FORMER JEOPARDY

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He who turns the pages of reports and digests under the title "double jeopardy", although he barely scratches the surface of the prodigious record of successful and unsuccessful prosecutions, gets, nevertheless, even in an afternoon's casual reading, some very strong impressions as to the manner in which lawyers and judges have performed their task of ascertaining, declaring and applying the rules and principles of criminal law. He will most probably depart with an uneasy feeling that the law itself, meaning thereby the decided cases, is in no small measure responsible for the menace of unmanageable criminality which now confronts the people of the United States.

Pick out one hundred cases from the record of criminal appeals, wherein judgments of conviction have been set aside, taking care that they extend backward over the last one hundred years, and assume them to be fairly representative of the whole body of decisions. You will find that with some exceptions here and there, their net result has been not to protect the innocent but to accomplish the escape of the guilty. By the word "innocent" is not meant that technical precept of Anglo-Saxon legal philosophy, that every man is innocent until he has been convicted of guilt in strict accord with every minute detail of legal procedure. Rather this is meant, that when a man, in the settled opinion of all who know the facts, has burned the house of his neighbor, or assaulted and robbed a fellow traveller, or battered out the life of one whom he hates or fears; and that man goes free, or wanting freedom, succeeds in dragging out the inquest of his crime through long, successive, and exhausting trials, appeals and retrials, because of haunting fear of a long-past tyranny or slavish devotion to worn out dogmas, then the net result of all the labors of lawyers and judges in that case is not to protect the innocent, but rather to secure or, at least, to offer hope of immunity to the guilty.

Viewed historically, much of the criminal litigation in this country in the last hundred years, is a ridiculous anachronism. Time was, in the development of the English law, when judges had before them over and over again the innocent victims of a savage code and an unconscionable abuse of power. From the circumstances of such cases, they sought to evolve rules which would thwart the instant outrage, and discourage its repetition in the future. But so far has that savagery spent itself, so completely has the abuse of criminal procedure disappeared in the vast improvement of social and economic conditions, that seldom,

if ever, are those rules evoked in modern times except to defeat what, in common understanding, would be called the ends of justice. And this would seem to be what Justice Holmes had in mind in a dissenting opinion delivered in 1904, when he said,

"At the present time in this country, there is more danger that criminals will escape justice than that they will be subjected to tyranny." [1]

Some centuries ago, in the time of Lord Hale, let us say, a poor wretch was dragged into court and charged with crime. So vague and uncertain was the proof that judge and prosecutor, despairing of their prey, dismissed the jury and started again; and so on, till a conviction was assured. Finally, such a case came before a judge of nobler feeling, who found in that outrageous practice full warrant for the proposition that the accused in the first trial had been once in jeopardy; that he was entitled to plead that jeopardy in bar of the second trial; and that upon such a plea he must be acquitted. And few fail to do honor to the men who thus served the cause of justice.

But less than forty years ago, in Pennsylvania, an accused was put to trial upon the charge of murder. The jury went out, and after five days of deliberation, the term having come to an end, were discharged for failure to agree. At the next term, the accused was again put to trial upon the same charge, and he pleaded the selfsame plea of "double jeopardy". The Supreme Court of Pennsylvania solemnly concluded that the defense was letter perfect and that the accused must be discharged. It does not seem to lessen the rebuke to the majesty of the law that the pages of this opinion were figuratively blotted with tears of judicial regret for a conclusion so monstrous. And as far as can be determined, this case still states the law of Pennsylvania on this particular branch of the subject of "double jeopardy".

