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NOTES

CRIMINAL PROCEDURE—RIGHT OF STATE TO APPEAL

This note is concerned with the problems surrounding the limitations upon the state's right to appeal in criminal cases. These limitations serve, it is believed, as an obstruction to the effective administration of criminal justice and provide an avenue for the guilty to escape conviction. If this actually is the result obtained due to the limitations upon the state's right to appeal in criminal cases reasonable men would agree that such limitations should be eased to meet the demands of society. The history of the problem, the existing law, and suggestions for the alleviation of possible defects are the subjects of this paper.

The Situation At Common Law

There is a split of authority as to whether the state has an inherent right to appeal at common law. The Supreme Court has asserted that the state has no such right in criminal cases in the absence of a statute expressly according such procedure.¹ The Court said, in denying a right of appeal, that the only authority for such a right by the state at common law is in statements by Coke and Hale merely *implying* it. An overwhelming majority of courts in the United States follow this Supreme Court decision in saying no right for the state to appeal existed at common law.² In a number of states, however, appeal has been allowed to the state although no statute expressly permits it.³ Such courts rely heavily upon the language of Coke and Hale. The actual words of Lord Coke are:

[I]f a man be erroneously acquitted of felony by verdict and judgment thereupon given, yet if the indictment be insufficient, he may be indicted again . . . and in the case of an erroneous judg-

¹ United States v. Sanges, 144 U.S. 310 (1892).

² 2 Am. Jur., Appeal and Error 984 (1936), and cases cited therein. Also see note, 20 Harv. L. R. 219 (1906): "In this country, by the overwhelming weight of authorities, including the United States Supreme Court, it is held that the common law gives the state no right of appeal in criminal cases."

³ State v. Buchanan, 5 Har. & J. 317 (Md. 1821); State v. Lee, 65 Conn. 265, 30 A. 1110 (1894). Also see State v. Lane, 78 N.C. 547 (1878) where it was decided that the right of the state to sue out a writ of error was independent of any statute in two instances; where judgment is on a special verdict and where judgment is on a motion to quash or on a demurrer. Commonwealth v. Capp, 48 Pa. St. 53 (1864) held that the commonwealth had power to sue out a writ of error from the order sustaining a demurrer to an indictment.

ment of acquittal that no Writ of Error needeth to be brought by the King, but the offender may be newly indicted. . . .⁴

It would appear that there is merit in such an implication of a right to appeal. The lack of necessity on the part of the Crown to bring a writ of error in such a case would imply that it would have been available and permissible had the necessity arisen. In the final analysis, however, it is relatively unimportant how such a right of appeal came to the state. Whether the right existed in England prior to the Criminal Appeals Act of 1907 which provided for such an appeal to a limited extent,⁵ or whether such a procedure came into existence at its enactment has little importance in a determination of what the limitations should be today.

Development of Statutory Limitations of Right of Appeal

In studying the various statutes which the states have enacted to afford such a right of appeal and to set its limitations, it is important to note that the period of such enactments followed an era in English history in which the defendant was placed at a disadvantage in criminal courts, appearing without counsel, without witnesses, and without the right to be sworn in his own behalf.⁶ Just as important, it was during an era of juristic thought which tended to protect the liberties of man and subordinate the powers of the government. Such a philosophy and attitude naturally tended to limit the state's right to an appeal.

This underlying philosophy of "protect the individual" which attached to all processes which might be used against one accused of crime was undoubtedly sound, and the writer would not wish to break down the safeguards of the accused to a point where he might again be made the victim of persecution. The question is whether it is still necessary or desirable to deny the state the right to a review by an appellate court of a case tried before a jury for the purpose of obtaining a new trial—where the accused was acquitted—on the theory that an undue advantage would be taken of him if such a review were permitted. To this question the answer is believed to be a qualified "no".

⁴ Coke Inst., 3rd Part 214 (6th ed. 1680).

⁵ Appeal by the prosecution is limited to those taken to the House of Lords from the court of criminal appeals. Such an appeal is granted only upon unusual public importance and with the consent of the attorney general. See Orfield, *Criminal Appeals in America* 57 (1939).

⁶ See discussion and collection of authorities on this point in 2 Wigmore, *Evidence* 684 (3rd ed. 1940).

