Land & Water Law Review

Volume 20 | Issue 1 Article 8

1985

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LAND AND WATER
LAW REVIEW

VOLUME XX 1985 NUMBER 1

Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint

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In this article, the author examines the constitutional propriety of the Wyoming Supreme Court's recent decisions regarding the writ of certiorari. The author begins by reviewing the constitutional underpinnings of the "rule" that the supreme court is without jurisdiction to hear the state's appeal in a criminal case absent legislative authorization. He then moves through the series of recent cases in which the supreme court has effectively abolished this rule via the writ of certiorari. He concludes that the process is likely to result in formalized appellate rules.

"We are not final because we are infallible, but we are infallible only because we are final."†

> Out of all these components comes Judge Hand, the democratic aristocrat, with his explicit antipathy to setting up his personal convictions against those of the people. This antipathy sometimes he expresses, when he says to me that it is not a judge's business to concern himself with justice. Very likely, he remembers Holmes' rejoinder to him when, many years past, he drove with Holmes on his way to the Supreme Court. As Holmes left his carriage and strode off, Hand called to him, "Do justice, sir!" Holmes replied: "Young feller! I am not here to do justice. I am here to play the game according to the rules."††

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†Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J.).

††A MAN'S REACH, THE PHILOSOPHY OF JUDGE JEROME FRANK 59-60 (Barbara Frank Kristein ed. 1965).

OVERVIEW**

The following article contains an examination of the legal soundness of a series of recent decisions announced by the Wyoming Supreme Court. The series of decisions involves five cases which have been decided in the past two years: *State v. Faltynowicz*[1], *Wright v. State*[2], *City of Laramie v. Mengel*[3], *State v. Heiner*[4], and *State v. Sodergren*[5]. The cases are noteworthy individually for the court's treatment of specific issues. As a series of five cases, however, their cumulative effect is not only greater, but their interrelationship seems more than coincidence in time and related subject matter. The sequence in which the decisions were announced reveals each case to be not only prophetic of the next, but also useful if not necessary authority to support the result reached in the subsequent case. The result of this process is the establishment, in five cases and in less than two years, of a supreme court appellate jurisdiction unknown to this state for its first ninety-plus years, without benefit or blessing of legislative authorization. Nor is the process complete, as one opinion promises that the extraordinary appellate jurisdiction is to be regularized by proposed supreme court rules.[6]

The ability of a court to choreograph a series of cases to develop a new area of law is a phenomenon familiar to students of the United States Supreme Court and other courts whose appellate jurisdiction is discretionary. Generally, the exercise of judicial discretion in choosing cases to be reviewed is guided more by the importance of the legal issue, than by considerations of justice in a particular case. Thus a court desiring to clarify a particular area of law will select one or more cases which will afford it the opportunity to discuss the area. Often a court will select more than one case in order to cover significantly different factual or legal variations and thereby to provide a unified doctrinal treatment of the entire relevant area. When the doctrinal change is to be major, it is not unusual for the development to take place in a series of cases. This strategy offers two advantages: it minimizes the significance of each case in the process, while it maximizes the appearance of continuity by providing for each case a rapidly growing line of authority.

**This overview is like an opening statement at trial. It is not evidence but is predictive of what the evidence and exhibits will show. In another sense, the body of the article is one large footnote to the assertions of this introduction and overview. The assertions of the overview as to the holdings of the cases will be specifically supported in the text. The inferences to be drawn therefrom are within the realm of acceptable legal logic. More abstract are the characterizations of certain opinions and eras of the Wyoming Supreme Court. These characterizations are the result of reading broadly in the court's decisions, far beyond the cited cases. Their legitimacy depends upon the message to be drawn from contrasting approaches (and results) of different courts at different times to similar problems.

To the reader as juror, I ask you to keep an open mind and to reserve judgment until all the evidence is in.

1. 660 P.2d 368 (Wyo. 1983)
2. 670 P.2d 1090 (Wyo. 1983)
3. 671 P.2d 340 (Wyo. 1983)
4. 683 P.2d 629 (Wyo. 1984)
5. 686 P.2d 521 (Wyo. 1984)
6. 683 P.2d 629, 642 (Wyo. 1984) (Rooney, J., concurring).

The chronology of the series of cases which follows exemplifies such a development in Wyoming case law. Briefly, this series of cases demonstrates the rapid turnabout in the law from the long standing situation where a defendant in criminal cases had the right to appeal from a final judgment and sentence, while the state had no right to appeal at all, to the present situation where the state will have a right of appeal whenever it seems appropriate within the discretion of the supreme court and whenever it is not barred by the guarantee against double jeopardy. The principal vehicle used to transform the supreme court's jurisdiction (and the structure of the criminal justice system) is the writ of certiorari.

Prior to the decisions to be discussed later, the law was clear. The defendant alone had the right to appeal. The defendant's appeal was only from the final judgment and sentence, although such an appeal brought up for review the entire record. The state had no right to appeal. Its sole method of review was the statutory bill of exceptions procedure.[7] The bill of exceptions procedure affords the state the opportunity to have the questions of law involved in a case reviewed by the supreme court, but the court's decision cannot affect the disposition below.[8] The one characteristic of an appeal lacking under the bill of exceptions procedure is the characteristic most important to the defendant and least desirable to the state—the defendant cannot be compelled to face the charges again no matter what the error. The jurisdiction of the supreme court in criminal cases was thus limited to two kinds of cases. The most common instance of this jurisdiction was on appeal of right by the defendant from final judgment and sentence. The second kind of jurisdiction was by the seldom used bill of exceptions, which is subject to the court's discretion on a petition by the state. The legal basis for both forms of supreme court jurisdiction was established by legislative enactment. Sporadic attempts by the state to obtain review by direct appeal or by writ of error were dismissed abruptly by the court which cited the "rule" that the sole method of review available to the state was by way of a bill of exceptions.[9] This settled state of the law was completely uprooted by the five decisions which will be discussed in greater detail in the body of this article. A brief summary of the five cases and their significance for this overview will be summarized here:

> *State v. Faltynowicz* provided the occasion for Justice Raper in a concurring opinion to question the "rule" precluding the state from an appeal other than through the bill of exceptions procedure.[10]

7. WYO. STAT. § 7-12-101 to -105 (1977).
8. WYO. STAT. § 7-12-105 (1977). Section 7-12-105 provides:
   > The judgment of the court in the case in which the bill was taken shall not be reversed nor in any manner affected, but the decision of the supreme court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterwards arise in the state.
9. *See, e.g.*, State *ex rel* Gibson v. Cornwell, 14 Wyo. 17, 85 P. 977 (1906).
10. 660 P.2d 368, 372-76 (Wyo. 1983) (Raper, J., concurring).

In *Wright v. State,* Justice Thomas, casting the deciding vote, suggested in his concurring opinion an appellate role for the long dormant writ of certiorari.[11]

City of Laramie v. Mengel was the first case of the series in which the court granted the writ of certiorari to review a lower court decision. Here the court found the bill of exceptions procedure inapplicable, but because the cases were moot when the decision was announced, the defendants were unaffected by the disposition.[12]

In *State v. Heiner,* the writ of certiorari was the vehicle by which the court was able to reverse a pre-trial order to suppress evidence.[13]

In *State v. Sodergren,* the writ of certiorari was granted and the court reversed the district court's dismissal of the information against the defendant.[14]

In just five cases the court went from merely questioning the long established rule against appeals by the state in criminal cases to affording the state both interlocutory relief and reversals of final judgments. Although the relief was carefully styled "certiorari," Justice Rooney indicated in *Heiner* that the court had already begun work on a rule authorizing interlocutory appeals.[15]

Unfortunately, the issues in these five cases were not joined or decided in a sense basic to the adversary system. In *State v. Faltynowicz* for instance, the concurring opinion by Justice Raper was pure dictum and the issue of whether the state's only remedy in a criminal case was by the bill of exceptions procedure was not briefed by the parties.[16] Also, in *Wright v. State,* the scope of certiorari was not an issue on appeal, and the discussion of the issue by Justice Thomas was mere dictum.[17] In *City of Laramie v. Mengel,* there was no appearance by the respondents, and the amicus failed to file a brief or to appear.[18] *State v. Heiner* and *State v. Sodergren* were briefed before the decision in *City of Laramie v. Mengel,* the principal basis of decision in both cases,[19] was published.[20] The line of cases and the authority for both the novel use of the writ of certiorari and prospectively for rules authorizing interlocutory appeals were thus developed largely outside of the adversary system. The proponents of

11. 670 P.2d 1090, 1097-1141 (Wyo. 1983) (Thomas, J., concurring).
12. 671 P.2d 340, 343 (Wyo. 1983).
13. 683 P.2d 629, 630 (Wyo. 1984).
14. 686 P.2d 521, 527-28 (Wyo. 1984).
15. 683 P.2d 629, 642 (Wyo. 1984) (Rooney, J., concurring).
16. *See* Brief for Appellant, State v. Faltynowicz, 660 P.2d 368 (Wyo. 1983); Brief for Appellee, State v. Faltynowicz, 660 P.2d 368 (Wyo. 1983).
17. 670 P.2d 1090, 1097-1114 (Wyo. 1983) (Thomas, J., concurring).
18. 671 P.2d 340, 341 (Wyo. 1983).
19. 683 P.2d 629, 632 (Wyo. 1984); 686 P.2d 524, 527-28 (Wyo. 1984).
20. City of Laramie v. Mengel, 671 P.2d 340 (Wyo. 1983) was published on November 4, 1983. State v. Heiner, 683 P.2d 629 (Wyo. 1984) was argued on August 3, 1983, and State v. Sodergren, 685 P.2d 521 (Wyo. 1984) was argued on October 6, 1983.

these theories were the Justices themselves, accounting perhaps for the unusually strident tones and acerbic exchanges found in the opinions.

The prevailing majority ultimately abandoned the argument that the state had a right of appeal in criminal cases, selecting instead the writ of certiorari as the vehicle for reviewing criminal cases at the request of the state. The court's switch from the language of "appeal" to the language of "certiorari" was more than one of terminology. The writ of certiorari has a number of tactical advantages over a right to appeal. First, certiorari is not an appeal. At least it bears a different name and is provided for in a different section of the constitution. Article 5, section 2 of the Wyoming Constitution which establishes the court's general appellate jurisdiction was fairly clearly interpreted under the case law to require that this jurisdiction depended upon legislative enactment.[21] Whereas article 5, section 2 of the Wyoming Constitution subjects appeals to the supreme court to "such rules and regulations as may be prescribed by law,"[22] clause 1 of article 5, section 3 grants the supreme court the power to issue writs without that qualifying clause.[23] In addition, unlike the state's ability to appeal, the scope of certiorari had not been explored and defined. By resorting to certiorari the court opted for the broadest scope of authority without legislative control—the common law. In construing the scope of constitutional certiorari, the court turned to the common law and to the decisions of other states.[24] Under the variety of common law and statutory schemes available, the scope of certiorari was only limited by the number of published cases and statutes, with access to published materials increased exponentially by computer assisted research.

