the case went to the jury, and a verdict in the amount of actual damages was awarded to the plaintiff. The defendant was then granted a judgement NOV on the grounds that the plaintiff had failed to prove actionable negligence.

On appeal, the plaintiff's exceptions to the supreme court were set out as follows:

1. His honor, the trial judge, erred in granting defendant's motion for a judgement non obstante veredicto, the error being that under the evidence a reasonable inference can be drawn that the negligence and recklessness on the part of the defendant was the direct and proximate cause of the accident.

2. His honor, the trial judge, erred in granting defendant's motion for a judgement non obstante veredicto, the error being that it is not necessary under the testimony and evidence to build inference upon inference in order to establish the liability of the defendant.

3. His honor, the trial judge, erred in granting defendant's motion for a judgement non obstante veredicto, the error

\(^3\) 146 S.E.2d 606 (S.C. 1966).
being that testimony and evidence raised a reasonable inference that the plaintiff's damages were due to the negligence and recklessness of the defendant and, viewed in the light most favorable to the plaintiff, presented a question of fact for the jury to decide.\(^4\)

In its per curiam dismissal of the plaintiff's appeal, the court cited rule 4, section 6 as its grounds for determining that these exceptions were "entirely too general, vague and indefinite to be considered."\(^5\)

The numerous decisions construing the rule are no less vague than is the language of the rule itself; therefore, only an exhaustive comparative expedition through the cases will serve to illuminate the practitioner's query as to whether or not a proposed exception will meet the court's construction of what constitutes compliance in a given instance. The volumes of the *South Carolina Reports* are replete with decisions dealing either exclusively or in part with the present rule and its predecessors, but few of these cases devote more than passing attempts at any real illustrative definition of the rule or the precise scope of its effectiveness.

The disposition of Boyer's appeal in the instant case was effected in a manner which has characterized the method of implementation of this rule for certainty. The rule itself is set out, the general language of cases dismissing other appeals in which exceptions were found to be faulty is referred to, and the court's consideration is terminated without specifically stating or even directly alluding to the actual nature of the defect within the exceptions.\(^6\)

**B. Application of Rule 4, Section 6 as a Standard for Exceptions**

The language of rule 4, section 6 is in all essential particulars identical to that of the prior rules for certainty\(^7\) and indicates by its preservation the intention of the court to maintain a rule susceptible of broad constructive interpretation in dealing with exceptions on appeal. Under the rule as it exists, the court has determined that the object of an exception is to present a distinct

\(^4\) Ibid. at 607.
\(^5\) Ibid.
\(^6\) Solley v. Weaver, 146 S.E.2d 164 (S.C. 1966). In form and in language this decision is essentially identical to the *Boyer v. Loftin-Woodard* opinion.
\(^7\) The earlier cases refer to S.C. Sup. Cr. R. 5 § 6. The rule is in effect the same as the present codification's Rule 4, section 6.
principle or question of law which the appellant claims to have been violated by the court which tried the case, and to present it in such form that it may be properly reviewed.\textsuperscript{8}

In order to comply with the requirements, each exception must contain a clear, succinct statement of the grounds upon which it is based\textsuperscript{9} and generally exceptions will not be considered when too indefinitely phrased or when an assignment of alleged error is incompletely set out within the exception.\textsuperscript{10} Such statements as these from cases disposed of under the rule, confirm that what is envisioned by its language is a subjective determination of whether or not compliance has occurred by the form of specific exceptions. In applying this discretionary standard, the court is loathe to decide cases on strictly technical grounds and has indicated that "a good test whether an exception is too general is to inquire whether it is so framed as to involve the necessity of retrying the whole case just as it was presented to the Circuit Judge."\textsuperscript{11}

This type of "rule of thumb" test by the court is derived from the many cases holding that exceptions requiring a review of all the evidence are too generally stated to be considered.\textsuperscript{12} The test was conversely phrased in Brady v. Brady.\textsuperscript{13}

We have held in many cases that every ground of appeal ought to be so distinctly stated that the court may at once see the point which it is called upon to decide without having to "grope in the dark" to ascertain the precise point at issue.