The Existing Situation as to Appeal by the State

Today the various states take three distinct positions in regard to limitations upon the prosecution's right to an appeal in a criminal case. The first position is that the legislative body allows no appeal whatsoever to be taken in a criminal case other than by the defendant.⁷ The states which allow no appeal to the prosecution in criminal cases obviously adhere to the argument that the defendant is at a very great disadvantage and in order to better his position in relation to the state, the prosecution should not be given another tool with which to "persecute" him. However sound this argument may have been at one time the situation at present has changed, and it is doubtful that such an argument justifies the ineffective administration of criminal cases which it produces.

The second position used in the *via media* approach, and this represents the majority view. It is best expressed in the *American Law Institute's Code of Criminal Procedure*:

An appeal may be taken by the State (Commonwealth or People) from:

- (a) An order quashing an indictment or information or any count thereof.
- (b) An order granting a new trial.
- (c) An order arresting judgment.
- (d) A ruling on a question of law adverse to the State (Commonwealth or People) where the defendant was convicted and appeals from the judgment.
- (e) The sentence, on the ground that it is illegal.⁸

Here, the substantial effect is that the state may be entitled to appeal from various rulings of the court, not, however, in such a way as to effect an acquittal. In some states there may be an appeal from an acquittal, but only to "lay down the law" for future guidance of the lower courts.⁹

The third position allows the state as broad a right of appeal as that of the defendant. The state is entitled to an appeal from an acquittal just as the defendant may appeal from a conviction. In Connecticut such a statute reads as follows:

⁷ Illinois, Massachusetts, and Texas allow no appeal whatsoever. Florida, Georgia, and Minnesota were usually listed prior to the American Law Institute's Code of Criminal Procedure as states which allowed no appeal to the government. Since its proposal, however, the legislatures of these three states have made provisions similar to those found in the Code of Criminal Procedure.

⁸ A.L.I., Code of Crim. Pro., sec. 440 (1930). For a survey of the respective state statutes on the matter, see the collection appearing in the Commentaries at 449.

⁹ Orfield Crim. Appeals in America 65 (1939).

Appeals from the rulings and decisions of the superior court or of the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused.¹⁰

This type of statute has two effective safeguards against too broad a use. First, the appeal is to be taken only upon questions of law and, second, the appeal is conditioned upon the presiding judge giving his permission. Further, the courts have said that such a right as appeal from acquittal must be exercised before the defendant has been discharged.¹¹

State's Right to Appeal from Acquittal—Double Jeopardy

With this summation of how the law exists in regard to the various limitations upon the state's right to appeal in a criminal case, the question is again posed: Whether it is any longer necessary or desirable to deny the state the right to a review by an appellate court of a case tried before a jury for the purpose of obtaining a new trial—where the accused was acquitted—on the theory that an undue advantage would be taken of him if such a review were permitted.

The first and foremost objection to such a broad right of appeal by the state is that it would place the defendant in double jeopardy and abridge the guaranty found in both the Federal and state constitutions. The discussion of whether the state should have such a broad right of appeal as would allow a new trial after an acquittal must be approached first in relation to the Fourteenth Amendment to the Federal Constitution, and secondly, in relation to provisions against double jeopardy found in state constitutions, considering that for such a right to be lodged with the state is not a violation of the Fourteenth Amendment.

It has been well settled since *Palko v. Connecticut*¹² that a statute giving the state an appeal from an acquittal or conviction of a lesser crime for which the accused was indicted for the purpose of obtaining a new trial is not in derogation of the due process clause of the Fourteenth Amendment. In this case the appellant was indicted for first degree murder. He was found guilty of murder in the second degree and sentenced to confinement in the state prison for life. On appeal by the state the appellate court found error in the instructions of the trial court to the jury upon the question of premeditation and also on

¹⁰ Conn. Gen. Stat. sec. 8812 (1949).

¹¹ *State v. Carabetta*, 106 Conn. 114, 137 A. 394 (1927); *State v. King*, 262 Wis. 193, 54 N.W. 2d 181 (1952).

¹² 302 U.S. 319 (1937).

certain rulings upon evidence. A new trial was ordered.¹³ On retrial the appellant was found guilty of murder in the first degree and sentenced to death. This conviction was affirmed by the Supreme Court of Errors¹⁴ and was then brought before the Supreme Court.