Second, the writ of certiorari is granted at the discretion of the supreme court. This discretion permitted the court to select the series of cases to prove the very point at issue: that the court has the discretion to review lower court decisions in the interest of justice. Likewise, the court had the discretion to refuse to hear particular cases not fitting the doctrinal pattern. This tactical advantage would have been lost if appellate relief were a matter of right for the state.

Justice Rose was the only member of the court who consistently dissented in these cases. His dissents were largely directed to the scope of appeal and the scope of certiorari. He argued that certiorari should not be a subterfuge to accomplish what the legislature had failed to authorize—an appeal. Attempting to meet the scope of certiorari head-on, he fell into the trap of arguing different common law precedents. The choice of the word "trap" is defensible when the ultimate decision will be made from among the precedents by a court bent upon the fullest exercise of its powers. The search for the exact scope of common law certiorari was chimerical—the wealth of conflicting precedents yielding no clear line suitable to describing a limited jurisdiction.

21. *See, e.g.*, Mau v. Stoner, 14 Wyo. 183, 83 P. 218 (1905).
22. WYO. CONST. art. 5, § 2.
23. WYO. CONST. art. 5, § 3.
24. *See, e.g.*, City of Laramie v. Mengel, 671 P.2d 340, 344 (Wyo. 1983).

A principal benefit of conducting substantial research in the case law of one jurisdiction is the sense one develops of predominant themes of successive periods in the development of a jurisprudence. The history of Wyoming offers an almost unique opportunity for generalizing because of its relatively recent statehood, limited case reports, and the presence of a few towering figures such as Justices Potter and Blume. While there is always a danger of over-generalizing and a danger of imprecision in marking historic periods, I believe that the following article substantially supports a recognition of at least three separate periods and the dawning of a fourth with respect to the supreme court's power to expand its jurisdiction to hear appeals by the state in criminal cases.

The Wyoming Constitution was adopted in 1890 and for approximately three decades the opinions of the court demonstrate a concern for constitutionality and the principle of limited powers. Within this period, the issues discussed in this article are generally seen as clearly of constitutional dimension, and notions of the limited jurisdiction of the court and the necessity of legislative authorization are common.[25]

The second period was largely the age of Justice Blume, a man of impressive learning in the common law, and a man given to extended treatment of legal doctrines. His opinions seemed directed toward providing Wyoming with its own common law, and his influence can be seen in the opinions of his colleagues. The shift toward common law explanations and away from constitutional reference can be seen, for instance, in explaining the state's inability to appeal decisions in criminal cases as a common law rule, rather than based upon the constitutional allocation of powers.[26]

The third period in the development of Wyoming law in this area was characterized by non-discriminating reference to precedent. Prior cases came to stand for rules, without reference to their basis: constitutional, statutory, or common law. Thus the non-appealability of criminal decisions by the state was styled "a rule."[27] The consequence of this classification was an invitation to re-examine the advisability of such a rule in terms of changed circumstances or "justice," or other policy considerations.

The fourth period marked by the cases under consideration is one of judicial activism, where the court seems bent upon the broadest expansion of its powers in the interest of justice, freed from the limitations of the rules of prior cases. The basis for this expansion of judicial authority has not been consistently stated. At one time or another, it has been justified as based on common law, supervisory power, inherent powers, or even that it was not barred by double jeopardy.

The thesis of this article is that the Wyoming Constitution represents a scheme of limited powers and that its meaning is clear from the wording of its provisions. The basic allocation of power is one of limited original

25. *See, e.g.*, State *ex rel* Gibson v. Cornwell, 14 Wyo. 17, 85 P. 977 (1906).
26. *See, e.g.*, State v. Ginther, 53 Wyo. 17, 77 P.2d 803 (1938).
27. *See, e.g.*, State v. Heberling, 553 P.2d 1043, n.1 (Wyo. 1976).

jurisdiction and broad appellate and supervisory jurisdiction. The latter jurisdiction, however, is subject to vesting and to limiting by the legislature. Further, it appears that the constitutional grant of the power to issue writs is limited to those writs necessary to the exercise of the court's appellate jurisdiction, and that jurisdiction must be defined by the legislature.

The five cases which provoked the writing of this article reject the above propositions in various forms. At one time or another the court appears to assert that (1) its appellate jurisdiction is not dependent upon a legislative grant of authority; (2) it has inherent powers not derived from the constitution or statutes; and (3) its power to issue writs is bounded only by common law usage and not by the constitutional language.

While this article was being written, the court handed down its opinion in *White v. Fisher*,[28] dealing with its rulemaking power. The case was similar in tone to the previous five. In addition, the court had already indicated its intention to regularize the certiorari power into rules. The relevance of this case then also requires treatment in this article.

FALTYNOWICZ V. STATE[29]

This unprecedented series of cases began inauspiciously with the homely little case of *Faltynowicz v. State*, a case that reached the Wyoming Supreme Court on a bill of exceptions.[30] Ms. Faltynowicz had been charged by complaint in county court with the commission of a misdemeanor. Arraigned on the date the complaint was filed, she entered a plea of guilty. During a dialogue to establish a factual basis for the plea, the court interrupted her and said there was a defect in the complaint because it did not state the year of the alleged crime. The court also said that because appellee had attempted to enter a plea, it would dismiss the complaint with prejudice.[31] The state subsequently filed a bill of exceptions to the supreme court.

Under the bill of exceptions procedure, the prosecuting attorney presents a bill to the supreme court to review the trial court's disposition of the case.[32] The supreme court is to decide upon the prosecuting attorney's exceptions, but

> [t]he judgment of the court in the case in which the bill was taken shall not be reversed nor in any manner affected, but the decision of the supreme court shall determine the law governing any similar case which may be pending . . . or which may afterwards arise in the state.[33]

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28. White v. Fisher, No. 83-106 (Wyo. October 2, 1984).
29. 660 P.2d 368 (Wyo. 1983).
30. *Id.* at 369.
31. *Id.*
32. WYO. STAT. § 7-12-103 (1977).
33. WYO. STAT. § 7-12-105 (1977).

In a thoroughly workmanlike opinion of the court, Justice Brown determined that the omission of the year in the complaint was not fatal either to its function as a statement of probable cause or as a charging document, because the defendant could not claim to have been misled to her prejudice. Concluding that in such a case the court below "does not, under Rule 9(a), W.R.Cr.P., have the discretion to dismiss a complaint, information, or indictment,"[34] the matter was appropriately disposed of with the words "the State's bill of exceptions to the trial court's dismissal of the complaint with prejudice is sustained."[35] The case, properly limited to its issue and disposition, is thus unremarkable.

Neither Justice Brown nor the other justices refer to the points presented in the bill of exceptions in their opinions. It seems safe to conclude, however, that the county court was in error in its dismissal and should have permitted an amendment to supply the date, or the county court should have found a waiver of any defects by the entry of a plea.[36] Although the bill of exceptions procedure contemplates that the result below is to be left undisturbed, it was this characteristic, unmentioned in the opinion of the court, that provoked three justices to specially concur.[37]

The opinion by Justice Raper, specially concurring and joined by Chief Justice Rooney, merits review because Justice Raper considered *Faltynowicz* "to be the catalyst to point up some misleading and poor Wyoming jurisprudence."[38] Justice Raper's principal thesis is that an appeal was the proper means of bringing the issue before the court, and not the bill of exceptions; the practical result being that the state would be able to reinstate the prosecution against the defendant. Recognizing that this would be radical departure from prior law, he attempted to justify such a result, absent direct authority, with arguments that are largely negative in their impact; for instance, that other doctrines do not prevent an appeal under these circumstances.[39]

In his concurring opinion in *Faltynowicz*, Justice Raper launched a two-pronged attack on the well established principle that the state's only recourse from an adverse decision in a criminal trial lies with the bill of

34. Faltynowicz v. State, 660 P.2d at 372.

35. *Id.*

36. *Id.* at 370, n.2.

37. The three who specially concurred were Justices Raper, Thomas, and Rose. Justice Raper's opinion will be discussed at length in the text. *See infra* text accompanying notes 38-58. Justice Thomas, joined by Justices Raper and Rose found that the county court had no authority to dismiss the complaint with prejudice, a point not covered in the opinion of the court, probably because it was not a question in the bill of exceptions. In any event, along with the main opinion it was purely advisory and could not affect the disposition below. State v. Faltynowicz, 660 P.2d at 376-77 (Thomas, J., concurring).

Justice Rose wrote a short opinion objecting to the concurring opinion of Justice Raper on the ground that the right of the State of Wyoming to appeal an adverse decision in a criminal case was not properly before the court, and on the further ground that he was not convinced by that opinion of any such right. *Id.* at 377 (Rose, J., concurring).

38. 660 P.2d at 372 (Raper, J., concurring).

39. *Id.* at 375.

exceptions. First, Justice Raper questioned the very proposition that "[a] bill of exceptions is the only way by which the State may challenge and have reviewed any adverse ruling of the district court in criminal prosecutions."[40] Second, he questioned the authority of the legislature to prohibit the supreme court's appellate jurisdiction in cases not barred by the constitutional protection against double jeopardy.[41]

It was Justice Raper who stated in *State v. Heberling,* that the only way the state may have an adverse ruling reviewed by the supreme court is through the bill of exceptions.[42] In *Faltynowicz,* however, Justice Raper contended that his statement was "loosely and unnecessarily" made.[43] He attributed this "rule" to two early Wyoming Supreme Court decisions: *State ex rel Gibson v. Cornwell*[44] and *State v. Ginther*[45].

In *State ex rel Gibson v. Cornwell,* the prosecutor had obtained permission of the supreme court for a bill of exceptions. Simultaneously he filed a petition in error, pursuant to which the clerk of the district court forwarded the complete file of the case to the supreme court.[46] The court ordered the petition in error stricken from the files.