In its application of rule 4, section 6 the court has manifested its unwillingness to consider those exceptions which it deems to be vague, indefinite, or general. Most typical of these instances in which the dismissal is predicated on the failure of certainty is the case in which the exception ascribes as error, in the granting or denial of a particular motion by the trial court, the simple

\textsuperscript{9} Nolf v. Patton, 114 S.C. 323, 103 S.E. 528 (1920); Holden v. Cantrell, 100 S.C. 265, 84 S.E. 826 (1915).
\textsuperscript{10} Cudd v. Moore, 126 S.C. 266, 119 S.E. 837 (1923).
\textsuperscript{11} Elkins v. South Carolina & Ga. R.R., 59 S.C. 1, 2, 37 S.E. 20, 20 (1900).
\textsuperscript{12} E.g., Weatherly v. Covington, 51 S.C. 55, 28 S.E. 1 (1897); Marshall v. Creel, 44 S.C. 484, 22 S.E. 597 (1895).
fact of such granting or failure to grant. Relying on its rule for certainty and its previous decisions, the court determined an exception to be entirely too general, vague and indefinite in Fruehauf Trailer Co. v. McElmurray, where the exception stated that the court had erred in granting the motion to strike an answer as sham, frivolous, and irrelevant; the only error assigned being that the motion made upon those grounds had been granted.

Dismissal of an appeal generally follows a finding of non-compliance with the court's rules, but in some instances in which there has been a specific finding that exceptions are too general to satisfy the rule a resolution on the merits of the appeal is made. In one such case, FUX Co-op. Serv., Inc. v. Bryant, the court held inter alia that it would have been justified in dismissing the appeal because the large number of questions presented in the appeal were unduly repetitious and because the requirement that points be raised in specific exceptions was completely ignored. Illustrative of the defective exceptions in that case were those which charged error in the direction of a verdict in favor of the plaintiff. The exceptions set out as grounds for error that more than one issue could be drawn from the testimony, that the credibility of the testimony was for the jury alone, and that the evidence could support a verdict in favor of defendant on his counterclaim. None of these exceptions clearly defines nor points out any issue of fact which it is claimed should have been submitted to the jury; therefore technically "they leave the court to search the entire record and are too general to be considered."

The question of sufficiency of exceptions may be raised by motion of the respondent or lack of conformity with the rules may be noted by the court on its own motion. In Norton v. Livingston, one example of the latter occurrence, the appellant's

14. E.g., Concrete Mix, Inc. v. James, 231 S.C. 416, 98 S.E.2d 841 (1957) (exception alleged error in failure to grant a non-suit on the ground that plaintiff had failed to make out a case against the defendant); St. Andrew's Evangelical Lutheran Church v. St. Andrew's Evangelical Lutheran Church, 223 S.C. 9, 73 S.E.2d 845 (1952) (exception simply recited that the judgement was contrary to law and evidence).
16. Id. at 142, 113 S.E.2d at 758.
18. Id. at 514, 131 S.E.2d at 703.
20. 14 S.C. 177 (1880).
exception stated an objection to the judgement and to the entire charge to the jury. Despite the obvious non-conformity with the rule, no objection was made by the respondent to either the exception or the appeal. The court, however, indicated that it did not consider such an imprecise exception to be in compliance with the rules of the court and dismissed the appeal with the admonition that:

The points of law wherein error is charged should be specifically stated in exceptions, otherwise the court has no guide as to the points contested . . . . This court is excluded from considering the sufficiency or insufficiency of evidence, or any other question except errors of law; and it is indispensable to the satisfactory discharge of their duty that these questions, submitted for their consideration, should be separately and distinctly stated.21

As with any body of decisions based primarily on discretion and limited only by subjective standards, inconsistencies appear in the court's opinions in the determination of what constitutes vagueness or indefiniteness within stated exceptions. Apparent differences in the interpretation of the sufficiency of exceptions have on occasion occurred within the text of a single decision. In the case of Jumper v. Commercial Bank;22 an exception which stated that "he [the trial judge] refused defendant's motion for a non-suit"23 was sustained and its merits considered, while another, stating that "he refused defendant's . . . requests to charge"24 was dismissed as too incomplete for consideration. It is difficult to see that the first of these exceptions is any more or less concise or specific than the second, but in its consideration of the appeal the court exercised its discretion and ruled on the first while dismissing the second for defects in form.

Undoubtedly the greatest number of dismissals based on rule 4, section 6 arise out of purported vagueness or indefiniteness contemplated by the first phrase of the rule. In addition to and often in the absence of defects of conciseness, however, exceptions are deemed to be in violation of the segment of the rule requiring

21. Id. at 178.
22. 39 S.C. 296 (1893).
23. Id. at 297.
24. Id. at 298.
within each exception a complete assignment of error based on the record.  