In determining the issue in the case the Supreme Court failed to answer the question of whether the appellant was actually put in double jeopardy. The Court resolved the question, "Is double jeopardy in such circumstances, *if double jeopardy it must be called*, a denial of due process forbidden to the states." (Emphasis supplied).¹⁵ Doubt was thus expressed as to whether the circumstances in the *Palko* case were actually double jeopardy at all and only on the *assumption* that it was, the Court decided that "such circumstances" were not a denial of due process.

It is true that the Fifth Amendment prohibits double jeopardy with respect to federal prosecutions¹⁶ but from this it does not necessarily follow that such a practice should be prohibitive against a state since the Fifth Amendment provision against double jeopardy is not necessarily incorporated in the Fourteenth Amendment. The Court in the *Palko* case dispelled the argument rather hurriedly that whatever would be a violation of the original Bill of Rights if done by the federal government is now equally unlawful as to the states by force of the Fourteenth Amendment. The words used to refute such a rule were that "there is no such general rule". For such a practice as that in the *Palko* case to be denied the state, it must be found to be contrary to those practices which are "implicit in the concept of ordered liberty".¹⁷ The Court, speaking through Justice Cardozo, said:

Does it [the Connecticut statute] violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? The answer must be 'no'. . . . The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.¹⁸

¹³ *State v. Palko*, 121 Conn. 669, 186 A. 657 (1936).

¹⁴ *Palko v. State*, 122 Conn. 529, 191 A. 320 (1937).

¹⁵ *Supra* note 12 at 323.

¹⁶ *Kepner v. United States*, 195 U.S. 100 (1904).

¹⁷ *Supra* note 12 at 325.

¹⁸ *Supra* note 12 at 328.

The conclusion then is clear that an appeal by the state in a criminal case after acquittal is not such a violation of those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions" to cause such a practice to be forbidden the state under the Fourteenth Amendment.¹⁹

If, therefore, the Supreme Court has found that such a practice by the state does not violate the rights of the individual guaranteed him through the Fourteenth Amendment, what, then, is the reason that such a limitation upon the state's right to appeal should still exist? The answer is found in the various state constitutions which also contain provisions against double jeopardy. There are such provisions in the constitutions of most states,²⁰ and in the states with no constitutional provision against double jeopardy the right is enforced as a common law right.²¹ Therefore, even though a right of appeal from acquittal is not in violation of the Fourteenth Amendment, the states themselves prohibit such a right because it would be in violation of the double jeopardy provisions found in their various state constitutions. At this point the next question is: Even though there is a provision in the state constitution protecting the accused against double jeopardy, does it follow of reason or necessity that an appeal by the state from an acquittal to secure a retrial would place the accused in double jeopardy so as to abridge the state constitution?

It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by the elementary writers and courts from a very early period to the present time, "that a man shall not be brought into danger of his life or limb for one and the same offense more than once."²² It seems that the weight of authority is to the effect that a statute going so far as to expressly, or

¹⁹ The states have been permitted to make several procedural innovations denied the Federal Government by the first eight amendments. Among them are the privilege against self-incrimination, *Twining v. New Jersey*, 211 U.S. 78 (1908); trial by jury of eight, *Maxwell v. Dow*, 176 U.S. 581 (1900); and information instead of presentment of grand jury, *Gaines v. Washington*, 277 U.S. 81 (1928). Nevertheless, real hardship to the accused, and unfair, arbitrary hearings have been held to be a denial of due process. Illustrations of procedural innovations which result in a denial of due process are: trial influenced by a mob, *Moore v. Dempsey*, 261 U.S. 86 (1923); shifting of the burden of proof, *Morrison v. California*, 291 U.S. 82 (1934); confession by torture, *Brown v. Mississippi*, 297 U.S. 278 (1936); denial of right to counsel, *Powell v. Alabama*, 287 U.S. 45 (1932) and an unreasonable search and seizure, *Rochin v. California*, 342 U.S. 165 (1952). It would appear that the enforcement of the right of a state to have criminal prosecutions free from prejudicial error has little in common with the cruelty and immoderate vexation which is regarded as a violation of due process.