> In the statute above quoted [bill of exceptions] providing for a proceeding of this character there is no provision or authority for filing such a paper or pleading [petition in error], nor is authority therefor to be found in any other statute applicable to such proceeding. To the extent and for the purpose explained in the statute, the jurisdiction of this court is invoked through the filing of the bill of exceptions; and a petition in error is neither necessary or proper.[47]

The court went on to state the rule supporting its holding that it had no jurisdiction to entertain a petition in error from the state in a criminal matter:

> No provision is made by this [bill of exceptions] or any other statute for an appeal by the state, or any other proceeding on behalf of the state, to vacate, or modify the judgment rendered in a criminal case. The statute in question very clearly sets forth its purpose and *defines the power and jurisdiction of the court in the premises.*[48]

Later in the opinion the court reiterated its position by stating "no decision or order of this court in the proceeding could reinstate the case so

40. *Id.* at 372 (quoting State v. Heberling, 553 P.2d 1043 (Wyo. 1976)).
41. *Id.* at 372-73 n.1.
42. 553 P.2d 1043, n.1 (Wyo. 1976).
43. 660 P.2d at 372.
44. 14 Wyo. 526, 85 P. 977 (1906).
45. 53 Wyo. 17, 77 P.2d 803 (1938).
46. State *ex rel* Gibson v. Cornwell, 14 Wyo. 17, 18, 85 P. 977, 978 (1906).
47. *Id.*
48. *Id.*

as to require the defendant to again answer to the same information, even if we should come to a different conclusion from that announced by the learned district judge."[49]

As for the bill of exceptions, the court held that the failure to have the bill properly sealed as required by statute prevented the court from obtaining jurisdiction. After the bill was stricken, nothing was left for the court's consideration and the cause was dismissed.[50]

In his concurring opinion in *Faltynowicz*, Justice Raper quoted Chief Justice Potter's "rule" in *Cornwell*.[51] Justice Raper maintained, however, that the rule "with more progeny than a rabbit" was unnecessarily stated in *Cornwell*.[52] In his view the *Cornwell* case was dismissed "because the bill of exceptions was not sealed!"[53] He characterized the rule as "dicta pure and simple [which] has been blindly followed ever since and demonstrates how dicta can become settled law, though erroneous."[54] Because the *Cornwell* case was before the court *both* on a petition in error and on a bill of exceptions, the determination that the court had no jurisdiction to entertain the petition in error was vital to the court's decision. Chief Justice Potter's "rule" in *Cornwell* can hardly be classified as dicta or unnecessary to the disposition of the case. The "rule" presumably was also an accurate statement of law at that time.

In resorting to the language of jurisdiction in *Cornwell*, Chief Justice Potter applied the very proposition that Justice Raper attempts to deny: that the appellate jurisdiction of the supreme court is constitutionally limited to those instances prescribed by statute.[55] Because the legislature enacted the bill of exceptions procedure, the court has jurisdiction to entertain the state's exceptions in a criminal case. But there is no statute providing for an appeal or petition in error by the state, so the court has no jurisdiction in these instances. It should be noted that the *Cornwell* court did not concern itself at all with the problem of double jeopardy, either in the case before it or in any hypothetical case where the state might appeal.

State v. Ginther was the second case cited by Justice Raper in *Faltynowicz* as the basis for the "rule" prohibiting appeals by the state. In *State v. Ginther*, the supreme court dismissed an appeal by the state from the district court's grant of a motion in arrest of judgment.[56] Although it referred to the general rule "under the common law as ad-

49. *Id.* at 19, 85 P. at 979. The lower court had sustained a demurrer to the information, on the ground that the act charged was not a crime under the laws of this state, and the defendant was discharged—a case strikingly parallel to State v. Sodergren, 686 P.2d 521 (Wyo. 1984).

50. 14 Wyo. at 19, 85 P. at 979.

51. 660 P.2d 368, 372 (Wyo. 1983) (Raper, J., concurring).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See infra* text accompanying notes 84-94.

56. 53 Wyo. 17, 77 P.2d 803 (1938).

ministered in this country that the State may not bring a writ of error or take an appeal or have exceptions in a criminal case"[57] the court relied principally upon *Cornwell*. It did bolster its opinion by noting the clear implication that the legislature contemplated the supreme court's jurisdiction being invoked by the defendant only.[58] The court did not explicitly rely upon the principle that there must be legislative authorization for any appeal, but the disposition of the appeal by dismissal is inexplicable without resort to that rule.

In *State v. Heberling*, Justice Raper summarized the rules of *Cornwell* and *Ginther* in footnote one of his opinion.[59] In *Heberling*, the district court ruled that on an appeal from a conviction in a justice of the peace court, the district court was compelled to void the conviction and dismiss the charges whenever there was an error of law.[60] The prosecutor filed a bill of exceptions and the supreme court sustained it. The court held that the district court's authority was not limited to setting aside a conviction, but rather included the power to reverse, vacate, or modify as appropriate and to remand for further proceedings.[61]

It is true that the *Cornwell* rule restated in footnote one of Justice Raper's opinion in *Heberling* was unnecessary to the court's decision because the supreme court's jurisdiction was not in dispute. However, the footnote also cited the earlier case of *State v. Benales*.[62] In *Benales*, the court dismissed an appeal by the state from a district court order dismissing an information on grounds of denial of speedy trial. The court stated in a per curiam opinion that the procedure for appeal by the state to the supreme court in criminal cases is set out in the statutes governing the bill of exceptions procedure.[63] Because the state brought a direct appeal to reverse the order of the trial court, the supreme court dismissed the appeal.[64]

It is clear from the foregoing discussion that it has been a settled rule of law that the state can not obtain review of district court decisions by way of a petition in error or an appeal. This rule is no mere dictum but is the *ratio decidendi* in *Cornwell*, *Ginther*, and *Benales*. Moreover, the "rule" was unchallenged as recently as 1976 in *Heberling*. Although it appears that the bill of exceptions is the only way by which the state may have an adverse ruling reviewed by the supreme court, two questions remain: (1) whether modes of review other than error or appeal are barred in the absence of statute, and (2) whether the "rule" has a statutory or constitutional basis.

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57. *Id.*
58. *Id.* at 21, 77 P.2d at 806-07.
59. 553 P.2d 1043, n.1 (Wyo. 1983). "A bill of exceptions is the only way by which the State may challenge and have reviewed any adverse ruling of the district court in criminal prosecutions [citations ommitted]." *Id.*
60. *Id.* at 1043.
61. *Id.* at 1045.
62. 365 P.2d 811 (Wyo. 1961).
63. *Id.* at 812.
64. *Id.*

Double Jeopardy and the Bill of Exceptions

> No person shall be compelled to testify against himself in any criminal case, nor shall any person be twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.[65]

Justice Raper in *Faltynowicz* opined that "[t]he bill of exceptions provisions pertaining to proceedings initiated by the State has [sic] its [sic] roots in and implements [sic] §11, Art. 1, Wyoming Constitution. . . ."[66] The intent of the constitution, as he sees it, is to limit its protection to those situations when the defendant has been placed in jeopardy, and the operation of the bill of exceptions should be limited to those occasions only and when there is a serious error of law. Under this view, the proper scope of the bill of exceptions is the same as the constitutional protection against double jeopardy. In any other instance, the state should have a means to challenge an adverse disposition of a criminal case by way of writ of error or appeal.

In an even more limited reading of the bill of exceptions statute, Justice Raper comments:

> A careful examination of that language indicates that the particular proceeding in which the bill of exceptions was taken cannot be disturbed. However, if the defendant was not in jeopardy at the time and an erroneous decision at law was made in his favor, that does not mean that new proceedings may not be initiated and pursued.[67]

No citation of authority is given for this statement, but the analogy offered is the dismissal of an original complaint as in *Richmond v. State*.[68]

The limited reading of the bill of exceptions provisions by Justice Raper is an extensive foray into uncharted territory. Its very novelty may explain the inability to refute authoritatively the propositions set forth, but it would seem fair to place upon the proponent of such a radical theory the burden of producing affirmative evidence of such a construct. If Justice Raper's theory were true, the bill of exceptions procedure would provide very little protection. It would be an appeal in all but name. Further, the court stated precisely the opposite in *State ex Rel Gibson v. Cornwell*.[69]

It is appropriate to note that there is no legislative history limiting the bill of exceptions to those areas protected by the constitutional provision against double jeopardy. As noted in *State ex rel Gibson v. Cornwell*, the bill of exceptions statute was enacted when Wyoming was a territory and it predated the adoption of the Wyoming Constitution.[70] Chief

65. WYO. CONST. art. 1, § 11.
66. 660 P.2d 368, 373 (Wyo. 1983).
67. *Id.*
68. 554 P.2d 1217 (Wyo. 1976).
69. *See supra* text accompanying notes 46-55.
70. 14 Wyo. 526, 527, 85 P. 977, 978 (1906).

Justice Potter, the author of the *Cornwell* decision and a member of the constitutional convention, made no reference in that opinion to the ban on double jeopardy, relying instead upon finding no jurisdictional basis for the state to file an appeal or petition in error.

In *Cornwell*, the error of the lower court was not identified in the opinion. It is at least arguable, however, that if the supreme court asserted jurisdiction over the petition in error, the accused would not have been in jeopardy. Thus, the defendant would not be protected by "double jeopardy." His protection against re-prosecution was found in the statutory bill of exceptions, and the limited effect of any supreme court ruling in his favor. If that were so, the case that "sired the rule"[71] demonstrates that the protection of the bill of exceptions procedure is broader than the words of the constitutional guarantee against double jeopardy.

A more basic problem with tying the bill of exceptions to the protection against double jeopardy is the misconception that the constitutional protection has fixed contours that persist to this day. Nothing could be further from the truth or more misleading than to impose the specifics of modern double jeopardy law anachronistically to the framers of the Wyoming Constitution and the original proponents of the bill of exceptions procedure.[72]

The protection afforded the defendant under Wyoming's double jeopardy provision was undetermined until the mid-1970's. In *Vigil v. State*, Justice Raper stated for the court that the federal and state provisions against double jeopardy "have the same meaning and are coextensive in application."[73] Although no authority was given for that proposition, Justice Raper did note that "[t]here is much turmoil in the case law involving double jeopardy and the cases are difficult to reconcile."[74]

Given the state of the law in Wyoming from 1890 to the present, it seems at least an ingenuous attempt to rewrite history to find a limited legislative intent to restrict the bill of exceptions to those instances where retrial would be barred. If there be any doubt, the broad language of the

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71. State v. Faltynowicz, 660 P.2d at 372.