*Hall v. Senn* presented an exception in which the factual stage was set for the allegation of trial court error, but no complete assignment of error was actually made; thereby leaving a defective exception. The text of the exception related that:

Exception is taken to the Court's opinion that the plaintiffs were guilty of laches and estoppel for not commencing their action against the defendants for the purpose of resolving the controversy for a period of eight years from the date of the deed . . . .

In its refusal to consider the exception, the court charged that it failed to meet the particulars of the rule for certainty in that it did not point out nor even indicate what the claimed error was in the lower court's ruling that the evidence established the stated defenses.

In order to insure that a complete assignment of error was set out by the exceptions, in *Holden v. Cantrell*, the court suggested a procedure to be followed in revising them and granted leave to the appellant to amend his defective exceptions. The original exceptions merely made reference to grounds of motions set out elsewhere in the record but did not within themselves contain any complete assignment of error. The court instructed that corrections should be made and the defects cured by incorporating the grounds into the body of the exceptions and stating in the record that the exceptions correctly set out the grounds for the motions and the error alleged. By following the suggested procedure a complete assignment of error is contained within the exception and the record corroborates the statement of fact appearing in the exception. The latter effect is essential because the court will not consider exceptions which contain statements of fact appearing only in the exception and not on the record. Under this procedure both exceptions and the record were rendered complete without necessity for repetition of factual statements.

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25. *E.g.*, Gulledge v. Young, 245 S.C. 88, 138 S.E.2d 833 (1964) where the sole exception offered, with its explanatory paragraphs, was too vague and indefinite to comply with the court's rules, no complete assignment of error was set out, and examination of the record indicated no abuse of discretion nor manifest error of law or fact.


27. Id. at 546, 131 S.E.2d at 701.

28. 100 S.C. 265, 84 S.E. 826 (1912).

29. Id. at 276, 84 S.E. at 828.
Exceptions are objections stated to decisions of law arising out of the trial of a matter; therefore they must relate to matters which were before the trial court and on which the trial judge was given an opportunity to make a ruling. This rule, applicable to appellate procedure generally, was passed upon in Wilson v. Clary and found by the court to be within the purview of rule 4, section 6. Various exceptions raised questions concerning the propriety of the lower court's jurisdiction over the subject matter and the alleged unconstitutionality of a statute involved in the litigation. These matters had not been advanced by the appellant prior to their appearance in the exceptions and counsel’s brief, and consequently had never been before the trial court for determination. The court held that it could not be reasonably contended that the exceptions were proper because questions not raised at the trial are not available on appeal.

The provisions of rule 4, section 6 instruct the appellant that exceptions which merely refer to other exceptions then or previously taken and those which are lengthy or argumentative in form are violative of the rule. As a practical matter, the latter provisions have been seldom invoked by the court as an independent defect sufficiently grave to require the dismissal of an appeal. The more frequently used procedure in instances of needlessly long and complicated exceptions or those argumentative in form is to dispose of the appeal by application of other provisions of the rule for certainty or to grant leave to amend the exceptions.

The prohibition against exceptions which merely refer to other exceptions is primarily relied on to prevent an appellant's availing himself of matters not appearing in the record of the trial in the circuit court. The situation most often arises where appeals were first carried to the circuit courts from judgements by masters, magistrates, or judges of probate and in the later appeal from the circuits to the supreme court the exceptions assign error on grounds appearing on the primary appeal but not encom-

32. 212 S.C. 250, 47 S.E.2d 618 (1948).
33. Id. at 257, 47 S.E.2d at 622.
34. See FCX Co-op. Serv., Inc. v. Bryant, 242 S.C. 511, 131 S.E.2d 702 (1963) where three pages of appellant's brief were devoted to some nineteen questions—repetitious and phrased without regard to requirements of the court rules. The appeal was disposed of on its merits rather than dismissed for deficiencies in the exception.
passed within the record from which the supreme court appeal is taken. This application of rule 4, section 6 receives limited use by comparison to the incidence of reliance on the vagueness provision, but it has been construed by the court and where applicable, exceptions must conform to these interpretative constructions or succumb to dismissal without ever having been reviewed on merit.