What is this "double jeopardy"? The Fifth Amendment to the Constitution of the United States contains this quaint relic of mediaeval jargon:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

To find out what it means, one must go back to Blackstone, and so on through the dusty past to Lord Hale. He must treat it as a masterpiece of literary elision, and must conclude, as our American Courts have since concluded, that to the old English mind a man must indeed be said to be in jeopardy of life or limb whenever he was brought into a court of justice and charged with the commission of a crime. And so to-day in American law, it means that a man may not be brought to trial in a new and independent case when he has already been tried once for the same offense, notwithstanding he may never, either in the first

[1] *Kepner v. United States* (1904) 195 U. S. 100, 134, 24 Sup. Ct. 797, 806.

trial or in the second, have been in any jeopardy either of his life or any of his limbs, which rather delicate problem of liberal construction was thus expounded in an early New York case:[2]

"The expression 'jeopardy of limb' was used in reference to the nature of the offense and not to designate the punishment for an offense; for no such punishment as loss of limb was inflicted by the laws of any of the states at the adoption of the Constitution. Punishment by deprivation of the limbs of the offender would be abhorrent to the feelings and opinions of the enlightened age in which the Constitution was adopted and it had grown into disuse in England for a long period antecedently. We must understand the term 'jeopardy of limb' as referring to offenses which in former ages were punished by dismemberment and as intending to comprise crimes denominated in the law as felonies."

This provision, as a matter of Constitutional limitation, does not, of course, apply to the States. Connecticut has no such provision in her Constitution. The principle, however, is regarded as one well established in the common law and applicable in all its vagaries to the administration of criminal law in this State. But to the honor of the judiciary of Connecticut, it ought to be added that they have been very intolerant of some of the extravagance which, in other States, has been solemnized as law.

Thus, in *State v. Woodruff*,[3] they refused to accede to the proposition that there could be no second trial after a jury in the first trial, having disagreed, had been discharged. True it is, that in reaching that decision, they were obliged to treat lightly the obstacles which were confidently expected to block the path of justice. But the result was good, and it was final.

Again in 1893, in *State v. Lee*,[4] Judge Hammersley divested this ancient phantom of more of its venerable vestments. It has from earliest times been an established rule in American criminal law that the State could not by writ of error secure a new trial. And this was supposed to be a necessary consequence of the rule against double jeopardy. But here again we have an instance of judicial prejudice based upon one consideration, fastening upon a wholly unrelated rule to furnish forth a seeming support from ancient precedents. One might argue that it is against public policy to subject a man who has been accused of crime to the expense and burden of an appeal and the possibility of a new trial. But such argument is not without its flaws and imperfections. Thus from early times the dicta of Lord Hale and others that a criminal cause once submitted to a jury cannot be submitted to another jury has been repudiated under the guise of exceptions in many instances. It has been ruled that the jeopardy is not exhausted by an indictment followed by a *nolle*; nor by the discharge of a jury in case of sickness of a judge; nor even the case

[2] *People v. Goodwin* (1820, N. Y.) 18 Johns. 187, 201.

[3] (1807, Conn.) 2 Day, 504.

[4] (1894) 65 Conn. 265, 30 Atl. 1110.

of sickness of a juror; nor the sickness of the prisoner; nor in case of the expiration of the term of Court during the progress of the trial; nor in the case of the inability of the jury to agree; nor in the case of influence exerted on the jury against the prosecution by an officer in charge of the jury; nor in the case of misconduct or incapacity of a juror even after the case has been committed to the jury; nor is it exhausted by an acquittal when the verdict has been obtained through the fraud of the accused. In other words, it is very plain that the one consideration of public policy which outweighs all others is that the question of the acquittal or immunity of one charged with crime, like the question of his guilt, should not be regarded as settled until it has been ascertained through the just and fair application through the Courts of the rules and principles of law.

And if this is so, why is it not pertinent to ask whether the same underlying principle of justice which demands a retrial as against the accused because a juror is legally disqualified does not equally demand a new trial when illegal evidence has been admitted or excluded or fundamental principles of law erroneously applied?

In *State v. Lee*,[5] Judge Hammersley, having emphatically stated that there can be no sensible ground for distinction, goes on to say:

"Before the verdict is returned, the trial court, of its own motion, can award a retrial; after the verdict is returned, a retrial is awarded only on further proceedings in the cause which may or may not be authorized by the law regulating procedure. If such further proceedings are not authorized by law, the cause is ended, and the one jeopardy of the accused is exhausted; but this results *not* from any special sanctity attributable to a verdict tainted with illegality, but solely to the fact that the State, influenced by considerations of public policy, has decided to make such verdict, whether just or unjust, the end of that controversy. But when the State sees fit to provide that the cause shall not necessarily be so ended, but that further proceedings on motion of the accused may be had, an unjust verdict resumes its normal position of a legal nullity; and when the State provides for like proceedings on the motion of the prosecutor, a similar result must follow."