72. In connection with the right of the prosecutor to appeal an acquittal, obtain a reversal, and retry the defendant, it may be appropriate to note that in 1907 in Kepner v. United States, 195 U.S. 100 (1904), Justice Holmes argued in dissent:

> If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake in his favor, than he would be when retried for a mistake that did him harm.

Id. at 135 (Holmes, J., dissenting).

In Palko v. Connecticut, 302 U.S. 319 (1937), the Court held that a state statute permitting the prosecution to appeal the erroneous exclusion of evidence and to retry the defendant was not violative of due process under the fourteenth amendment. It was not until 1969 in Benton v. Maryland, 395 U.S. 784 (1969), that *Palko* was formally overruled and the fifth amendment made applicable to the states.

73. 563 P.2d 1344, 1350 (Wyo. 1977).

74. *Id.*

statute should be dispositive.[75] This is not the guarded language of whether and when the defendant was in "jeopardy."

Constitutional Basis of the Bill of Exceptions

In *Faltynowicz*, Justice Raper stated:

> I seriously question that the legislature has the authority to restrict our "*complete*" appellate jurisdiction to hear appeals taken by the State in proper cases if in fact the bill of exceptions procedure does that. There is no constitutional prohibition against the State taking an appeal in a criminal case as long as it is to an issue which would not place the defendant in jeopardy for a second time. [citation omitted] When a statute and the constitution collide, the constitution prevails.[76]

The structure of this argument is deceptively simple. Since the only constitutional limit on the state's right to appeal is the double jeopardy clause, the legislature could not have intended to restrict the jurisdiction of the supreme court by adopting the bill of exceptions procedure. Support for this conclusion is drawn by reference to the separation of powers clause of the Wyoming Constitution[77] which equates the legislature's denial of jurisdiction to be an infringement on judicial power. The approach is question begging assuming either (1) a constitutional, self-executing grant of appellate jurisdiction, or (2) an appellate jurisdiction not mentioned in the constitution that is somehow intrinsic to the very nature of a supreme court.

The logical starting point in examining this question is by considering the relevant sections of the Wyoming Constitution, although, as indicated by Justice Raper's opinion, the provisions are not so thoroughly drafted as to be capable of only one construction.[78] The several sections are set out here in accordance with the principle that the constitution "must be construed as a whole in order to ascertain its intent and general purpose, and also the meaning of each part."[79] Therefore, these provisions have been set out in full, including some clauses of only marginal relevance, in the interests of fairness and completeness—the better to infer the intent of the framers as to overall structure.

Article 5, section 2 of the Wyoming Constitution, pertains to the appellate jurisdiction of the court and provides: "The supreme court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control

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75. WYO. STAT. § 7-12-102 (1977) provides in part: "The district attorney may take exceptions *to any opinion or decision of the court during the prosecution of the cause.*" (Emphasis added).

76. 660 P.2d 368, 375 (Wyo. 1983).

77. WYO. CONST. art. 2, § 1.

78. State v. Faltynowicz, 660 P.2d 368, 372-76 (Wyo. 1983) (Raper, J., concurring).

79. Ross v. Trustees of University of Wyoming, 31 Wyo. 464, 473, 228 P. 642, 651 (1924).

over all inferior courts, *under such rules and regulations as may be prescribed by law.*"[80]

Article 5, section 3 deals with the court's original jurisdiction and provides:

> The supreme court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself or before the supreme court or before any district court of the state or any judge thereof.[81]

Article 5, section 18 deals specifically with appeals from district courts to the supreme court and provides: "Writs of error and appeals may be allowed from the decisions of the district court under such regulations as may be prescribed by law."[82]

In *Faltynowicz*, Justice Raper quotes only clause 1 of article 5, section 2 and clause 2 of article 5, section 3 before setting out in full the text of article 2, section 1, the separation of powers clause. He then questions whether the legislature has the authority to restrict the complete appellate jurisdiction to hear appeals taken by the state.[83] With such selected excerpts from the constitution, such a conclusion might seem supportable, but as noted above the constitution is to be construed as a whole, and the intent of the framers, as determined by the language itself, is the governing principle.[84]

Looking at only clause 1 of article 5, section 2, it might be argued that this clause vests "general appellate jurisdiction . . . in both civil and criminal causes"[85] even though the term "general appellate jurisdiction" is not elsewhere defined. In order for that argument to prevail, it would have to be maintained that the phrase "under such rules and regulations as may be prescribed by law"[86] in section 2 neither modifies clause 1 (although the placing of the comma would indicate *contra*) nor contemplates the legislative power to grant, deny, and circumscribe appellate jurisdiction.

The argument that section 2 of article 5 vests unlimited, general appellate jurisdiction is made difficult, if not untenable, when section 2 is

80. WYO. CONST. art. 5, § 2. The portion of the constitutional provision quoted in italics was omitted from Justice Raper's opinion in *Faltynowicz*, 660 P.2d at 374.
81. WYO. CONST. art. 5, § 3.
82. WYO. CONST. art. 5, § 18.
83. State v. Faltynowicz, 660 P.2d at 375.
84. *See* Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819 (1897); Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511, 173 P. 981 (1918).
85. WYO. CONST. art. 5, § 2.
86. WYO. CONST. art. 5, § 2.

read with section 18 of article 5: "appeals *may be allowed* . . . under such regulations as may be prescribed by law."[87] The uniform interpretation of sections 2 and 18 of article 5 is that the legislature is to confer jurisdiction by statute, and that jurisdiction does not otherwise exist. Turning to the question of whether under the constitution the right of appeal is guaranteed in all cases, the court in *Mau v. Stoner*[88] considered the text of both section 2 and section 18 and stated:

> Section 2 merely defines and limits the jurisdiction of the Supreme Court, without attempting to define the manner of appeal or the class of cases in which appeals may be taken. It provides that the appellate jurisdiction of the Supreme Court shall extend throughout the state, both in civil and criminal cases, without attempting to define how it may be exercised. We think the expression "under such rules and regulations as may be prescribed by law" refers to and limits all the powers conferred by the section; in other words, prescribes how the exercise of these powers may be regulated and limited.[89]

After discussing section 18, the court concluded, "by that section it was intended merely to provide that the legislature might allow writs of error and appeals when it might deem it most expedient for the public welfare."[90]

In *Geraud v. Schrader*,[91] Justice Raper quoted at length from *Mau v. Stoner*. In denying the right of a school district to intervene in an appeal involving a petition for review of administrative action under the Wyoming School District Organization Law, Justice Raper noted: "The right of an appeal is a privilege rather than a right."[92] After citing portions of *Mau v. Stoner* he stated: "The legislature has authority to abridge or extend the right of appeal at its discretion and can determine in what cases and under what circumstances appeals may be taken, as well as regulate the manner of appeal."[93] Exactly what prompted Justice Raper to depart from these principles in his opinion in *Faltynowicz* remains unclear.

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87. WYO. CONST. art. 5, § 18 (emphasis added).

88. 14 Wyo. 183, 83 P. 218 (1905). *Accord* Mayland v. State, 568 P.2d 897 (Wyo. 1977).

89. 14 Wyo. at 185, 83 P. at 219. The court stated further:

> It is well settled that in the absence of a direct constituional requirement, the right of appeal does not exist unless expressly conferred by statute. The right to have a judgment of an inferior tribunal reviewed by writ of error or appeal is not a natural or inherent right. It pertains merely to the mode of judicial procedure or the remedy. Unless it is guarantied as a matter of right in the Constitution, the Legislature has power to pass laws not only regulating the mode of proceeding but limiting the cases in which the right may be exercised. The remedy of appeal was unknown to the English common law, hence it may be said that in both England and the United States the whole matter of appellate review is regulated entirely by statute law.

Id.

90. *Id.*

91. 531 P.2d 872 (Wyo. 1975). *Geraud v. Schrader* was decided only one year before the court decided *Heberling*.

92. *Id.* at 875.

93. *Id.*

The constitution and the case law is thus clear that section 2 of article 5 is not a self-executing grant of jurisdiction, and that the court's appellate jurisdiction is defined by the legislature. It follows that with respect to the appellate jurisdiction of the supreme court, legislative action (or inaction) cannot be violative of the separation of powers doctrine. The requirement of a legislative grant of jurisdiction is surely the basis for the rule that "[a] bill of exceptions is the only way by which the State may challenge and have reviewed any adverse ruling of the district court in criminal prosecutions."[94] The important point to be made here is that the rule is properly based not on the negative inference that the passage of the bill of exceptions procedure implied that the state could not appeal. The reason for the rule is more basic: the state cannot appeal until the legislature confers that appellate jurisdiction.

Faltynowicz in Perspective

The decision in *Faltynowicz*, as noted above, is totally unremarkable when limited to its proper issues, its disposition, and its rationale. As one who heard the oral arguments in the case, I was as baffled as the assistant prosecutor and county court judge, who were also in attendance, at the court's neglect of the issues before it in order to inquire as to whether the state could have appealed (especially when jeopardy attached in the guilty plea process) and whether the county court judge could dismiss "with prejudice." It soon became clear that neither lawyer arguing the case had briefed any of these points.

In retrospect, it appears that the opinions in *Faltynowicz* were being shaped during oral argument (if they had not already been) without notice to the parties, without opportunity to be heard, and without allowing for the appearance of amicus curiae.[95] Perhaps, this accounts for the curious disparity of the opinions.

The opinion of the court addresses the issues presented in the case, is thorough, and is undoubtedly correct. The concurring opinion of Justice Raper does not hang together; it lacks coherence, depth, and direction. It does not prove any existing right of appeal by the state, but rather asks "why not?" In view of the importance of the issue, its content is extremely short on available Wyoming authority. The opinion of Justice Rose, who disagreed with Justice Raper's analysis, is confined to noting that the issues of the state's right to appeal was not properly before the court. Justice Rose did not even attempt to meet the substance of Justice Raper's opinion.

The principal impact of Justice Raper's opinion, in light of later opinions, was that it opened up the question of the right of the state to obtain *some* sort of review of lower court decisions in criminal cases. The particular remedy of appeal suggested in *Faltynowicz* is scarcely mentioned in the subsequent cases, but *Faltynowicz* was a signal that certain members of the court seemed bent upon inventing some new appellate remedy.

94. *See Faltynowicz supra* note 40.
95. *See* W.R.A.P 5.12.