Although the consideration of the supreme court's rule for certainty has here been primarily centered about the cases in which adherence to both letter and spirit of the rule was essential to prevent the dismissal of appeals, the rule is not administered in a vacuum and where the court deems it to be in the interest of justice the rule is generally waived. Such a waiver may be dictated by the gravity of the case, as is the circumstance on many criminal appeals; or it may come from the court as a matter of grace in cases in which it considers more appropriate an adjudication on the merits than a dismissal based on technical infraction of the court's rules.

Where the insufficiency of exceptions is not such that it would mislead the respondent on the questions to be raised on appeal and the record indicates merit in the appeal, the court construes the form and the words of each exception as liberally as the language will permit in order that it might decide the questions involved without a dismissal. The court has in situations where violation of the technical requirements existed, dismissed an appeal without prejudice to the right of the appellant to rephrase his grounds for appeal.

In considering the advisability of waiving breaches of rule 4, section 6, the court determined in Jackson v. Carter that circumstances and merit should dictate.

If such examination of an exception as may be necessary to disclose that it is framed in violation of this rule also discloses that it clearly embraces a meritorious assignment of


41. 128 S.C. 79, 121 S.E. 559 (1924).
prejudicial error, the Court will ordinarily waive the breach of the rule and consider the exceptions.\(^{42}\)

Adhering to this application of the rule in recent years, the court overruled an objection by respondent to the form of a patently defective exception in the case of *Brady v. Brady*,\(^{43}\) after an examination of the record disclosed a meritorious assignment of error. Later in *Hewitt v. Reserve Life Ins. Co.*,\(^{44}\) after an ex gratia consideration of the merits of the appellant's exceptions, although their form did not comply with rule 4, section 6, the court determined that the meritorious weight of the appeal was adverse to appellant's position and that no error had been made in the lower court.

The avowed intention of the court to decide meritorious questions on their merits rather than on technical violations of rules of procedure is followed where practicable; however, circumstances do arise in which the court may find it either impractical or impossible to waive a breach even though it may be inclined by merit to effect a waiver. This unfortunate situation is most readily envisioned where the appeal is not in such shape that it enables a proper consideration of the merits because the order from which the exception is made has not been made a part of the record of the trial from which the appeal is taken.\(^{46}\)

**O. Simpson v. Cox—A Judicial Guideline**

In *Simpson v. Cox*\(^{48}\) the court expressed its concurrence with the opinion shared by virtually all appellate benches, that the consideration of exceptions which do not conform to court rules is a vexatious task. It further agreed with the commonly held view that where gross error occurs in the formulation of exceptions any court is warranted in dismissing an appeal without further consideration. In speaking for the court however, Mr. Justice Hydrick did not summarily dismiss appellant's appeal; but rather seized the opportunity to provide some guidelines for

\(^{42}\) Id. at 86, 121 S.E. at 562.

\(^{43}\) 222 S.C. 242, 72 S.E.2d 193 (1952). The single exception stated "that his Honor . . . erred in sustaining the oral demurrer . . . upon the ground that the complaint did not state a cause of action, the error being that the complaint does not state a cause of action."

\(^{44}\) 235 S.C. 201, 110 S.E.2d 852 (1959) (exceptions simply stated that the trial court erred in failing to grant judgment non obstante veredicto or a motion for new trial).


\(^{46}\) 95 S.C. 382, 79 S.E. 102 (1913).
the direction of future petitioners in the preparation of exceptions which comply with the requirements of the court's rule for certainty and specification.

In Simpson, through an arrangement between all the parties involved and in consideration of previous, related transactions, the defendant executed a note secured by mortgage and endorsed by the plaintiff to the Farmer's Bank which discounted it. Included in the discounted note was a note for seventy-five dollars already owed to the bank by the defendant. The defendant failed to pay the note at maturity, and the plaintiff paid the amount of the note to the bank and brought an action for foreclosure against the defendant. A special referee determined the matter in favor of the plaintiff and ascribed the amount of damages owed by the defendant.

On appeal from the judgement and award by the referee, the defendant's exception alleged:

Error of said special referee on finding as a matter of fact and so reporting the amount to be due plaintiff on said debt to be fourteen hundred and ninety dollars principal and one hundred and forty-nine dollars interest plus attorney's fee, it being shown by the preponderance of the testimony that the amount due plaintiff is not so much as that amount and said referee committed error in concluding that plaintiff is entitled to judgement of foreclosure against the defendant, Cox, for such amount.47

The court agreed with the determination of the circuit judge that this exception was far too general to be considered proper. The nature of an exception is to specify some definite error and under the court rule a failure to do so is fatal to the exception. The general language of the exception here does not direct the court's consideration towards any particular error, but only makes a statement which might or might not allude to one or several avenues of error. All that is complained of is that the amount of damages awarded by the referee was not a correct amount and no suggestion of how or why the stated amount is incorrect is embodied.