Thus it comes to be pretty clear that if the courts had considered this subject of appeals by the state upon the basis of common sense and public welfare, they would have found it somewhat embarrassing to demonstrate that the administration of criminal justice was best served by leaving untouched a verdict of acquittal known by all competent observers to be a legal nullity, and, in consequence, a miscarriage of justice. And so we find the courts applying to this question of writs of error by the state to

[5] *Supra* note 4, at 274, 30 Atl. at 1111.

review verdicts of acquittal the test of an ancient dogma that in reality carries with it no controlling reason whatsoever and which, in its practical workings, defeats rather than promotes the ends of justice. In other words, the maxim that no one shall be twice put in jeopardy for the same offense (which, in its origin and reason, properly means that a judicial proceeding lawfully carried on to its conclusion by a final judgment ends the controversies determined by that judgment) is converted into the fallacious theory, having no basis in actual experience, that a person accused of crime has a right of exemption from those regulations of judicial procedure which the state deems necessary to make the conduct and final result of that proceeding accord with law.

The Supreme Court of Tennessee in 1817, in dismissing an appeal by the state under an acquittal of perjury, said:[6]

"A writ of error or appeal in the nature of a writ of error, will not lie for the State in such a case. It is a rule of the common law that no one shall be brought twice into jeopardy for one and the same offense. Were it not for this salutary rule, one obnoxious to the Government might be harassed and run down, by repeated attempts to carry on a prosecution against him. Because of this rule it is, that a new trial cannot be granted in a criminal case where the defendant is acquitted. A writ of error will lie for the defendant but not against him. This is a rule of such vital importance to the security of the citizen, that it cannot be impaired but by express words and none such are used in the statutes of this State."

Here, it seems, we have a perfect illustration of a preconceived notion arbitrarily made to rest upon an accepted doctrine to which it bears no relation at all. Who, in thinking in legal terms of a civil action, would ever say that its issues had been twice determined notwithstanding there had been a trial and verdict, an appeal and a new trial and a second verdict. Would it not be allowed without dispute that there had been but one determination of the issues and that the original case had never lost its identity, no matter how many trials might have intervened, until there had been accomplished in strict conformity with the rules of law, a final, unassailable judgment? So, in a criminal case, if a writ of error is not allowed to the state, it is not because such a writ would involve "double jeopardy" to the accused, but because the courts of the United States which, in so many other subjects struck off completely and independently the shackles of the English common law, in respect to criminal prosecutions were unable to rid themselves of notions which were erroneously supposed to be imbedded in the English practice. And returning once more to the Tennessee case as a fair sample of this point of view, it is now to be remarked that not only was the ancient

[6] *State v. Reynolds* (1817, Tenn.) 4 Haywood, 110.

maxim of "double jeopardy" wholly inapplicable to the question whether writs of error should be allowed against the accused; but likewise the apprehension of persecution and tyranny which was supposed to inspire the rule was wholly without foundation. For in the State of Connecticut, and in many other states, by constitutional amendment, or by statute where no constitutional provision intervened, the state has been given the same right of appeal in criminal cases as is given to the parties in civil actions; and there seems to be no evidence that the rights and liberties of persons unjustly accused of crime have been impaired or threatened in consequence of the change.

