Although such was the gloomy picture of actual conditions, Justice Reade felt that every man's bond—that is to say, his word—should be inviolable, a fact which he believed the framers of the Constitution of the United States regarded as of vital importance, a principle which "was a guaranty of justice to all, and is expressly so against him who would obtain the profits of industry and withhold the reward."[28]

To this decision Associate Justice Rodman entered an able dissent in which he claimed that the stay laws were intended primarily to change the jurisdiction of the courts and that the Supreme Court was not entitled to declare this legislative intent false. Pointing out that the General Assembly had interfered greatly with obligation of contract before, the most notable example being the ordinance of emancipation, he declared:

> If in these instances the legislative acts did not so materially impair the remedy of the creditor as to impair the obligation of the contract, it is difficult to see on what principle that effect can be attributed to an act which leaves to the creditor every remedy he had before; their operation being retarded on considerations of public policy.

He could "conceive of no standard by which the degree of the materiality of the change can be judicially measured any more definite than that heretofore declared, which is obviously insufficient to solve this case."[29]

Justice Rodman's dissent emphasizes the importance of the change in public policy. As will be noted presently, Justice Reade was no conservative in economic thought and the majority of the Supreme Court endorsed the homestead principle. It was clear, however, that the motive behind the change in policy was dictated by a liberal middle-class philosophy, the basic elements of which were "obligation of contract" and "a sound and judicious credit system."

Another solution suggested to cure the economic ills of post-Civil War society in North Carolina was the "homestead exemption." This plan attempted to secure from actions of debt a designated amount of real property to every freeholder and a specified amount of personal property to all persons.[30] Thus, no matter how fiercely the winds of adversity might blow, all men, their wives, and their children

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[28] 63 *N. C.*, 113-114.
[29] 63 *N. C.*, 125, 127.
[30] The exemption would not, however, apply to cases involving fraud or cases wherein the debt had been incurred to secure the property itself.

would be secure in their homes and in their means of earning a living—provided they once possessed the means.

The first law dealing with this subject was passed by the General Assembly on February 25, 1867. It exempted from actions of debt all mechanics' tools; the agricultural implements of a farmer necessary for two male laborers; the libraries of attorneys-at-law, doctors, physicians, and ministers of the Gospel; and surgeons' and dentists' instruments. Furthermore, it exempted real estate of heads of families or housekeepers, if freeholders, to the extent of one hundred acres, if located in the country, or one acre, if located within a city. Finally, the following personal property of said heads of families or housekeepers was made free from actions of debt: one work horse, one milk cow and a calf, fifteen hogs, fifty bushels of corn, twenty bushels of wheat or rice, five hundred pounds of pork or bacon, one yoke of oxen, one cart or wagon, and household furniture to the value of two hundred dollars, to be selected by the debtor. This act, far-reaching as it was, was not to be *ex post facto*.[31]

Shortly after the passage of this law, General Sickles promulgated a military homestead order in his much-debated General Order No. 10.

> In all sales of property under execution or by order of any court, there shall be reserved out of the property of any defendant who has a family dependent upon his or her labor, a dwelling house and appurtenances and twenty acres of land, for the use and occupation of the family of the defendant; and necessary articles of furniture, apparel, subsistence, implements of trade, husbandry or other employment, of the value of five hundred dollars. The homestead exemption shall inure only to the benefit of families—that is to say, to parent or parents and child or children. In other cases, the exemption shall extend only to clothing, implements of trade or other employment usually followed by the defendant, of the value of one hundred dollars. The exemption hereby made shall not be waived or defeated by the act of the defendant.[32]

This order, while it suspended all civil laws or ordinances inconsistent with its provisions, obviously did not defeat the purpose or provisions of the state homestead law. In applying the exemption to *all* sales of property, it was *ex post facto*, but did not become an object of controversy between the civil and military authorities.

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[31] *Laws of North Carolina*, 1866-1867, Ch. 61: 81-84.
[32] G. O. No. 10, April 11, 1867, *General Orders, Second Military District*, 1867.

This trend of economic thought, expressed by both the civil and military authorities, received its final endorsement in Article X of the Constitution of 1868.

> Section 1. The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt.
>
> Section 2. Every homestead and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.
>
> Section 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt, during the minority of his children, or any one of them.

These provisions were seconded by legislation enacted shortly after the new civil government went into effect in 1868.[33]

The outstanding question involved in the application of these constitutional provisions and the laws pursuant thereto was whether or not they were *ex post facto*. A number of Republicans wrote Governor Holden for an opinion upon this matter. They felt that the exemption was valueless if it did not apply to debts contracted before the adoption of the Constitution of 1868; yet their lawyers, who were Conservative Democrats, told them it did not so apply.[34] The governor endorsed one of these requests: "Answered that Homestead ought to be considered retrospective until decided different [*sic*] by the Supreme [Court]."[35] So important did the question become that the General Assembly requested the Supreme Court to render an opinion upon it. This the court refused to do, reserving its opinion until an actual case

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[33] *Laws of North Carolina*, 1868-1869, Act of August 22, 1868, Ch. 43: 59-60, Act of April 9, 1869, Ch. 137: 331-342.