In order to clearly show that the exception was violative of the rule requiring specification, by the very imprecision of its phrasing, the court fully analyzed the body of the exception.48

47. Id. at 384-85, 79 S.E. at 102-03.
48. Id. at 385, 79 S.E. at 103.
This judicial dissection revealed the impossibility of ascertaining from the face of the exception the specific error out of which the complaint arose. At the conclusion of his consideration of the many possible allegations of error which might be derived from the defective exception, Mr. Justice Hydrick offered as a substitute and cure for the appellant's exception a statement to the effect that "the referee erred in including in the amount found to be due on the mortgage debt the amount of defendant's note for $75.00 to the Farmers Bank of Williamston."\(^{49}\) In the revised form, the precise point which the appellant desires reviewed is immediately apparent to the court without necessity of its looking beyond the exception itself to ascertain the question raised.

Realizing that the rule requiring specification in exceptions must be administered with some degree of flexibility in order that it might reasonably appertain to every appeal, Mr. Justice Hydrick determined that the court's greatest service in rendering a usable interpretation of the rule would be to set out the minimum standards for compliance. Basically, the purpose of the rule is to insure that exceptions be framed in such a form that both the court and the opposing counsel may see at a glance the point of law or fact which appellant is submitting for review on appeal; therefore, under the rule it is unfair to permit any generality of language which serves to mask the questions presented or to render them ascertainable only by aid of extraneous explanation.\(^{50}\)

In implementing this primary function of the exception, grounds or reasons upon which the assignment of error is predicated may be included where they are not readily apparent from a mere statement of the assignment itself. Argument and repetition serve only to cloud the presentation of error and should not appear in the exception, but should be reserved for the brief. Each assignment of error represents a unique ground for appeal; therefore, each should be concisely stated in a separate exception and where circumstances compel the inclusion of more than one specification of error within a single exception, proper subdivisions must be employed. Only one exception should be used to present a single assignment of error, and the patience of the court should not be taxed with a point so attenuated that it requires statement in a number of different forms to be seen or

\(^{49}\) Ibid.

\(^{50}\) Simpson v. Cox, 95 S.C. 382, 386, 79 S.E. 102, 103 (1913).
understood. In the typical instance of where the grounds are the same for all three, only one exception should be used to allege error in the court's ruling on the motions for non-suit, directed verdict and new trial.

In outlining this procedural format for the preparation of exceptions which comply with the rule for certainty, the court instructed that "counsel may act upon these suggestions with the assurance that all objections which their exceptions specify will receive the consideration of the Court."\(^{51}\)

Rule 4, section 6 embraces a double aspect. Any mandatory objective standard would open the door to the possibility that either a meritorious appeal might fail on a mere technical infraction or the unwarranted review of a flood of defective, unworthy exceptions might ensue. Where exceptions are too general or otherwise non-conforming, "there is much danger that [only] a single grain of wheat may be effectually concealed in so much chaff."\(^{52}\) Under the rule as it is in fact administered, the determination of whether justice is better served by a recovery of the single grain or by the efficient disposal of chaff and wheat is left to the discretion of the court.

Whether or not strict adherence to the guideline established in the *Simpson* case will serve today as a guarantee that an exception will be reviewed on appeal, or indeed whether any definitive standard exists whereby compliance with rule 4, section 6 becomes automatic, is difficult to ascertain. The preparation of exceptions, following some procedural guideline similar to that described in *Simpson* will undoubtedly protect the practitioner from the embarrassment of a dismissal for failure to meet the requirements of the court's rule in the vast majority of appeals. A greater degree of certainty than this is not possible so long as interpretation of the rule is discretionary with the court.