²⁰ 15 Am. Jur., Crim. Law 39 (1938).

²¹ Maryland, Massachusetts, North Carolina, Connecticut and Vermont do not have double jeopardy provisions in their constitutions. See 22 Univ. Cinn. L. Rev. 463, 469 (1953).

²² *Ex Parte Lange*, 85 U.S. 163 (1873).

by necessary inference, allow the right of appeal from an acquittal in a criminal case, and thus subject the defendant to the possibility of another trial, would be placing the accused in such a danger of his life or limb as to make such a statute unconstitutional.²³ There is, however, a notable minority which foster the argument that such a right vested with the state does not constitute double jeopardy. Such a conclusion is believed to be the better view.

In 1904, the Supreme Court of the United States rendered a decision in *Kepner v. United States*²⁴ which expressly denied the Philippine Islands government an appeal from an acquittal of the crime of embezzlement. The basis for the decision was a provision in the Act of Congress for the government of the Islands which was identical to the provision in the Fifth Amendment against double jeopardy. There was, however, a dissent in the *Kepner* case by Justice Holmes in which two other justices joined. His argument in substance was that such an appeal by the government to procure a new trial would be but a *continuing* jeopardy having its beginning and end in the *same* case. It is not jeopardy in a new and independent cause. Justice Holmes said:

It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . 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 of law in his favor, than he would be when retried for a mistake that did him harm.²⁵

It is believed that in a more recent decision by the Court, the *Palko* case, the inference to be drawn from the opinion is that such an appeal does not constitute double jeopardy. Therein the question whether double jeopardy existed due to the retrial obtained under a state statute was not necessary to the decision of the case and was consequently not decided. However, Cardozo, in the opinion of the writer, shows favor to the dissenting opinion of Holmes just set out.²⁶ Several state courts have reached a similar result in a determination that such a practice does not constitute double jeopardy.²⁷

²³ 113 A.L.R. 637 (1938) and cases cited therein.

²⁴ *Supra* note 16.

²⁵ *Supra* note 16 at 134-135.

²⁶ *Supra* note 12 at 323.

²⁷ *State v. Lee*, 65 Conn. 265, 30 A. 1110 (1894); *State v. Palko*, 122 Conn. 529, 191 A. 320 (1937); *State v. Witte*, 243 Wis. 423, 10 N.W. 2d 117 (1943).

The reasoning and argument which support the view that an appeal by the state may be provided by statute without infringing upon the almost universal state constitutional provisions against double jeopardy would appear valid, if viewed in the light of the following syllogism. The purpose of a criminal trial is to establish with finality the guilt or innocence of the defendant. It is admitted that when that has been done the defendant has been once in jeopardy and to subject him to the possibility of a new trial would be a violation of provisions against double jeopardy. But it is not admitted that a verdict of a jury need necessarily be the end of a trial for it is within the legislative power to prescribe the method by which guilt or innocence shall be established with finality. The legislature may, therefore, provide that the trial may be continued in a reviewing court in order to insure that the final determination of guilt or innocence is free from legal error.

The main objection to such reasoning is the determination of when finality is obtained. It is the contention of most that finality is attained when the jury has returned its verdict. This result is based solely upon the fact that the legislature, influenced by considerations of public policy, has decided to make such verdict of acquittal, whether just or unjust, the end of that controversy. Finality with error, however, is not finality. It is at best but error. Surely the interests which tend to protect the individual would not be hampered unjustly to require criminal proceedings to continue to finality in the true sense of the word—finality free from error. Who is able to determine freedom from error with finality other than the appellate court?

This view which seeks finality free from error has gained support in recent years. The state of Wisconsin enacted a statute in 1941 which granted the state an appeal upon all questions of law arising on the trial, with the permission of the trial judge, in the same manner and effect as the accused has the right.²⁸ This statute was tested in *State v. Witte*²⁹ where the state took an appeal from an order by the trial court setting aside the conviction for the reason that the evidence was insufficient to convict. The defendant's objection was that the statute violated the provision against double jeopardy found in the Wisconsin Constitution. The court, after pointing out that there was no question about the defendant having been in jeopardy in this case, concluded that it did not follow that the statute in question violated the double jeopardy provision in the constitution:

²⁸ Wis. State. sec. 958.12 (d) (1955).