As late as 1903, this identical question came before the Supreme Court of the United States, and Mr. Justice Day, writing the majority opinion, fell into that unsatisfactory line of reasoning which Judge Hammersley so relentlessly exposed in *State v. Lee.*[7] Referring to the constitutional provision against double jeopardy, Justice Day said:

"At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the Court, having jurisdiction had acquitted the accused of the offense. The rule is thus stated by Hawkins in Pleas of the Crown . . . : 'The plea of former acquittal is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man has once been found not guilty, on an indictment or appeal, free from error, and well commenced before any Court which has jurisdiction of the cause, he may, by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime.'" [8]

Now if you will look over the reports upon this subject, you will find that our American judges seldom get far beyond some such quotation as that employed by Justice Day. It is true, for reasons quite distinct from the theory of "double jeopardy", that neither the state nor the accused in England was, until recent times, permitted to trifle with a verdict, either of conviction or of acquittal, through the means of an appeal. But granting this, it is still fair to ask by what possible interpretation Mr. Hawkins can be said to have announced that the maxim of "double jeopardy" would prevent a writ of error against an accused who had been acquitted of crime.

In the United States case last referred to, the majority opinion confidently states that both in England and in the United States the doctrine of former jeopardy has been universally held to forbid the issuance of a writ of error against the accused; and

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[7] *Supra* note 5.

[8] *Kepner v. United States, supra* note 1, at 126, 21 Sup. Ct. at 803.

yet three judges of that Court, dissenting, declare that they were unable to find any authority for such a conclusion in any of the cases cited by the majority opinion, Justice Holmes going on to say:

"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 cause." [9]

It is interesting to note that in the majority opinion, Justice Day refers to Judge Hammersley's opinion in the *Lee* case as follows:

"The case of *State v. Lee*, in the reasoning of the Court, seems opposed to this view. But no reference is made in the course of the opinion to any constitutional requirement in Connecticut as to double jeopardy. An examination of the Constitution of that State, and amendments as published in General Statutes of Connecticut, Revision of 1902, discloses no provision upon the subject of jeopardy and we conclude there is none. The exceptional character of the decision in *State v. Lee* is stated by the learned editor of American State Reports in the following language: 'This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy.' "

But if, as Judge Hammersley and Justice Holmes both so logically demonstrate, there is nothing in the ancient rule against double jeopardy which in any way modifies the universal view of all judicial proceedings, that no particular proceeding can ever be said to have terminated until a final judgment has been rendered in accordance with law, then what possible bearing can it have upon the question as to the right of the state to appeal from a verdict of acquittal that the Constitution contains a provision against "double jeopardy"?

There is another phase of the problem which is not without mild interest. As our American law developed, it soon became settled, either by judicial decision or by statute, that the accused in a criminal case might, by appeal or writ of error from a verdict of guilty, secure a new trial for errors of law appearing in the record. It was not long after the first appearance of this privilege in the United States before it occurred to a person who was unquestionably guilty in a moral sense of a most atrocious crime, that having, through the intricacies of the criminal law, secured a reversal of a judgment of conviction and a new trial, it would be a gross invasion of his natural and constitutional rights to be

[9] *Kepner v. United States, supra* note 1, at 135, 24 Sup. Ct. at 806.

again put in jeopardy of his precious life or limb. And so, the courts have been compelled gravely to consider, and with no little difficulty to conclude, that this was pushing the dicta of Hale and Hawkins altogether too far. And yet it seems that the reasoning of the courts upon this subject only further illustrates the original misuse of the old maxim. Turn the thing as they would, the judges could not get away from the fact that here, far more than in most of the cases in which they had found no difficulty at all in granting immunity to the guilty, the suppliant for sanctuary was in very truth facing a "double jeopardy". He had been tried once and by a close squeak had gotten away from it. And now the law was making him face for the second time the peril so lately avoided. And so the courts were moved to say that by taking his appeal from the first conviction and asking for a new trial, he had waived the constitutional guarantee against "double jeopardy".[10] This sounds like good, plain common sense, although it would have been much plainer and more satisfactory sense to have said that there was no "double jeopardy" involved at all. More satisfactory because the explanation that the accused had waived his constitutional guarantee at once calls to mind those cases in which, despite the regrettable consequences of their decisions, the courts have said over and over again that these "fundamental guarantees of life and liberty" cannot be waived.