[34] Governors' Papers, Holden, W. J. Laird to Holden, November 9, 1868. After requesting, on behalf of the comissioners of Anson County, Holden's opinion as to whether or not the homestead exemption was retrospective, Laird wrote as follows:
"thear [*sic*] has become to be some dissatisfaction among the Republican party with regard to that one thing [*sic*] they [*sic*] ar [*sic*] told by the democrats and Lawyers of that party that the Homested [*sic*] has a nuthing [*sic*] to do with any debts only new and that has bin [*sic*] made since its rattification [*sic*]"
Frank D. Irwin (Clerk of Burke Superior Court) to Holden, January 20, 1869. Irwin declared that if the homestead law were only prospective, little good could be derived from it, for "the people of this County are sorely oppressed, especially the farmers—who were so unfortunate as to get into debt, they [*sic*] are sued, their little property & effects, advertised and soon under the sheriff's hammer to be sacrificed at less than ⅓ its value. . . ." "I have heard of but one as yet, who have [*sic*] taken the benefit of the Home-stead. The lawyers say it is nul [*sic*] & void, his creditors tell the Officers to go a head [*sic*], and execute & sell."

[35] Governors' Papers, Holden, endorsement upon John C. Whitsett to Holden, November 11, 1868.

was decided.[36] Associate Justice Reade, however, in an *obiter dictum* in Jacobs *v.* Smallwood, for all practical purposes announced that the court would receive the homestead exemption favorably.[37]

The authoritative decision upon this very important problem was rendered by the State Supreme Court in the case of Hill *v.* Kessler, in the January term, 1869. Justice Reade delivered the opinion: the homestead exemption *did* apply to pre-convention contracts; in so doing, it did not impair the obligation of contract, since the intent of the law was to secure homesteads, not to defeat debts.

> The great error is in supposing that the homestead law is to defeat debts. That is no part of the object of the law. The laying off of a homestead is the sole object, and is prospective altogether. If any debt is affected by it, it is merely incidental. It . . . declares its object upon its face to be not to defeat debts, but to allow to every resident of the State "and his children" and his "widow" a home and the means of living, if they have them. It is a question not of defeating debts, but in the language of *Chief Justice Taney*, "it is a question of policy and humanity, which every civilized community regulates for itself."[38]

The object, then, of the homestead law was to further the welfare of society and it was the business of the legislature—not of the courts—to determine public policy.

The court, however, was not unanimous in its decision; indeed, Hill *v.* Kessler revealed that the two most important figures on the bench—men who had the support of both Conservative Democrats and Republicans in the election of 1868—differed sharply in economic and social outlook. Chief Justice Pearson dissented vigorously from the court's opinion as delivered by Justice Reade. The chief justice disliked all forms of homestead exemptions, prospective as well as retrospective; he believed that in nine cases out of ten the only property a debtor possessed would be covered by the exemptions:

> I am aware that in several of the States decisions have been made sustaining homestead laws. These cases all rest on the fallacy of assuming the power to make exemptions to some extent, and then, on the idea of legislative discretion, the amount is swelled up to thou-

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[36] *Legislative Documents, North Carolina*, 1868-1869, No. 23. Chief Justice Pearson to T. R. Caldwell (President of the Senate) and J. W. Holden (Speaker of the House), February 9, 1869.
[37] Jacobs *v.* Smallwood, 63 *N. C.*, 116-117.
[38] 63 *N. C.*, 447.

sands; and it is justified on the ground of "keeping pace with the progress of the age"—a progress in this particular, I fear, of dishonesty and fraud.[39]

After the basic decision had been made, the court proceeded to the interpretation of secondary, though important, matters. Thus, although the homestead act was considered retrospective, the exemption was not to apply if a levy had been made upon property before the adoption of the constitution of 1868. In such case there was a vested right; the court held that the constitution of 1868 did not propose to destroy vested rights.[40] If judgment had been obtained against a debtor before the adoption of the Constitution but levy on the same was not made until afterward, however, the homestead exemption applied.[41]

Another question which gave rise to much discussion was whether or not the homestead exemption applied to persons who became debtors as a result of judgments arising out of tort or conviction of crime. The matter was referred to Attorney General L. P. Olds, who replied convincingly that the public welfare requires that injuries to both State and individuals be punished for wrong done them and therefore "any law whereby these remedies are weakened is a public and a private evil, and not to be tolerated."[42] Yet, in the face of so strong a construction, the Supreme Court held, in the case of Dellinger *v.* Tweed, in 1872, that the personal property and homestead of an individual guilty of defamation of character could not be sold under an execution issued upon judgment rendered in such action. Justice Reade, in delivering the opinion of the court, argued that execution never issued upon debt, contract, tort, or damages, but upon *judgment;* therefore, since the paramount aim of the constitution of 1868 was to secure homesteads, the homestead and personal property of individuals could not be sold under an execution issued upon a judgment rendered in an action *ex delicto.*[43] Chief Justice Pearson dissented vigorously, saying that such a construction would protect slanderers, seducers, and malicious prosecutors—that it was not the intention of