²⁹ 243 Wis. 423, 10 N.W. 2d 117 (1943).

[I]t is not straining the commonly called double jeopardy provision of the constitution to say that it is a single and continuing jeopardy until such time as a defendant has had a legal trial for the offense with which he is charged. To say that a defendant has been twice placed in jeopardy because he is required to stand a second trial when the first trial was not according to the law of the jurisdiction in which he was tried is contrary to sound reasoning.³⁰

The American Law Institute has adopted the view of finality free from error. After the three year revisionary period of the tentative draft of 1932, the proposed final draft of the Administration of Criminal Law was submitted and accepted. The portion supporting such a view reads:

State may be granted a new trial—*when*. Where a person has been acquitted generally, and in the course of the trial a material error has been made to the prejudice of the state, the state shall be entitled to a new trial.³¹

This recent authority, coupled with the well reasoned opinion by Justice Holmes, leads the writer to the conclusion that such a right of appeal by the state would not violate the state constitutional provisions against double jeopardy. Granted, the accused would be in jeopardy, but it is not such jeopardy as to be in derogation of the right guaranteed the defendant. It is a mere continuing jeopardy in the same cause. The courts realize fully the importance of the protection of the liberties of its citizens, and the injustice of requiring a person to stand trial more than once in the same cause. The state should not be permitted to continually prosecute a citizen in hope that it may find a jury which will eventually convict him, but it should have the privilege of one legal trial of the accused for the offense with which he is charged. This can only be accomplished by the correction of material errors in each case, whether they be prejudicial to the state or to the defendant. The single jeopardy of the defendant is not terminated until both the facts and the law applicable thereto are finally determined. Finality is essential, but not when it is acquired contrary to law. The proposed statute would not and does not deprive the accused of a fair and impartial trial—in fact, it guarantees just that.

Proposal for State Appeal from Acquittal

It is not contended here that a statute would be valid if it gave the state an appeal on the ground that the verdict of acquittal by the jury was not supported by the evidence. There is a strong argument that this situation might well be double jeopardy.³² Further, if the verdict

³⁰ 10 N.W. 2d at 120.

³¹ A.L.I., Ad. of Crim. Law, sec. 13 (1935).

³² 47 Yale L.J. 489, 492 (1938).

of acquittal is supported by the evidence there would clearly be double jeopardy.³³ The proposal for a state statute might read:

An appeal may be taken by the state from any judgment adverse to the state:

1. upon questions of law arising upon the trial and
2. with the permission of the trial judge.

A judgment acquitting the defendant of all or part of the charge shall be deemed adverse to the state. Such a right as appeal by the state from an acquittal is further conditioned upon prompt application for permission to appeal. Such application must come before discharge of the accused.

Such a proposal places three safeguards upon possible abuse by the state. First, there can clearly be no appeal upon the facts of the case as to their sufficiency to support the *jury's* verdict of *acquittal*. The right can only be invoked to test the rulings of the trial court on matters such as admissibility of evidence, an order setting aside a conviction, or an erroneous instruction. Secondly, with the consent of the trial judge as a prerequisite to the state's appeal, it could not be termed an *absolute* right but rather a *discretionary* right. Thirdly, the application for permission to appeal must be prompt and before discharge of the defendant. This provision would prevent the accused from being apprehended after discharge and termination of jeopardy in the cause.

Henry H. Dickinson

THE RUNNING OF RESTRICTIVE COVENANTS IN KENTUCKY

The purpose of this note is to determine under what conditions a vendee of property in Kentucky is bound by, or may enforce, covenants made by his vendor. This requires a study of Kentucky cases involving covenants running with the land. These cases will be analyzed to determine the extent to which orthodox doctrine is now applied in light of modern policy.

Restrictions on the free use of land are not new. Licenses, easements, retaining wall agreements, leases and subdivision restrictions have been known since early times.¹ The last seventy-five years, however, have seen the most rapid increase in the amount of land transferred within the restricted subdivision scheme. This increase, to a great extent, has been due to the demand by individuals for protection

³³ 28 Jour. of Crim. Law 919, 923 (1938).

¹ Horack and Nolan, Land Use Controls 202 (1955).