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CRIMINAL LAW AND PROCEDURE - APPEAL BY STATE - CONSTITUTIONALITY OF STATUTES-DUE PROCESS OF LAW

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CRIMINAL LAW AND PROCEDURE — APPEAL BY STATE — CONSTITUTIONALITY OF STATUTES — DUE PROCESS OF LAW — Developing as a result of a period when an accused person was placed at a tremendous disadvantage at the hands of tyrannical judges exercising an unconscionable abuse of power, the concept that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" was put into the Fifth Amendment of the Federal Constitution and into many of the state constitutions. As a part of this double jeopardy concept, the American courts, from the first, established the rule that the state should not be allowed to appeal in a criminal prosecution. The accused, rather than being imposed upon, was granted many other aids and safeguards. But in recent years there has been a reaction against the idea that the punishment of crime is a sort of invasion of natural right, and, a realization that, as Holmes put it,[1] "at the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."

Various states have, by statutes ingrafting exceptions, attempted to relax the strict rule against state appeals in criminal cases. The statutes have been attacked either by claim of protection under state constitutions, or under guarantees in the Federal Constitution.

I.

At common law neither the state nor the defendant is allowed an appeal in a criminal case;[2] hence, to have any appeal there must be a statute specifically authorizing it.[3] The statutes and decisions of the various states cover a wide range. In Connecticut, by statute, the state

[1] Dissenting opinion in Kepner v. United States, 195 U. S. 100 at 134, 24 S. Ct. 797 (1904).

[2] 1 BISHOP, CRIMINAL LAW, 9th ed., 757 (1923); BRENNAN, "The Right of the State to Appellate Review in Criminal Cases," 1 OHIO ST. UNIV. L. J. 93 at 94 (1935); 38 DICK. L. REV. 129 (1934); 92 A. L. R. 1137 (1934); 17 C. J. 41 (1919).

[3] State v. Felch, 92 Vt. 477, 105 A. 23 (1918), noted 28 YALE L. J. 408 (1919); State v. B'Gos, 175 Ga. 627, 165 S. E. 566 (1932), noted in 81 UNIV. PA. L. REV. 340 (1933); United States v. Sanges, 144 U. S. 310, 12 S. Ct. 609 (1891). In State v. Muolo, 118 Conn. 373, 172 A. 875 (1934), the court seems to have allowed the state to appeal in a situation not specifically covered by statute. Noted in 4 FORD. L. REV. 130 (1935).

is permitted to take appeals upon all questions of law arising on the trial of a criminal case in the same manner and to the same effect as if taken by the accused;[4] and it is held that the state, even after acquittal, is authorized to appeal and, in case of reversal, to bring the defendant again into court for a new trial.[5] In Illinois,[6] Massachusetts,[7] Minnesota,[8] and Texas,[9] the state cannot appeal under any conditions or circumstances. Between these two extremes is a large variety of situations wherein the state has been authorized to appeal. The most common of these are cases where the appeal is based upon order setting aside or quashing an indictment or information, or on an order sustaining a demurrer to an indictment or information, or an order arresting judgment, or an order granting a new trial.[10]

[4] Conn. Gen. Stat. (1930), § 6494.

[5] State v. Lee, 65 Conn. 265, 30 A. 110 (1894).

[6] Ill Rev. Stat. (1931), c. 38, § 747; People v. John York Co., 80 Ill. App. 162 at 163 (1898). The statute was modified, however, by a 1933 amendment, Ill. Rev. Stat. (1937), c. 38, § 747, which allowed the state to appeal from an order or judgment setting aside or quashing an indictment.

[7] Commonwealth v. Cummings, 3 Cush. (57 Mass.) 212 (1849).

[8] State v. McGrorty, 2 Minn. 224 (1858); State v. Johnson, 146 Minn. 468, 147 N. W. 657 (1920); State v. Wellman, 143 Minn. 488, 173 N. W. 574 (1919).

[9] Prescott v. State, 52 Tex. Cr. App. 35, 105 S. W. 192 (1907).

[10] According to a comment in 10 N. Y. UNIV. L. Q. REV. 373 at 376 (1933) statutes in twenty-one states allow appeals by the state in one or all of these situations. For further analysis of the statutes and decisions wherein the state has been permitted to appeal, see Miller, "Appeals by the State in Criminal Cases," 36 YALE L. J. 486 (1927); 38 DICK. L. REV. 129 (1934); 27 J. CRIM. L. 917 (1937); 17 C. J. 41 ff. (1919); AM. L. INST., CODE OF CRIMINAL PROCEDURE (proposed final draft), § 445 and commentary p. 494 (1930).