And so, in the same *Kepner* case, Justice Holmes was moved to remark as follows:

"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. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt v. People*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. . . . Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." [11]

It seems impossible to read Justice Holmes' dissenting opinion without asking oneself whether the critics of our criminal jurisprudence are not fully justified in asking, in no very pleasant mood, how it comes to pass that judges of our highest courts have continued to set at liberty over and over again men guilty of the most atrocious crimes because of slavish devotion to an erroneous interpretation of a quaint and curious phrase extracted

[10] *Trono v. United States* (1905) 199 U. S. 521, 534, 26 Sup. Ct. 121, 124.

[11] *Supra* note 1, at 135, 24 Sup. Ct. at 806.

from the old records of medieval lawyers. For it may be repeated that the imposing array of adjudications accumulated in the records of criminal trials, for the most part exhibits striking instances, not of the protection of the innocent, but of the regrettable escape of the guilty.

Wherever one turns in the phases of this subject of "double jeopardy", he encounters anew this queer consequence of the misapplication of words. Thus the highest courts of New York, and of several other states of authority in this country, have been called upon to consider this proposition. An accused is charged with murder in the first degree, and he is convicted of the lesser crime of manslaughter. He appeals from that conviction and secures a new trial. Being again brought to plea upon the charge of murder in the first degree, he pleads his "double jeopardy"; he claims, and with unanswerable logic, that the jury by finding him guilty of manslaughter found him not guilty of murder; that he has once been in jeopardy of that dreadful crime and now, under the Constitution, can only be tried for manslaughter. And these courts have felt constrained to allow that plea, and to decide that the second trial must be confined to the minor charge of manslaughter.[12] They have reached this conclusion, however, not because they found it in harmony with principles of justice or best suited to preserve the public welfare, but because in times past they and their predecessors have given to the words "former jeopardy" a meaning quite at variance with all concepts of judicial procedure.

Such an attitude toward the administration of criminal justice, it is respectfully submitted, can be productive of no good results, and may perchance have exercised a grave and deplorable influence in bringing to pass that attitude of contempt for law and the apparent inefficiency of its criminal administration so painfully regretted by all good citizens in the present day and generation. The point may be emphasized by reference to two cases which you will encounter whenever you look up the subject of "double jeopardy", but which, in themselves perhaps, are only loosely related to the subject.

In 1875, one Kring committed murder in the State of Missouri. The proceedings taken to establish his guilt and impose the penalties prescribed by law are thus summarized in the opening paragraph of the opinion in the Supreme Court of the United States when the case eventually reached that tribunal.[13]

"The plaintiff in error was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed January 4, 1875, to which he pleaded: not guilty. He has been tried four times before a jury, and sentenced once

[12] *People v. Dowling* (1881) 84 N. Y. 478, 483.

[13] *Kring v. Missouri* (1882) 107 U. S. 221, 2 Sup. Ct. 443.

on a plea of guilty of murder in the second degree. His case has been three times before the Court of Appeals of that State and three times before the Supreme Court of the State. In the last instance, the Supreme Court affirmed the judgment of the Criminal Court by which he was found guilty of murder in the first degree and sentenced to be hung, and it is to this judgment that the present writ of error is directed."

It appears that by the law of Missouri in force when the homicide was committed, a conviction upon the charge of murder of a lesser degree was construed as an acquittal of the higher degree of murder. When Kring was first brought to trial, however, this rule of law had been changed by a constitutional enactment. Kring then, upon the first trial, being charged with murder in the first degree, pleaded guilty to the charge of murder in the second degree and was sentenced to imprisonment. Having pleaded guilty, he then prosecuted an appeal and succeeded, for some reason or other, in getting a new trial. Having been again convicted, he was once more, through the merciful intervention of the law, granted a third trial. Upon the third trial, he was convicted of murder in the first degree. He then prosecuted another appeal to the Supreme Court of Missouri and from that Court to the Supreme Court of the United States, claiming that under the law as it existed at the time of the homicide, his plea of guilty of murder in the second degree would have been equivalent to a conviction of murder in the second degree, and that a conviction of murder in the second degree would have been equivalent to an acquittal of the charge of murder in the first degree; that although at the time he pleaded guilty to murder in the second degree, this rule of law had been abrogated by constitutional amendment, yet as against him the constitutional amendment was *ex post facto* and therefore inapplicable. He must, therefore, be held by his plea of guilty of murder in the second degree to have been acquitted of the charge of murder in the first degree, and that notwithstanding he had himself, by writ of error, asked and obtained a new trial, he ought not to have been put to trial upon the charge of murder in the first degree because thereby he was twice put in jeopardy. The Supreme Court of the United States decided that these claims were so securely founded in the principles of law and justice that there must be a new trial. In consequence, the last verdict was set aside and the cause was sent back to Missouri with instructions to the public authorities of that State to begin once more where they had begun seven years before to bring this murderer to justice.