WRIGHT V. STATE[96]

The peculiar vehicle chosen by the court for its next foray into appellate remedies was perhaps even more unlikely than the one in *Faltynowicz*.

Wright v. State involved an appeal by a first offender from a sentence of from two to four years for delivering one half ounce of marijuana to undercover agents on the principal grounds that the sentence was (1) too severe, and (2) an abuse of the trial judge's discretion.[97] In an opinion by Chief Justice Rooney, apparently joined only by Justice Brown, the court stated that the trial court's sentence was reviewable for abuse of discretion, but then found no such abuse.[98] Justices Rose and Cardine, in separate dissents, found an abuse of discretion and would have set the sentence aside.[99]

The remarkable opinion in the case is that of Justice Thomas, who provided the critical third vote to sustain the sentence.[100] He did so on a basis with which no other member of the court could agree. Although Chief Justice Rooney and the dissenting justices agreed that sentences were reviewable for abuse of discretion, even though they are within statutory maxima, Justice Thomas stated: "[I]t is quite clear to me that this court as a matter of practice follows the common-law rule with respect to sentence review. The practical effect of our decisions is that a sentence is not subject to appellate review if it is within the limits set by the legislature."[101]

Since Justice Thomas' conclusion would dispose of the case, the rest of his opinion is dictum. Important to note here, however, is that while voting to maintain this rule for the average case, Justice Thomas recognized the possibility of "exceptional" cases in which "it would be appropriate for the supreme court to examine the sentence imposed by a district judge in the exercise of our discretion."[102] In this case for instance, "the granting of the writ [certiorari] is entirely within the discretion of this court" to enable it to review the sentence.[103]

The structure of Justice Thomas' opinion is unusual and seems designed only to resurrect the long dormant writ of certiorari.[104] Justice Thomas' opinion can be outlined as follows: (1) the sentences should be reviewed; (2) non-reviewability under the so-called common law rule should apply in the context of this appeal; (3) rather than change the rule, cer-

96. 670 P.2d 1090 (Wyo. 1983).
97. *Id.* at 1091.
98. *Id.*
99. *Id.* at 1114 (Rose, J., dissenting), 1116 (Cardine, J., dissenting).
100. *Id.* at 1097-99.
101. *Id.* at 1097.
102. *Id.* at 1098.
103. *Id.*
104. The earlier cases involving the writ of certiorari were City of Sheridan v. Cadle, 24 Wyo. 293, 157 P. 892 (1916) and Call v. Town of Afton, 73 Wyo. 271, 278 P.2d 270 (1954).

tiorari should be available to enable the court to review this "exceptional" case. Under certiorari the court could exercise its discretion—presumably the same discretion the other four justices were exercising in this case. Justice Thomas apparently preferred the certiorari route even though it would often require two separate proceedings: a hearing on a petition for certiorari, and an appeal. No authority was given in support of this use of certiorari; in fact none existed in Wyoming case law, statutes, or court rules. More remarkable is the suggestion that the scope of review on the record is broader on certiorari than on direct appeal.

Justice Rose, after a spirited dissent on the merits, turned to the writ of certiorari issue. He found that the writ would not be proper in this case, because there was an adequate remedy by appeal.[105] He interpreted article 5, section 3 of the Wyoming Constitution to limit certiorari to situations where it is "necessary and proper to the complete exercise of [the supreme court's] appellate and revisory jurisdiction."[106] If this interpretation is correct, then certiorari should not be available where an adequate appellate remedy is available.

Justice Rose appears to be on firm ground with his interpretation of article 5, section 3 of the Wyoming Constitution. Apparently not content to rest there, however, Justice Rose slips into a discussion of the scope of common law certiorari, inadvertently perhaps conceding *substantive* scope to certiorari beyond that "necessary and proper to the complete exercise of its appellate and revisory jurisdiction," and which jurisdiction is limited "under such rules and regulations as may be prescribed by law."[107]

This constitutional slippage, if it may be so styled, went seemingly unnoticed at the time, but it bore the potential for great mischief. If certiorari can be used for appeal, and the limits of certiorari are as broad as the holdings of any of the sources of common law in the several states and the English speaking nations, then the limitations on appellate jurisdiction erected in article 5, section 2 are expanded to the limits of the digests and appellate jurisdiction is increased exponentially by the wonders of computer assisted research.

On a much more mundane level, however, Justices Raper and Rooney who had shown an impatience with legislative limits on the court's appellate jurisdiction in *Faltynowicz*, were now joined by a crucial third vote in that sentiment.

CITY OF LARAMIE V. MENGEL[108]

This case, like the two previous cases, was hardly earthshaking to all outward appearances. It arose because two Laramie municipal judges ruled in separate prosecutions under a city ordinance, that admitting

105. Wright v. State, 670 P.2d 1090, 1110 (Wyo. 1983).
106. *Id.* (quoting WYO. CONST. art. 5, § 3).
107. *See supra* text accompanying notes 84-94.
108. 671 P.2d 340 (Wyo. 1983).

evidence of the defendants' refusal to submit to a test to determine blood-alcohol content violated the privilege against self-incrimination.[109] The procedural history of the two cases, while somewhat tangled, is worth recounting here, insofar as it throws light upon the doctrinal development under examination in this article.

The two cases in *Mengel* arose as separate prosecutions growing out of separate incidents. The defendants were arrested for driving while intoxicated in violation of the Laramie Municipal Code,[110] which paralelled the state statute.[111] Both laws contained an identical section providing that "evidence of . . . refusal [to submit to a chemical test for determining blood-alcohol content] shall be admissible in any administrative, civil or criminal action or proceeding arising out of acts alleged to have been committed while the arrested person was driving. . . ."[112] In each case, but before different judges, the defendant raised the issue of the constitutionality of the procedure under state and federal protections against self-incrimination.[113] After conferring, the judges issued a joint order excluding the evidence of refusal and found the city ordinance and the statute unconstitutional.[114]

On November 29, 1982, the same day the joint order was issued, a jury found one of the defendants guilty even though evidence of his refusal to submit to the chemical test was not admitted.[115]

> On December 3, 1982, the City of Laramie filed a Notice of Action, stating that it intended to file a petition in the District Court . . . seeking appropriate relief from the order of November 29, 1982, by means of a writ of mandamus or writ of prohibition. The notice stated that the City of Laramie held the view that the order of the municipal judges was erroneous; that the issue was one of importance which must be determined by a court of record with access to final ruling by the Supreme Court of the State of Wyoming; urged that the order entered by the municipal court was invalid and unenforceable because the statutory procedures to raise constitutional questions regarding the validity of ordinances and statutes found in § 1-37-113, W.S. 1977, were not followed, with the result that the municipal court was deprived of any jurisdiction to invalidate the state statute; and aruged further that because of the status of the municipal court and the uncertainty of rights of appeal the court was without jurisdiction to invalidate municipal ordinances and must be required to refer any such matters to a court of competent jurisdiction.[116]

109. *Id.* at 341.
110. LARAMIE, WY. CODE § 10.24.090 (1982).
111. WYO. STAT. § 31-6-105 (1977).
112. WYO. STAT. § 31-6-105(f) (1977) and LARAMIE, WY. CODE § 10.24.090 (1982).
113. WYO. CONST. art. 1, § 11 and U.S. CONST. amend. V.
114. City of Laramie v. Mengel, 671 P.2d 340, 341-42 (Wyo. 1983).
115. *Id.* at 343.
116. *Id.* at 342-43.

The above quoted passage fairly states the quandary facing the city in having the municipal judges' ruling reviewed and reversed, instead of awaiting other eventualities. Although the Notice of Action might be styled "shotgun," it came close to the mark on several points. It is useful to pause at this point to examine further the position of the city, because ultimately the supreme court decided that certiorari was an appropriate, even a necessary remedy.[117]

It can be conceded that the constitutional question was serious in the abstract without conceding that it had much, if any, practical impact. The constitutional issue only affected those cases in which the defendant refused the test and where the city intended to use that evidence. As already noted, one defendant was convicted without the use of the evidence. The other defendant, Mengel, entered a plea of guilty on December 6, 1982.[118] On the other hand, the municipal judges indicated that "until such time as a court of greater jurisdiction decides to the contrary, the decision will stand . . ." and they did not intend to postpone any pending cases.[119] In the absence of access to overruling authority, the City of Laramie would have to forgo such evidence *or* file such cases in justice court and have the county attorney prosecute. In the meantime, the city could hope for a similar case to reach the Wyoming Supreme Court or it could hope for an imminent decision in *South Dakota v. Neville*.[120]

The gist of the writ of mandamus is the higher court "commanding the performance of an act which the law specially enjoins as a duty resulting from an office. . . . It may require an inferior tribunal to exercise its judgment or to proceed to discharge any of its functions but it cannot control judicial discretion."[121] Traditionally, the duty sought to be enforced must be clearly ministerial.[122] It would seem quite clear that there was no ministerial duty that the district court could order the justice court to perform to solve the city's problem.

As for the writ of prohibition, the case for the city was somewhat stronger. The function of the writ of prohibition is to prevent an inferior tribunal from exceeding its jurisdiction. The position of the city was that the failure of the defendant to follow the procedures under section 1-37-113 of the Wyoming statutes ousted the trial court's jurisdiction.[123] While the statute might not apply in the context of a motion to suppress, at least the district court would have a chance at the question and appeal would lie.

An alternative approach to the supreme court's granting the writ of certiorari might have lain in the procedure for reserving constitutional

117. *See infra* text accompanying note 120.
118. City of Laramie v. Mengel, 671 P.2d at 343.
119. *Id.* at 342.
120. 459 U.S. 553 (1983). The case was argued December 8, 1982 and was decided February 22, 1983.
121. WYO. STAT. §§ 1-30-101, -102 (1977).
122. State *ex rel* Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1906).
123. Tobin v. Pursel, 539 P.2d 361 (Wyo. 1975)

questions,[124] although that procedure seems to be limited to district courts. Another alternative not explored by the supreme court would have been to grant certiorari, discuss the substantive law, and then to dismiss certiorari as improvidently granted. While the resultant opinion might be styled "dictum," the moral authority of the court would have been sufficient to bring conformity to the lower courts. It should be noted that the Wyoming Supreme Court is not limited by the "case or controversy" limitation of federal courts, and advisory opinions are therefore permitted. The result of resorting to this second alternative would have been the court deciding the legal issue without affecting the judgment below; a result consistent with the legislatively authorized bill of exceptions procedure.[125]

The use of certiorari seems to have been a conscious choice by the supreme court in view of subsequent developments; in particular, that *Mengel* was not announced until after *Heiner* and *Sodergren* were argued on appeal and that *Mengel* formed the principal basis for those opinions.[126]

STATE v. HEINER[127]

In *State v. Heiner*, the trial court granted the defendant's motion to suppress evidence obtained by agents of the insurer in the context of an arson investigation. The prosecution sought review in the supreme court by a petition for writ of review, or writ of prohibition, or writ of certiorari, or writ of mandamus on May 20, 1983. On May 25, 1983, an order granting the writ of certiorari was entered, and further proceedings in the district court were stayed pending disposition by the supreme court.[128]

The opinion of the court announced by Justice Thomas stated that "[t]he threshold question of the authority of this court to review these evidentiary rulings by the trial court pursuant to a writ of certiorari is settled in principle by the decision of this court in City of Laramie v. Mengel. . . ."[129] While it is true that *Mengel* involved the pre-trial suppression of evidence, the critical point justifying the use of certiorari was the unavailability of the bill of exceptions procedure.[130] This was not true in *Heiner*.