[39] 63 *N. C.*, 451.
[40] McKeithan *v.* Terry, 64 *N. C.*, 25-26.
[41] Ladd *v.* Adams, 66 *N. C.*, 164.
[42] *Legislative Documents, North Carolina*, 1868-1869, No. 16, p. 3. Construction of November 29, 1869. The question had been put by the House of Representatives.
[43] 66 *N. C.*, 210-211.

the constitution to put people "at the mercy of the vicious and ill-disposed."[44]

Although Chief Justice Pearson's argument favored the cause of substantial justice, the decision of the court illustrated well the difficulties involved in holding the position that the homestead exemption was retrospective and yet did not impair the obligation of contract. Had the court conceded that the exemption was intended to protect debtors, then obviously the retrospective action impaired the obligation of contract, for a contract, when made, involves the remedy obtainable at the time. On the other hand, the decision that the constitution intended to secure homesteads almost necessarily led, upon strict legal construction, to such a ruling as Dellinger *v.* Tweed. Yet the court was not consistent in its application of the homestead principle. As noted above, Justice Reade himself held in one case that vested rights held priority over homesteads.[45] And, in 1873, Justice Rodman, speaking for the court, declared: "The purpose of the homestead law is to legislate between a debtor and his creditors, and to affect other interests incidentally only. . . ."[46] Justice Rodman spoke only the truth, but his admission invalidated the thesis of Hill *v.* Kessler that the object of the constitution of 1868 and the laws pursuant thereto was to secure homesteads, not to defeat debts.

Three years after the authoritative state decision of Hill *v.* Kessler, the United States Supreme Court announced in the case of Gunn *v.* Barry that a homestead act of the State of Georgia, by allowing far greater exemptions than were permitted under the former laws of the State, was unconstitutional in its retrospective aspects in that it impaired the obligation of contract.[47] This decision visibly upset the North Carolina Supreme Court, although that court refused at first to concede that the decision affected the North Carolina law. Justice Reade argued most cogently that, in striking contrast to the Georgia laws, the North Carolina constitution of 1868 permitted less exemption than was granted by the North Carolina law of 1867; hence the 1868 law was made primarily to secure necessities and comforts to people not to defeat debts.[48] His fear of the Gunn *v.* Barry decision

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[44] 66 *N. C.*, 212-214.
[45] McKeithan *v.* Terry, 64 *N. C.*, 25-26.
[46] Hager *v.* Nixon, 69 *N. C.*, 113.
[47] 82 *U. S.*, XXI, 214-215.
[48] Garrett *v.* Chesire, 69 *N. C.*, 399-401.

was reflected, however, in his comment on the action of the highest court:

> It would be verging on the ridiculous to say that the Supreme Court of the United States, or any other court, better knows the details of what is necessary for the "comfort and support" of the citizens of North Carolina than the Legislature of the State. . . . And it would be inhumanity to say that because the Legislature repealed one exemption law and substituted another and a lesser one, therefore the debtor should not have any exemption at all. And this, too, at a time when, owing to peculiar circumstances, probably one-half of the debtor class are owing more *old* debts than they can pay. . . . If under our circumstances our people are to be left without any exemptions, the policy of Christian civilization is lost sight of, and we might almost as well return to the inhumanity of the Twelve Tables of the Roman law: "If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber." Cooper's Justinian, 655, App.[49]

For the next four years the North Carolina Supreme Court continued to assert the constitutionality of the state laws; but in 1877 its course was directly overruled by the highest court in the land; the homestead law could no longer be considered retrospective in action.[50]

It is most interesting to note that the course of state laws and decisions upon the homestead issue was closely paralleled by bankruptcy decisions in the Federal courts in North Carolina. On March 2, 1867, Congress passed a law providing that there should be exempted from the possessions of a bankrupt before the Federal courts all such property as was exempt by state laws as of 1864.[51] This law was amended in 1872 and 1873 so that bankrupts would be allowed exemptions accorded debtors by state laws existent in 1870. By these acts Congress applied the homestead exemption to Federal proceedings in bankruptcy in North Carolina.[52]

Before the passage of the laws of 1872 and 1873, an attempt had been made to apply the homestead exemption of North Carolina of 1868 to Federal proceedings in bankruptcy. In 1869 a bankrupt pleaded that Congress, in accepting the North Carolina constitution of 1868 and permitting the State to return to its normal political relations with the national government, had, in effect, amended the

[49] 69 *N. C.*, 399-401.
[50] Edwards *v.* Kearsey, 96 *U. S.*, 595.
[51] *U. S. Statutes at Large*, XIV, 517.
[52] *U. S. Statutes at Large*, XVII, 334, 577. Acts of June 8, 1872, and March 3, 1873.