**ROBERT F. FULLER**

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51. *Id.* at 387, 79 S.E. at 103.
PROPERTY—OVERFLIGHTS—RECOVERY NOT ALLOWED IN INVERSE CONDEMNATION FOR AIRCRAFT NOISE*

Aircraft noise is presenting the courts with a serious problem that reflects the growing pains of an ever expanding technological society. This is an issue which is being aggravated by the development of larger and more powerful jet airplanes that produce tremendous roar and "whine." There are today more than sixty-five million take-off and landing operations occurring annually, and as the planes become larger their angle of flight on take-off and landing becomes flatter, thus spreading the noise over a greater area. With the jet age upon us and the rocket age in the not-too-distant future, the law must adapt itself to cope with the friction which is produced by a clash of conflicting interests.

Property owners residing near airports often have their daily lives interrupted by terrific blasts of noise and vibration produced by low-altitude jet aircraft. This is the problem considered in a recent Kentucky case, Louisville & Jefferson County Air Bd. v. Porter. The plaintiffs brought an action based on "inverse condemnation" for the diminution in market value of their home resulting from annoyances of a permanent or continuous character attributable to the operation of a nearby airport. Damages were awarded by the trial court for property loss sustained by the excessive noise and vibration caused by jet aircraft. This decision was reversed by the Court of Appeals of Kentucky. The court held that even though there may have been a substantial loss in property value, the activities of the county airport in light of their importance to the community were not so unreasonable as to compel compensation for damages.

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1. A modern four-engine jet transport casts a 100 decibel overpressure on the land to a distance of over three miles after take-off. See Hill, Liability for Aircraft Noise—The Aftermath of Causby and Griggs, 19 U. MIAMI L. Rev. 1, 31 (1964). "Ear plugs are recommended for Air Force personnel when the sound pressure level reaches 85 decibels and are required at or above 95 decibels." Batten v. United States, 306 F.2d 580, 582 (10th Cir. 1962).

2. S. REP. No. 1811, 85th Cong., 2d Sess. 4 (1958). At this date the number would be vastly increased.


4. 397 S.W.2d 146 (Ky. 1965).

5. Inverse condemnation is a term used to describe an action brought against a governmental body having the power of eminent domain to recover the loss of property value which has been appropriated in fact without a formal exercise of power.
In early common law it was generally considered that property owners had unlimited proprietorship of all superjacent airspace. The maxim *cuius est solum, ejus est usque ad coelum*—he who owns the land owns the airspace above it up to the heavens—provided the landowner with a cause of action in trespass for any invasion. But with the advent of the Wright brothers' winged machine the courts began to realize that this theory was untenable. State legislatures also became aware of the desirability of flight, and twenty-two states adopted a uniform law providing that ownership of airspace remained in the surface owner, but subject to a right of flight. This apparent adherence to the *ad coelum* maxim produced controversy, however, and in 1926 Congress, acting pursuant to the commerce power, passed the Air Commerce Act which provided that airspace above the minimum safe altitudes of flight as prescribed by the Secretary of Commerce was public property. The Secretary set the floor of navigable airspace at 1000 feet over congested areas and 500 feet elsewhere.

The United States Supreme Court considered the problem of excessive aviation noise for the first time in *United States v. Causby*. This case dealt with a poultry business which was located near a military air base directly under a take-off and landing path. Frequent low level aircraft flights produced intense noise and vibration which harassed the owner and ruined his business. In an action against the government the plaintiff claimed that his property had been appropriated or taken and that he was due compensation under the fifth amendment for the devaluation in its market price. The Court considered the old common law theory of complete ownership of airspace and placed the doctrine at permanent rest. Speaking for the majority, Mr. Justice Douglas said that "common sense revolts at the idea." It was realized that in order for modern day commerce

10. UNIFORM STATE LAW FOR AERONAUTICS.
15. Id. at 261.

https://scholarcommons.sc.edu/sclr/vol18/iss2/7
to develop and expand, public policy demanded that the air ways be open to free, unrestricted navigation.

Since the objectionable flights were below that minimum altitude established by the secretary under the Air Commerce Act, the Court could have very easily found in favor of the landowner. Rather than basing their decision upon some arbitrary floor, however, the Court adopted a more elastic standard—that a property owner has an interest in so much of the superjacent air space as is necessary for his beneficial use and enjoyment of the surface. It was held that the frequent low level flights so substantially deprived the landowner of this element in his relationship to the property that it did constitute a "taking." The Court suggested that the property interest taken by the government was equivalent to an easement of passage over the surface.