It is, of course, true that "double jeopardy" plays but a small part in this miscarriage of justice. But it is respectfully submitted that the Court applied the doctrine of *ex post facto* in the same narrow and harmful spirit as characterized the interpreta-

tion of the words "double jeopardy" in other cases. It is noteworthy in the Kring case that three justices dissented, and in their dissenting opinion have gathered instances of laws claimed to be *ex post facto* materially affecting and altering the condition of men charged with crime, which were declared by the courts not to be within the constitutional prohibition. It is difficult to read the majority opinion and the dissenting opinion without being stirred by the uneasy feeling that the majority of the judges of the Supreme Court were moved to render their decision in the *Kring* case because they were still unconsciously held in the thralldom of the fear of royal tyranny which, like an infection, was brought to our shores with the importation of the English common law.

The other case which is closely linked with the constitutional doctrine of double jeopardy, is *Hopt v. People of Utah.*[14] Some time about the year 1880, Frederick Hopt committed a cruel and atrocious murder. In the whole wretched story, there was nothing to throw any reasonable doubt upon the guilt of Hopt, nor was there anything in the circumstances that mitigated the natural horror of the crime or awakened for the accused any sentiment, however misguided, of sympathy or regret. He was brought to trial and convicted. He brought his writ of error to the Supreme Court of the United States and there it was discovered that a statute of the State of Utah required that the instructions of the court to the jury must be reduced to writing, notwithstanding which in this trial, one of the paragraphs of the charge, consisting of a quotation from a law magazine, was not otherwise incorporated in the written instructions than by reference to the volume and page of that magazine. In the judgment of the Supreme Court of the United States, this omission was fatal; and it was ordered that the trial of Hopt begin again. It did begin and resulted very speedily in another conviction of murder in the first degree. Again Hopt brought his record to the Supreme Court of the United States, and there it was discovered that in his charge to the jury, the court had used these words:

"That an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling."

In the opinion of the Supreme Court, this constituted an invasion of the right of the jury to determine the degree of the murder, notwithstanding the Court had expressly stated to the jury that it was for them, and for them alone, to determine with what degree of murder the accused, if found guilty at all, should be convicted. The Court also found another error which is very

[14] (1881) 104 U. S. 631; (1884) 110 U. S. 574, 4 Sup. Ct. 202; (1885) 114 U. S. 488, 5 Sup. Ct. 972; (1886) 120 U. S. 430, 7 Sup. Ct. 614.