In *Heiner*, the court again referred to *Call v. Town of Afton*[131] and repeated its statement there that

> the writ of certiorari subserves a good purpose in instances in which an appeal (or a bill of exceptions) is not plain, speedy and

124. WYO. STAT. § 1-13-101 (1977). *See* State v. Crocker, 5 Wyo. 385, 40 P. 681 (1895) (holding the statute constitutional). The opinion by Justice Potter is another classic example of the conservative approach to jurisdictional questions under the Wyoming Constitution.
125. *See supra* notes 39-64.
126. *See supra* note 19.
127. 683 P.2d 629 (Wyo. 1984).
128. *Id.* at 631.
129. *Id.* at 632.
130. *Id.*
131. 73 Wyo. 271, 278 P.2d 270 (1954).

> adequate. . . . With respect to rulings which suppress important evidence to be offered by the State in a criminal prosecution the inadequacy of the bill of exceptions after an acquittal is patent.[132]

It is submitted that the argument proves too much.

Starting with the "plain" and "speedy" requisites for relief, it should be noted that the prosecution's right to a bill of exceptions in this case was clear, but it would have to await the orderly termination of the case below and could not affect the result. As to "speedy," this case was not disposed until almost a year after the original writ of certiorari was granted.[133] In the usual case, the availability of a remedy before going to trial is precluded by the bill of exceptions procedure. In that sense, "speedy" had never been a sufficient basis for granting certiorari to reverse a pre-trial ruling on evidentiary questions.

Finally, as to "adequacy," the court has altered the meaning of the word from its meaning in *Mengel.* In *Mengel,* the bill of exceptions was inadequate because the court held that no review of the lower court's holding was possible.[134] In *Heiner,* however, the bill of exceptions was "inadequate" because the state could not have the order of suppression reviewed before trial. In this sense, the bill of exceptions will always be inadequate, and the writ of certiorari should always be granted.

It is submitted that only in a narrow, formalistic way is *Mengel* authority for *Heiner.* The inadequacy that justified certiorari in *Mengel* was the complete unavailability of the bill of exceptions procedure. In *Heiner,* the bill of exceptions procedure was available at some point in the proceedings; yet, under these facts the court discounted the procedure as "inadequate."

The concurring opinion by Justice Rooney and the dissent by Justice Rose are noteworthy for their contrasting approaches and their sharp tone. Justice Rooney wrote to indicate a few fallacies in the dissenting opinion. He listed seven fallacies, starting with justice. He attributed to the dissent a belief that there is a "subversion of justice in allowing certiorari in a criminal case."[135] Although that phrase is not to be found in the dissent, the theme of the concurring opinion is definitely that justice demands that the court have some method of review, citing with approval Justice Raper's opinion in *Faltynowicz.*[136]

The new point made by Justice Rooney is with his reading of article 5, section 3 of the Wyoming Constitution.[137] Quoting only the second sentence of article 5, section 3, Justice Rooney states: "The phrase 'necessary and proper to the complete exercise of its appellate jurisdiction' modifies only 'other writs' inasmuch as many of the enumerated writs

132. State v. Heiner, 683 P.2d 629, 632 (Wyo. 1984).
133. *Id.* at 631.
134. *Id.* at 632.
135. *Id.* at 639 (Rooney, J., concurring).
136. *Id.* (citing State v. Faltynowicz, 660 P.2d 368, (Wyo. 1983) (Raper, J., concurring)).
137. WYO. CONST. art. 5, § 3. *See also supra* text accompanying note 81.

have nothing to do with appellate or revisory jurisdiction. The power granted is to issue a writ of certiorari without any strings attached thereto."[138] There is no authority cited for the foregoing analysis. This is the core of the problem with the writ of certiorari and the very problem that is ignored when the focus is on the scope of certiorari at common law or in other jurisdictions with different constitutional allocations of power.

Before turning to a textual analysis of article 5, section 3, it is useful to note that under section 2 of article 5, the appellate jurisdiction of the court is subject to the regulation of the legislature.[139] The effect of Justice Rooney's reading would be to permit all sorts of review under the named writs, so long as the word "appeal" was never used. Construing the constitution as a whole and these two sections *in pari materia*, an interpretation of article 5, section 3 which does not render article 5, section 2 a nullity should be preferred.

The first sentence of article 5, section 3 contains two separate clues as to its proper interpretation. First, the term of art "original jurisdiction" is used in the first sentence and three specific instances are listed.[140] Inferentially, the second sentence includes something other than original jurisdiction (i.e. appellate jurisdiction) because that sentence begins "[t]he supreme court shall also have power. . . ."[141] Second, the term "habeas corpus" is used in both sentences.[142] It should therefore follow that the first and second sentences of section 3 refer to separate powers of the supreme court.

With respect to habeas corpus, in the first sentence of section 3, the supreme court is given original jurisdiction of the writ "without any strings attached thereto" to use Justice Rooney's phrase.[143] In the second sentence of section 3, habeas corpus is one of a number of named writs "and other writs necessary and proper to the complete exercise of its [the supreme court's] appellate and revisory jurisdiction."[144] Attributing to the drafters of the constitution an awareness of the meaning of words, habeas corpus in the second sentence must refer to the court's appellate and revisory jurisdiction. If this interpretation applies to habeas corpus, then it applies to all the writs listed. Contrary to the assertion of Justice Rooney, it is not difficult to envision each of the enumerated writs as a vehicle for the exercise of appellate and revisory jurisdiction.

Ultimately, the question arises as to whether the Wyoming Constitution provides a system whereby the legislature describes the scope of the supreme court's appellate jurisdiction, or whether the appellate powers limited in article 5, section 2 were left wide open in section 3. In the only

138. State v. Heiner, 683 P.2d at 641 (Rooney, J., concurring).
139. *See supra* text accompanying notes 84-94.
140. WYO. CONST. art. 5, § 3, clause 1.
141. WYO. CONST. art. 5, § 3, clause 2.
142. WYO. CONST. art. 5, § 3.
143. State v. Heiner, 683 P.2d at 641 (Rooney, J., concurring).
144. WYO. CONST. art. 5, § 3.

case close to the point at issue, the court stated: "The power to issue these prerogative writs is confined to its [the supreme court's] appellate and revisory jurisdiction, except as enlarged by its general superintending control over all inferior courts."[145] The court further indicated that the writ of prohibition was available to restrain inferior courts when they exceed their jurisdiction.[146] From a textual analysis of the constitution and from an analysis of the authorities, the writs are available only to aid the supreme court's appellate jurisdiction, except as to its general superintending control, which under article 5, section 2 is also subject to legislative regulation.

Not only does a textual analysis of the Wyoming Constitution lead to a different conclusion than that reached by Justice Rooney, the case law also supports a different result. In the *City of Sheridan v. Cadle*, the case most relied upon to establish the use of the writ of certiorari, the only issue before the court was the jurisdiction of the district court.[147] Seen in this light the case is only authority for certiorari in the exercise of the court's superintending control over inferior courts. *Cadle* does not stand as authority for the court to review questions within the jurisdiction of the lower courts. In *Call v. Town of Afton*, relied upon by the court in *Heiner*, the court dismissed a writ of certiorari stating: "It is not our province to create, in effect on our own motion, a third method of appeal in addition to the two statutory methods which we now have [bill of exceptions and petition in error] nor allow the writ of certiorari except when the constitution requires it."[148] This was stated by Justice Blume in a characteristically broad view of the common law.

In his dissenting opinion, Justice Rose exhaustively reviewed the prior case law on the bill of exceptions and criticized the majority's reliance upon *Mengel* in granting the writ of certiorari.[149] The one disturbing note in his opinion, uncharacteristic of his general approach, is the following: "I agree that we need not be slavishly bound by old opinions, but if we are to overrule them we should say so and at the same time be possessed of adequate and substantial authority upon which to base our overruling decision."[150]

If by this quote, Justice Rose sees the issue as one of common law, subject to change by the court, his opposition to the majority is one of policy. On the contrary, the main thrust of Justice Rose's dissents has been constitutional in dimension. The previous cases were thus wrongly decided because the court lacked the jurisdiction to hear them. This constitutional "slippage" undercuts the force of the argument and is consistent in theory with the opinions of Justices Raper and Rooney. If the issue were only whether the court should use its powers to do "justice," its

145. State v. True, 26 Wyo. 315, 184 P. 229 (1919).
146. *Id.* at 317, 184 P. at 230.
147. 24 Wyo. 293, 157 P. 892 (1916).
148. 73 Wyo. 271, 277, 278 P.2d 270, 275 (1954).
149. State v. Heiner, 683 P. 2d 629, 645-56 (Wyo. 1984) (Rose, J., dissenting).
150. *Id.* at 653.

impact upon the constitutional separation of powers would be minimal. It is submitted here that the issue is constitutional.

STATE v. SODERGREN[151]

In *State v. Sodergren*, the defendant was charged with two counts of involuntary manslaughter growing out of a traffic accident. The offense carries a maximum sentence of twenty years in prison.[152] Vehicular homocide, which is based on "a conscious disregard of the safety of others" carries a maximum sentence of only one year in jail.[153] The district court judge ruled that the statutes punished the same conduct, and therefore the latter, specific statute controlled. Accordingly, he dismissed the case for want of subject matter jurisdiction.[154] The supreme court granted the prosecution's petition for a writ certiorari and reversed.[155]

In an opinion by Justice Rooney, the issue of the propriety of granting the writ of certiorari is treated summarily on the basis that it is controlled by *Mengel* and *Heiner*. Justice Rooney did state that the writ would only be granted in unusual circumstances: "However, we do serve notice on the bar that we will exercise our discretion to grant certiorari only in unusual circumstances and upon rare occasions."[156]

In dissent, Justice Rose reminded the other justices on the court of the extensive precedence limiting review of criminal cases to the bill of exceptions. In particular, he quoted from Justice Rooney's opinion in *State v. Selig*,[157] and from Justice Raper's opinion in *State v. Heberling*,[158] to demonstrate the court's recognition of this rule.