When the Causby decision based the landowner's remedy on the theory that underlies eminent domain, the Court began speaking in terms of easements and servitudes, and the confusion that exists today can be attributed to the ambiguous language used by the Court. It is difficult to determine exactly what was the Court's conceptual analysis of a "taking." Nuisance and trespass are two distinct legal entities, yet the Court in finding a "taking" spoke in terms of both: "Flights over private land are not a 'taking' unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."\(^{16}\)

The Causby case brought out the fact that Congress had not placed within the public domain that area needed for takeoff and landing. This was remedied by the Federal Aviation Act of 1958\(^ {17}\) which expressly extended the navigable airspace of the United States to include all airspace "needed to insure safety in take-off and landing of aircraft." This act has not, however, immunized low-altitude take-off and landing flights from property owner suits. The Supreme Court held in Griggs v. County of Allegheny\(^ {18}\) that a landowner has rights of use and enjoyment superior to those of the public in the same swath of navigable airspace and that an action for damages\(^ {19}\) can still be maintained

18. 369 U.S. 84 (1962).
19. The Griggs case did not say whether injunctive relief would lie, and commentators are split on this question. Hill, Liability for Aircraft Noise—The Aftermath of Causby and Griggs, 19 U. MIAMI L. REV. 1, 8 (1964); 8 AM. JUR. 2d Aviation §§ 5, 6, 61 (1963).
if the owner is subjected to such interference as would constitute a "taking" of his property. It was held that liability for the diminution in market value of property rested upon the condemning authority which operated the airport rather than the individual aircraft or the flight safety-regulating federal authority.

Although in both Causby and Griggs direct overflights were involved, the interference that was held to constitute a "taking" was not caused by the physical occupation of the column of air-space but rather by the tremendous noise level in close proximity. The beneficial use of the surface was the property interest at stake, not some invasion of an imaginary column of air; therefore, the direction from which the interference came should have been immaterial. In neither case was recovery specifically limited to direct overflight. These cases may have suggested that relief was to be granted only to those directly beneath the flight path, but they did not compel it.

Since Causby, however, in actions against the federal government the courts have followed a trespass theory and have required a direct physical invasion of superjacent air space before recognizing a compensable "taking". The leading case on this point, Batten v. United States, denied recovery for interference brought about by airplane noise because flights were not directly over the surface owned by the plaintiffs.

The jet airplane is a great boon to the traveler but a veritable plague to the homeowners near an airfield. Noise, vibration, and smoke incidental to the operation and maintenance of jet planes disturb the peace and quiet in every residential area located near an airport used by jets. This disturbance is felt not only by those whose property is crossed by the planes on take-offs or landings but also by those who live outside of the established flight patterns.

Although realizing this vexed position of the landowners outside the flight path, the court held that no amount of sympathy

24. Id. at 583.
could change the legal principles involved. A primary distinction pointed out was that the federal constitution protects a private property owner from actions by the United States government which take his property, not for actions which merely damage his property. 26 It was held that although there may be a substantial interference with the use and enjoyment of the property resulting in a considerable diminution in value, if there is not a direct invasion, then any damage incurred is merely consequential and non-compensable under the fifth amendment. This distinction between a "taking" and a "damaging" seems to be based upon the arbitrary proposition that the fifth amendment protects only a possessor interest in property. The concept of an interest in property, however, deals not merely with the res corporales but also with the unrestricted rights of beneficial use, enjoyment, and disposal without unreasonable interference. 28 Nevertheless, illogical as it may seem, recovery against the federal government today is artificially limited to landowners directly beneath the plane's path of flight, regardless of the effects on adjacent landowners. 27

In actions against municipal or state government activities, however, the strict trespass requirement has not always been followed. 28 Unlike the federal constitution various state constitutions have a provision which requires that private landowners are to be compensated for either a "taking" or a "damaging" of property. 29 Therefore even in cases in which there have been no direct overflights, various state courts have considered proceedings against the state or local government in "inverse condemnation."

25. For a review of the principles relied upon see United States v. Willow River Power Co., 324 U.S. 499, 510 (1945); Transportation Co. v. Chicago, 99 U.S. 635 (1879); Nunnally v. United States, 239 F.2d 521 (4th Cir. 1956); Harris v. United States, 205 F.2d 765 (10th Cir. 1953).