significant in view of the ultimate disposition of this case. It appeared that under the law of Utah, where a talesman was challenged by the defense for prejudice, it was the duty of the Court to select three disinterested persons who should examine the challenged talesman and report to the Court whether there was any foundation for the challenge. With respect to four of the talesmen who sat upon the jury, there were peremptory challenges by the accused and triers were duly appointed. By direction of the Court and without objection from counsel for the defense, the triers stepped into an adjoining room and, having performed their duties, returned and reported to the Court that there was no basis for the challenge for prejudice. No further objection was made by the accused against these talesmen and no exception taken to the procedure followed. But the Supreme Court of the United States, upon the second appeal, decided that the examination of the talesmen by the triers not in the presence of the accused, was a violation of constitutional rights, and that neither expressly nor by implication could he be said to have waived so fundamental a guarantee of liberty. In consequence of this, the people of Utah were directed once more to begin their efforts to bring this villain to justice. A third time he was put to trial and promptly convicted of murder in the first degree, and again sentenced to be hanged. And again he brought his record to the Supreme Court of the United States. And on this occasion, it was discovered that the clerk, after conviction, in making up the record, failed to state whether or not the judge's charge was written or oral. And since the law required the charge to be reduced to writing before delivery in the absence of an agreement by both parties that it be oral, the Court was unable to determine, either that the charge was written or, if oral, that there had been an agreement to that effect. Again the Supreme Court decided, although by this time two justices were in vigorous dissent, that no man should be hanged upon such a record as that; and for the fourth time the people of Utah were directed to resume their efforts to see that the majesty of the law was upheld. The fourth trial resulted in conviction and again Hopt brought his record to the Supreme Court, confident no doubt that he was secure in his apparent right of sanctuary. But nothing that his counsel could find in the record upon which to base a claim of error proved of any avail on this fourth appeal. The defense of "former jeopardy" was not even argued. By counsel and court it seems to have been tacitly assumed that Hopt had waived the constitutional guarantee of the Fifth Amendment against being twice put in jeopardy of his life for the same offense. And so by a curious twist of fate, *Hopt v. People of Utah* appears, in all discussions upon the subject, as final authority for the proposition that one who secures a retrial after

a verdict of guilty cannot plead the first conviction in bar of a second prosecution, notwithstanding that nowhere in the course of the whole proceeding was the claim of "former jeopardy" raised by counsel for the defense, and notwithstanding that in the second review of the case by the Supreme Court of the United States, it was solemnly declared that even a statutory requirement as to the procedure to be followed in the trial of a capital case could not be waived by the accused.

It may well be that in the day and time of this famous litigation, the principles applied and the result accomplished may have been useful or, at least, inevitable steps in the orderly development of our criminal jurisprudence. But viewed as a record of the past, it seems to suggest only this mournful reflection, that it was in the Summer of 1880 that Hopt committed the crime of murder; and it was about Easter 1887 that the disquieting record was finally closed.

If these two cases stood alone, they would be of little consequence. But it is obvious that they could not stand alone. Two cases presenting the best thought and learning of men constituting the highest judicial tribunal in this country cannot be lightly set aside or disregarded. If these cases are travesties upon justice, it is because there is something inherent in our system of criminal administration which of necessity compelled the result which we are tempted to deplore. The fact is that these cases could be duplicated over and over again until one must necessarily return to the conclusion with which this discussion was begun, namely, that for the last hundred years by far the greater number of cases in the courts of last resort in this country, in so far as they apply to the administration of criminal justice, represent the employment of the best talents of advocacy and the greatest learning of jurists, not in saving the innocent from unjust conviction, but in making possible the escape or difficult the conviction of the guilty. All the lectures upon the beauties of the Constitution and the virtues of American citizenship, all the pictures of the evil consequences of crime, all the exhortations to law and order, all the examples of severity in the punishment of convicted criminals will go for nothing so long as we continue to maintain and build up a jurisprudence of criminal law which, as administered in the courts of last resort, serves no other purpose than to hinder or delay conviction of guilt.

It seems evident we must abandon the notion that there can be no swift and certain pursuit and punishment of the guilty consistent with the preservation of civil liberties. That is a doctrine born of conditions which ceased to exist more than a century ago. It reflects a fear that persists long after its cause has been removed from practical human affairs.