In the course of his dissent, Justice Rose articulated for the first time the view that legislation might be needed to implement the court's certiorari power under the constitution,[159] at least where there is no other legislative enactment authorizing jurisdiction.[160] This argument articulates for the first time in these opinions the two analytically separate roles of certiorari. Where certiorari is sought in order to have the court review questions not otherwise subject to appeal, Justice Rose would argue that its grant would have to be authorized by the legislature. Where the court has jurisdiction to review a lower court's decision, but appeal is not available (e.g. for late filing of a notice of appeal), the grant of the writ of certiorari would be within the discretion of the court.[161] This analysis

151. 686 P.2d 521 (Wyo. 1984).
152. WYO. STAT. § 6-4-107 (1977).
153. WYO. STAT. § 31-5-117(b) (1977).
154. State v. Sodergren, 686 P.2d 521, 522-23 (Wyo. 1984). Where county courts have been established, they have jurisdiction over misdemeanors. The district court only tries felonies.
155. *Id.*
156. *Id.* at 528.
157. 635 P.2d 786 (1981).
158. 553 P.2d 1043 (1976).
159. State v. Sodergren, 686 P.2d 521, 533 (Wyo. 1984) (Rose, J., dissenting).
160. *Id.* at 534.
161. *Id.*

is absolutely consistent with the prime constitutional requirement that appeals are subject to limitation by the legislature while relegating certiorari to a procedural and ancillary role. It is unfortunate that this analysis came too late in the day; the die appeared to be cast in *Mengel.*

THE RULEMAKING POWER OF THE SUPREME COURT

The Constitution of the State of Wyoming provides that the supreme court "shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."[162] The rulemaking power of the court is not mentioned expressly in the constitution, but it would seem to fall within "general superintending control." The rulemaking power is therefore subject to "such rules and regulations as may be prescribed by law."[163] Since territorial days, the legislature has authorized the supreme court

> to prescribe rules of practice for said court, not inconsistent with the constitution or laws of this state, and when said rules are adopted by said court, the same shall be as binding upon the court, and the attorneys thereof, and the parties having business therein as though the same were enactments of the legislature of the state.[164]

The present general rulemaking power of the supreme court to "adopt, modify and repeal general rules and forms governing pleading, practice and procedure," was not granted until 1947.[165] That was the occasion for the supreme court to appoint a committee of members of the state bar to revise state practice and to bring it into conformity with federal rules of procedure. It was not until 1957, that the Wyoming Rules of Civil Procedure were adopted.[166] Other instances of rulemaking have been similarly authorized by statute. For instance, the supreme court has authority to adopt "rules and regulations to provide for division of the work between the judges and to facilitate the administration of the business of the courts."[167] The court may also make rules of procedure for hearing reserved constitutional questions.[168]

Even in regulating the practice of law, legislation has established the general authority for the court's rulemaking authority.[169] In 1939, the supreme court was authorized to promulgate rules and regulations to prescribe a code of ethics, to organize the state bar association, and to establish disciplinary procedures.[170] Pursuant to this power, the court put forward the *Amended Rules Providing for the Organization and*

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162. WYO. CONST. art. 5, § 2.
163. *See* White v. Fisher, No. 83-106, slip op. at 5 (Wyo. October 2, 1984).
164. The current provision is WYO. STAT. § 5-2-113 (1977).
165. WYO. STAT. §§ 5-2-114 to -116 (1977).
166. W.R.C.P. Order of Supreme Court (July 2, 1957).
167. WYO. STAT. § 5-3-102 (1977).
168. WYO. STAT. § 1-13-102 (1977).
169. WYO. STAT. §§ 33-5-101 to -117 (1977).
170. WYO. STAT. § 5-2-118 (1977).

Government of the Bar Association of the Attorneys at Law of the State of Wyoming.[171] Only in the Preamble to the Disciplinary Code does the court declare its *inherent* power to supervise the conduct of attorneys, and omit reference to a statutorily conferred rulemaking power.

The history of the court's rulemaking has been that it has only followed legislative authorization. The scope of permissible rules has been the subject of supreme court comment on a number of occasions. With regard to the rules of practice of the supreme court, the court early on upheld its power both to promulgate rules under the statute and to dismiss matters for violations of the rules, emphasizing that the rules had the force of legislation.[172]

In *Harvey v. Standard Oil & Gas Co.*,[173] the court was faced with the claim that its rule requiring that appellant file his brief within fifteen days of the filing of the record on appeal was in conflict with a similar provision in the workmen's compensation laws. Conceding that its rules should not be inconsistent with the constitution or laws of this state, it found that where the statute was subject to two different interpretations, it was the equivalent of an absence of statutory regulation.[174] Thus, the court rule was upheld as not in conflict with the statute. It should be noted that if the statute had effectively prescribed the appropriate time period for filing briefs, the court's rule presumably would have been struck down.

This view that the legislative power was supreme, that rulemaking power was delegated, and that it could not be exercised in a manner inconsistent with the constitution and other laws was perfectly reflected in the wording of the authorizing statute: "[The rules] shall be as binding . . . as though the same were enactments of the legislature of the state."[175] The legislative authorization of rulemaking preliminary to the adoption of the Wyoming Rules of Civil Procedure was much broader than the act authorizing rules of practice for the supreme court just discussed. In essence, the court was given a free hand in modernizing Wyoming pleading and practice.[176]

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171. The rules were not adopted until 1957, but they were authorized by the Wyoming Legislature in 1939. 1939 WYO. SESS. LAWS ch. 97 (now codified as WYO. STAT. § 5-2-118 (1977)).

172. Cronkhite v. Bothwell, 3 Wyo 739, 31 P. 400 (1892); Robertson v. Shorrow, 10 Wyo. 368, 69 P. 1 (1902).

173. 53 Wyo. 495, 84 P.2d 755 (1938), *reh'g denied*, 53 Wyo. 495, 86 P.2d 735 (1939).

174. *Id.* at 496, 84 P.2d at 757.

175. WYO. STAT. § 5-2-113 (1977).

176. The relevant sections of the Wyoming statutes authorizing the court to engage in rulemaking are set out below.

> § 5-2-114 The supreme court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing pleading, practice and procedure, in all courts of this state, for the purpose of promoting the speedy and efficient determination of litigation upon the merits.
>
> § 5-2-115(a) Such rules may govern: (i) The forms of process, writs, pleadings, and motions and the subjects of parties, depositions, discovery, trials, evidence, judgments, new trials provisional and final remedies and all other matters of pleading, practice and procedure; and (ii) Any review of or other supervisory proceedings from the judgment or decision of any court, board, officer, or commission when such review is authorized by law.
>
> (b) Such rules shall neither abridge, enlarge nor modify the substantive

Several preliminary observations seem appropriate. In form, the legislative act is still one of delegating power. While the power granted is broad and permits rules to supersede laws, the rules cannot affect substantive rights, jurisdiction of courts, or statutes of limitation. Presumably, these latter matters remain within the power of the legislature. The case law interpreting the statute generally confirms this view as the scope of the rulemaking power.

In *State ex rel Fredrick v. District Court,*[177] the court held the rule requiring a timely demand for jury trial took precedence over any contrary proposition of the condemnation statutes. The sole issue was whether a demand for jury trial was substantive or procedural. If substantive, the rule was beyond the power of the court. If procedural, the rule would take precedence over the statute under section 5-2-116 of the Wyoming statutes.[178] In the context of the procedure for involving the right to trial by jury in a civil case, the court's result seems clearly justified. In *Goodman v. State,*[179] however, the supreme court maintained that the trial court could not deprive a criminal defendant in a minor court of a trial by jury where a statute had given such a substantive right. "This court has therefore held that our rulemaking authority cannot extend so far as to affect the substantive rights of our citizens and that these concerns will be left for the legislature."[180]

In *McGuire v. McGuire,*[181] the court held that rule 71.1 of the Wyoming Rules of Civil Procedure did not supersede the statutory proceedure governing the establishment of private roads by county commissioners. In the majority opinion, Justice Raper stated:

> The assertion that Rule 71.1, supra, can be interpreted to have directly repealed §§ 24-9-101 et. seq., also seems to stray beyond the bounds of this court's power to supersede acts of the legislature. We are empowered to make rules that are procedural in nature. Sections 24-9-101 et. seq., create a substantive and jurisdictional right that our rulemaking powers cannot change. To do so would be to usurp a power clearly vested in the legislature. This court cannot legislate by repealing that section.

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rights of any person nor the jurisdiction of any of the courts nor change the provisions of any statute of limitations.

§ 5-2-116 Upon the adoption of any rule or form the supreme court shall enter it in its proceedings and shall fix the date upon which such rule or form shall become effective, but such effective date shall be at least sixty (60) days after notice thereof has been published by the supreme court in such publication as it may designate. From and after the effective date of any such rule or form all laws in conflict therewith shall be of no further force or effect.

177. 399 P.2d 583 (Wyo. 1965).

178. WYO. STAT. § 5-2-116 (1977).

179. 644 P.2d 1240 (Wyo. 1982).

180. *Id.* at 1243. The court was discussing rulemaking under WYO. STAT. §§ 5-3-102 and 5-4-207, as well as §§ 5-2-114 and 5-2-115.

181. 608 P.2d 1278 (Wyo. 1980).