29. 2, Nichols, EMINENT DOMAIN § 6.44 (3d ed. 1963). Twenty-five states so provide. It is to be noted that property owners are protected from state action as well as from federal action by the fourteenth and fifth amendments. Griggs v. County of Allegheny, 369 U.S. 84 (1962).
In the recent Kentucky case\textsuperscript{30} there had been no invasion of airspace, but the court did not discuss this point because the state constitution has a provision for either a "taking" or a "damaging".\textsuperscript{31} Recovery was denied only because the court in balancing the equities did not feel that the airport's activities were so unreasonable as to compel reparations. The constitution of the state of Washington also provides for both,\textsuperscript{32} and there recovery has been allowed for interference sustained by property owners outside of the flight path.\textsuperscript{33} The Washington court has gone even further and held that compensation is to be awarded even if no substantial interference is shown.\textsuperscript{34} This is a definite departure from the majority of state jurisdictions which call for a balancing of interests and require that a plaintiff show substantial interference with consequent diminution in the market value of his property.\textsuperscript{35} Most state courts deem it necessary public policy to require that an individual bear some inconvenience as a cost of living in a modern, progressing society.\textsuperscript{36}

Contrary to the \textit{Batten} decision, which followed the trespass theory, some states having only the provisions similar to that of the federal constitution have allowed recovery on the basis of nuisance.\textsuperscript{37} Oregon, for instance in \textit{Thornburg v. Port of Portland},\textsuperscript{38} was the first state that allowed recovery of damages for excessive aircraft noise predicated upon the theory that a noise nuisance could so ripen into an easement as to constitute a compensable "taking". It was concluded that "a taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated non-trespassory invasions called 'nuisance'."\textsuperscript{39}

\textsuperscript{30} Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. 1965).
\textsuperscript{31} KY. Const. § 242.
\textsuperscript{32} WASH. Const. art. 1, § 16.
\textsuperscript{34} Ibid.
\textsuperscript{35} 2, NICHOLS, EMINENT DOM AIN § 6.44(1) (3d ed. 1963); Comment, 39 Wash. L. Rev. 920 (1965).
\textsuperscript{36} Ibid.
\textsuperscript{38} 233 Ore. 178, 376 P.2d 100 (1962).
\textsuperscript{39} Id. at 192, 376 P.2d at 106.
By abandoning the necessity of trespass this court for the first time held that property could be taken by unreasonable interference whether the noise vector came from directly above or from some direction other than the perpendicular. A balancing of interests was the standard used in determining whether the interference was so unreasonable as to constitute a "taking".

Although there have been no South Carolina state court cases dealing with excessive aircraft noise, the principles that underlie the theory of "inverse condemnation" based upon the taking of a noise easement are recognized. The South Carolina constitution mentions only "taking"; but the court has interpreted this to include "damaging". In this state the deprivation of the ordinary beneficial use and enjoyment of property is as much a "taking" as if the property itself were physically appropriated. It would seem, therefore, that South Carolina would follow the trend established by other states.

When the Court in Causby granted relief based upon "inverse condemnation" a new concept was provided to the harassed homeowner to fight devaluation in property caused by aircraft interference. The federal courts have placed a limitation on this concept in actions against the federal government by requiring a physical invasion of the property. The reasoning behind this limitation can possibly be explained by the federal courts' desire for a definite cut-off point against a multitude of claims.

The trend in state courts, however, has been to avoid the superficial approach of basing recovery strictly upon an arbitrary requirement of trespass. Since complaints allege substan-

40. There have been two recent federal cases, Bellamy v. United States, 235 F. Supp. 139 (E.D.S.C. 1964) and Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964); see text accompanying note 27, supra.


42. S.C. Const. art. 1, § 17.

43. E.g., Gasque v. Town of Conway, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1939).

44. Ibid.

45. The South Carolina court probably would not grant injunctive relief for nuisance because of the remedy of law in inverse condemnation. See Moss v. South Carolina Hwy. Dept., 223 S.C. 282, 75 S.E.2d 462 (1953).


tial detriment to the beneficial use of the surface and consequent
depreciation of the market value of their property, not inability
to use the airspace, the doctrine of nuisance is being applied in
actions in “inverse condemnation.”

In order that the clash of interest brought about by an ad-
vancing technological age be equitably abated all factors and
circumstances involved should be weighed and balanced. In
America the ownership of property weighs heavy as a basic
individual right. No other influence provides such incentive for
responsible citizenship, and it is the foremost duty of government
to see that the sanctity of this right is not violated. If repara-
tions are to be denied it should be only for the reason that a
governmental activity is not so unreasonable as to violate this
right.

THOMAS H. CURLEE, JR.