One hundred years ago, our fathers in the law seemed com-

pelled, particularly in criminal cases, to attempt to find in legal records even then long since forgotten and covered with dust the answer to problems presented on appeal. In the second of Day's reports appended to the case of *State v. Woodruff*,[15] is a reprint of Judge Kent's opinion in the case of *People v. Olcott*. This opinion is regarded as a classic. It re-appears in almost every discussion of the law of former jeopardy. The problem which Judge Kent had to decide was whether or not a rascal who had unquestionably committed a vicious fraud could be brought to trial by reason of the circumstance that at an earlier trial a jury, obviously disrupted by improper prejudices, had been unable to reach an agreement upon a verdict and had been discharged. It was the claim of counsel that here was a case of double jeopardy. If Judge Kent had tackled the problem as did Judge Hammersley in Connecticut and Justice Holmes in Washington, he would have dismissed the plea upon the ground that there could have been no jeopardy until the prosecution had been brought to a final judgment consistent with law. But instead of that, he went searching through the ancient, dusty tomes of the English juristic writings to find authority for the proposition that a situation such as this should be treated as an exception to the rule against double jeopardy. Going back to times wholly unlike the conditions under which he lived, the learned justice dug up and brought to light all manner of ancient and curious instances of complications arising in the workings of a crude and primitive jury system, none of which could have the slightest bearing upon the necessities of the times in which the authorities of New York were attempting to prosecute and punish offenses against the law. And it is curious to note that Judge Kent's doubts as to what should be the ruling of the court upon the mooted problem, were not finally resolved in favor of the State until he chanced to hit upon a bit of legal learning that is thus reported in his opinion. I quote from him as follows:

"There is an opinion given in an ancient book of approved authority, *The Doctor and Student*, Dial 2, Chapter 53, page 272, which comes up fully to the case before the Court. In answer to the fifth question of the Doctor, whether it stand with conscience to prohibit a jury of meat and drink until they be agreed, the learned author St. Germain, puts this answer into the mouth of the Student: 'That if the case happened, that the jury can in no wise agree in their verdict, and that appeareth to the Justices by examination, the Justices may, in that case, suffer them to have both meat and drink for a time, to see whether they will agree; and if they will in no wise agree, I think (continues the Student) that the Justices may take such order in the matter as may seem to them, by their discretion, to stand with reason and conscience, by awarding of a new inquest and by setting a fine

[15] *Supra* note 3.

upon them, that they find in default, or otherwise as they shall think best by their discretion, like as they may do if one of the jury die before verdict or if any like casualties fall in that behalf.' "

It so happens that in that case, Judge Kent arrived at a conclusion which has since commended itself to most courts. But we of the twentieth century can have little hope of a system of criminal jurisprudence whose interpretation is still guided and governed by considerations drawn from the Middle Ages; and it is most seriously to be considered whether the fault does not lie in applying to criminal records upon review, as between the State and the accused, the same tests as are applied in the records of civil cases upon appeal where, for all practical purposes, purely private interests are involved. It is wise and necessary, and for the simple reason that no better way has ever been discovered, that the determination of civil controversies shall be made in strict conformity with rules of law and procedure no matter how technical and finely drawn they may become in the intensity of legal conflict. So far as appears, however unsatisfactory may be the results of civil litigation when tested by the desired end of abstract justice, none the less we adhere to our rules and distinctions because we have not yet found any way to get rid of them. But when we turn to criminal prosecutions and insist that a conviction must be set aside because of some formal or technical default in the record made up by the parties concerned, we are forced to admit that when the thing is carried to the extent to which it has been carried in this country in the last hundred years, it defeats its own purpose. We have a system which, in many of its most cumbersome and burdensome features, serves in no wise to protect the innocent against unjust accusation but does serve, in an astonishing degree, to prevent, or at least make extremely difficult, the prosecution of those who, for all practical purposes, are known to be guilty of crime.

If, in the years to come, the method of calm judicial inquiry gives way to indiscriminate fury, or the machinery of law is employed with cold malignity to trap and destroy the innocent, it will not be because to-day we sweep aside the precepts and precedents of an old régime, but rather because by unreasoning devotion to them we weaken the forces which make for law and order, forgetful that when these forces are no longer in the ascendant, forms and precepts lend themselves as readily to deeds of wickedness as once they were supposed to inspire acts of righteousness. Law and all its institutions will surely collapse when they are beaten upon from one side by waves of crime and battered on the other by surges of exasperated and outraged justice.