> The rulemaking power of the Wyoming Supreme Court is restricted by statute. We cannot by rule in any way change substantive rights or enlarge the jurisdiction of any court.[182]

The problem of dealing with conflicts between provisions in statutes and rules reflected in the previous cases seems consistent with the statutory scheme. The initial question is whether the rule is within the court's rulemaking power. If it is not, it is invalid. If it is a valid rule, then it will supersede a prior procedural statute. This is in accord with section 5-2-116 of the Wyoming statutes.[183]

The student of Wyoming law usually does not have the advantage of legislative history in the form of published hearings, debates, or committee reports. Normally one is relegated to comparing successive amendments, other legislative actions, or judicial interpretation. The adoption of the Wyoming Rules of Civil Procedure is an exception to the general absence of Wyoming legislative history. For instance, in a 1947 law review article, then Professor Frank J. Trelease and member of the Wyoming State Bar committee to revise rules and forms governing pleadings, practice, and procedure, wrote an article anticipating the work of the Rules Committee. "The legislature of the State of Wyoming has adopted, in its most recent session, a statute *giving to* the Supreme Court the rulemaking power in matters relating to pleading, practice, and procedure in all courts of the State."[184]

Ten years later, after the adoption of the rules, Dean Trelease wrote again on the scope of the rules. Speaking of the relationship between the Code of Civil Procedure and the new rules, he said:

> Similarly our code still exists to supplement the Wyoming Rules. Perhaps "complement" would be a better word—the code fills out a complete system. Some of it is superseded completely, and is no longer applicable in any sense. . . . Some of the code is superseded in the sense that it has been incorporated into the Rules and will henceforth appear in the Rules instead of in the statutes. . . . But most of it, if you count it by pages, still exists and will be on the books, but not untouched. It must be fitted into the Rules and the two correlated.[185]

The picture presented by the two articles by Dean Trelease is of a delegated rulemaking power within legislative limits. The effectiveness of the power was guaranteed by the power to supersede statute by rule. The power to supersede was exercised judiciously, largely to bring Wyoming procedure into line with the federal rules, but there were large parts of Wyoming procedure left in the statutes, because the federal rules are

182. *Id.* at 1290.

183. *See, e.g.*, W.R.C.P. Committee Notes. Another exception to the general absence of legislative history is found in the Committee Notes to the Wyoming Rules of Evidence.

184. Trelease, *A Proposal for Wyoming Procedural Reform*, 1 WYO. L.J. 45, 48 (1946) (emphasis added).

185. Trelease, *Wyoming Practice*, 12 WYO. L.J. 202, 204 (1958).

not a complete system of procedure.[186] Therefore, the Wyoming Rules would not purport to be a complete system of procedure either.

The problem of which statutes to supersede was recognized as not perfectly soluble. Certain statutes were listed, "but there will undoubtedly be others, and these conflicts will be discovered as specific cases uncovering them arise."[187] Other statutes, procedural in whole or in part, were studied and left standing (e.g. mandamus, habeas corpus, quo warranto, and eminent domain). In situations where the court seeks to supersede procedural statutes, "common sense shall be the guide as to how much of the rules shall be applied."[188] None of these propositions are compatible with the idea that the rulemaking power is inherent in the court, or with the idea that the legislature cannot legislate on procedural matters. This was the state of the law until *White v. Fisher.*

WHITE V. FISHER[189]

A statute prescribing a rule of procedure in civil actions[190] (i.e. forbidding the statement of any dollar amount in the prayer for damages in personal injury or wrongful death actions) is an unconstitutional invasion of the powers of the judicial branch. The supreme court so held in reversing the district court's dismissal of a complaint violative of the spirit of the legislative ban.[191]

This particular issue was not raised by either party and the court noted that alternative methods of disposing of the appeal were available. Because those methods might only invite the legislature to amend the statute, the court decided to raise the larger issue *sua sponte.* In the course of finding this procedural statute to be an infringement upon the doctrine of separation of powers,[192] the court unveiled a perspective of the rulemaking power that is (1) unprecedented in prior-case law, (2) apparently unrestricted by statute, and (3) pre-emptive of the field. The statute in question was held to be unconstitutional because "[t]he legislature is thus effectively prohibited from enacting statutes specifying the content of or foreclosing material from pleadings."[193] This is the familiar doctrine of pre-emption in an unfamiliar setting. By the application of this doctrine, the legislative attempts in the proscribed area are a nullity, even though the court through its rulemaking power has not spoken to the particular question.

The reach of this new doctrine cannot be accurately predicted at this point. At a minimum, it puts in doubt the legitimacy of large portions

186. *Id.* at 203.
187. *Id.* at 205.
188. *Id.*
189. No. 83-106 (Wyo. October 2, 1984).
190. WYO. STAT. § 1-1-114 (1977). The statute actually only forbids the mention of dollars in the ad damnum clause or prayer. In the instant case, the dollar amount was contained in the body of the complaint.
191. White v. Fisher, No. 83-106, slip op. at 8 (Wyo. October 2, 1984).
192. WYO. CONST. art. 2, § 1.
193. White v. Fisher, *supra* note 191.

of title 1[194] and title 7[195] of the Wyoming statutes and those sections which are arguably procedural and which are scattered throughout the rest of the statutes (e.g. title 2 (Wills, Decedents Estates and Probate Code)).[196] On the other hand, the opinion of the court articulates a greatly expanded view of the rulemaking power, finding it to be inherent and not limited by the rulemaking statutes.[197] The court's structured argument for finding an inherent rulemaking power that is exclusive, and a corresponding legislative disability in procedural matters, seems unwarranted by the words of the constitution and seems inconsistent with prior authority and practice.

Constitutionally, the court based its inherent rulemaking power upon the clause that the supreme court "shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law."[198] In the next sentence of the opinion the court states: "The general superintending control over all inferior courts *granted to the supreme court by that provision* encompasses the authority to prescribe rules of practice and procedure in those courts."[199] The theory seems to be that the constitutional clause is self-executing and the qualifying phrase "under such rules and regulations as may be prescribed by law ,"[200] does not mean that the legislature has rulemaking power which must be delegated before the court can exercise it. This same qualifying phrase modifies the previous clause "[t]he supreme court shall have general appellate jurisdiction. . . ."[201] When interpreted together the two clauses have been consistently held not to be an independent grant of appellate jurisdiction. Rather, appellate jurisdiction is dependent upon legislative enactment.[202] The court treated the rulemaking statute as merely "recognizing" the inherent power and stated: "We have made it clear that this statute only supplements the constitution and does not constitute a delegation of rule-making authority from the legislature."[203]

In *Petersen v. State,*[204] the issue was whether a supreme court rule for the selection of jurisdiction in minor courts superseded a prior statute establishing a different procedure. The state argued that the court's rulemaking power is delegated by the legislature, and therefore "in the case of conflict between our rules and the statutes, the statutes control."[205] The court stated in essence that where there is direct constitutional authority or an assumed inherent judicial power for rulemaking, the court has an exclusive legislative power in that area. Legislative acts are a nullity

194. WYO. STAT. tit. 1, Code of Civil Procedure (1977).
195. WYO. STAT. tit. 7, Code of Criminal Procedure (1977).
196. WYO. STAT. tit. 2, Wills, Decedents' Estates and Probate Code (1977).
197. WYO. STAT. §§ 5-2-114, -115 (1977).
198. WYO. CONST. art. 5, § 2.
199. White v. Fisher, *supra* note 191, at 5 (emphasis added).
200. WYO. CONST. art. 5, § 2.
201. WYO. CONST. art. 5, § 2.
202. *See supra* text accompanying notes 84-94.
203. White v. Fisher, *supra* note 191, at 6.
204. 594 P.2d 978 (Wyo. 1979).
205. *Id.* at 981.

for lack of constitutional authority to legislate on the subject. The court then held that the rule, not the statute, governed jury selection.[206]

It should be noted that the position of the court that the rulemaking power is constitutionally conferred or inherent, and is exclusive, is not only unnecessary to the result in *Petersen*, it necessarily reaches a constitutional question. The rulemaking statute clearly provided that "after the effective date of any such rule or form, all laws in conflict shall be of no further force and effect."[207] Therefore, even if the rulemaking power were delegated, as the state argued, that delegation included the power to supersede.

In *White*, however, the court faced a question different from the one posed in *Petersen*. The statute in *White* was passed in 1976,[208] after the adoption of the Civil Rules and Forms in 1957.[209] The court apparently could not point to a later adopted rule which could logically supersede the statute. Faced with a statute that was arguably in conflict with earlier adopted rules and forms, the court had only one route to strike down the statute, and that was to declare it unconstitutional in the way it did.[210]

There was an alternative available for the future—to supersede the statute by later rule, but that would take time. It would also open up the possibility of the legislature re-enacting the statute-supereseding rule by statute. This course would also seem to recognize that the rulemaking power is delegated by the legislature and therefore could be withdrawn in whole or in part.

It remains to be seen whether the court's decision to strike down a relatively insignificant pleading statute will be worth the price of provoking the legislature by the implied constitutional challenge. On the one hand, the *White* case may be used as *Mengel*; that is to establish an important precedent in a case not otherwise likely to draw attention. On the other hand, the legislature may see fit to challenge the court by restricting the court's rulemaking by a superseding legislative enactment—a result surely not to be welcomed by the court. In the meantime, it seems clear that the legitimacy of legislatively-created judicial procedures have been cast in doubt.

CONCLUSION

The cases reviewed in this article can be viewed in a number of different ways, but their interrelationship is best demonstrated by marking their relevance to proposed rules authorizing the state to appeal from interlocutory orders and final judgments in criminal cases.

The establishment of certiorari as a mode of review was critical to this development. By disdaining the use of the term "appeal," the court avoid-

206. *Id.*
207. WYO. STAT. § 5-2-116 (1977).
208. 1976 WYO. SESS. LAWS ch. 10, § 1.
209. W.R.C.P.
210. White v. Fisher, *supra* note 191, at 5.

ed the "rule" against such appeals. Further, the court apparently sought to avoid the requirement of legislative authorization for reviewing criminal cases at the request of the state. Thus, the court found that common law certiorari was granted by the constitution and this grant of power is independent of the appellate jurisdiction controlled by the legislature.

Now that this "certiorari jurisdiction" is established, the court will need to regularize the process by rule. If the rulemaking power is inherent, not delegated and exclusive, then the court can proceed to make rules that do not abridge, enlarge, or modify the jurisdiction of the court. The new appellate rules will not change the court's jurisdictional powers because the rules will only regularize the court's certiorari jurisdiction. Where legislative authorization for this appellate jurisdiction was required under the early cases, after *White* it may well be the case that such legislation is violative of the separation of powers.

If the legislature need not authorize review by certiorari, it must follow that it cannot regulate the availability of certiorari. If the constitution does in fact grant the entire power of certiorari to the court, the legislature cannot take it away. Is there anything left to the constitutional limitations on the court's jurisdiction to hear the state's appeals of interlocutory orders and final judgments other than the limitation that the court, in an abundance of caution, should refrain from using the term "appeal"?