The courts have often been very strict in their interpretation of these statutes. In a recent case, People v. Reed, 276 N. Y. 5, 11 N. E. (2d) 330 (1937), the defendants were indicted under an act making certain types of gambling a crime except when another penalty is prescribed by law. Defendants immediately moved to dismiss. The trial court dismissed the indictment on an erroneous ruling that another penalty was provided by law. The state appealed from this ruling. The appeal was dismissed by the Appellate Division, which was affirmed by the Court of Appeals. The latter court said that if the case had gone to trial and the defendants had, by writing, filed in the court a demurrer to the indictment, there could be a valid appeal by the state to the judge's ruling, but even though the ruling on the motion to dismiss was for all purposes the same, although not in writing, the statute did not permit an appeal by the state in this situation and to do so would be to place the defendant in double jeopardy. A part of the statute which stated that in all cases where an appeal to an appellate court may be taken by the defendant, *except* where a verdict or judgment of not guilty has been rendered, an appeal may be had by the people, was interpreted as being meaningless since the only time the defendant was said to have an appeal is after a verdict or judgment. It would seem that the legislature would not have done a futile thing, and, as the district attorney suggested, may have intended to give the people the right to appeal from any ruling dismissing the indictment or ending the case, which did not result from a verdict of acquittal.

In the few states that have no constitutional provision regarding double jeopardy,[11] there is no valid objection, under state law, to statutes giving the state a right of appeal. Where such a constitutional provision is present, the dispute is as to just what the double jeopardy provision forbids. One of the chief issues on which the courts divide is whether the constitutional provision forbids only a trial in a new and independent cause, or also forbids a new trial in the same cause. The great majority of the cases take the latter view.[12] In most of the instances enumerated above and in others where the state has been allowed to appeal, it is on the theory that a second, or even a first, jeopardy has not arisen since the question of double jeopardy is usually said to arise only when the state is permitted an appeal after an acquittal.[13] There is, however, disagreement as to what amounts to an acquittal.[14] The real difficulty is in the construction of the meaning of double jeopardy in these state constitutions. Applying orthodox rules of construction, what constitutes "jeopardy" would be determined by practice and the common law at the time the constitution was adopted.[15] But since state appeals were probably unknown when most of the state constitutions came into being, the framers most likely were not concerned with this branch of double jeopardy. A conjecture as to what the framers would have intended had they thought of it leads, naturally, to a determination of what today would be the most de-

[11] At least five states, Connecticut, Maryland, Massachusetts, North Carolina, and Vermont, have no double jeopardy clauses in their constitutions. See, State v. Palko, 122 Conn. 529, 191 A. 320 (1937); Commonwealth v. Perrow, 124 Va. 805, 97 S. E. 820 (1919); Livingstone, "Twice in Jeopardy," 6 GREEN BAG 373 (1894); 27 J. CRIM. L. 917 at 919 (1937).

[12] Ex parte Lange, 18 Wall. (85 U. S.) 163, 21 L. Ed. 872 (1873); Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797 (1904); Commonwealth v. Simpson, 310 Pa. 380, 165 A. 498 (1933); State v. Taylor, 180 Ark. 588, 22 S. W. (2d) 34 (1929). The contrary argument was expressed in Holmes' dissent to Kepner v. United States, supra, and in State v. Lee, 65 Conn. 265, 30 A. 1110 (1894).

[13] Murray v. State, 210 Ala. 603, 98 So. 871 (1924); Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529 (1915); State v. Miller, 14 Ariz. 440, 130 P. 891 (1913). An admirable discussion of what has and has not been considered to be double jeopardy under statutes authorizing state appeals is presented in 10 N. Y. UNIV. L. Q. REV. 373 (1933).

[14] For example, it has been held that, when a jury has been properly sworn and trial started, if the judge without necessity and without the consent of the accused dismisses the jury before verdict, such action amounts to an acquittal and plea of double jeopardy will be sustained. Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587; Mitchell v. State, 42 Ohio St. 383 (1884). But the contrary was asserted by Story in United States v. Perez, 9 Wheat. (22 U. S.) 579, 6 L. Ed. 165 (1824).

[15] 2 WILLOUGHBY, CONSTITUTIONAL LAW, 2d ed., 1160 (1929); Commonwealth v. Fitzpatrick, 121 Pa. 109, 15 A. 466 (1888); People v. Webb, 38 Cal. 467 (1869).

sirable, and hence partially accounts for the expansion of the use of state appeals.

2.

Several provisions of the Federal Constitution have been asserted as standing in the way of appeals by the state. The double jeopardy clause of the Fifth Amendment has been held to prohibit appeals by the government in federal courts.[16] While it has been contended that this clause should be a limitation on state action, it is now well settled that the provisions of the first eight amendments are restrictions on the national government only.[17]

The assertion that the privileges and immunities clause of the Fourteenth Amendment[18] operates as a restriction on state appeals is not as easily disposed of. A definite limitation was first put on this clause in the *Slaughter House Cases*,[19] where it was said that the privileges and immunities of the Fourteenth Amendment referred to such privileges of a United States citizen as "owe their existence to the Federal Government, its national character, its Constitution or its laws." This interpretation practically nullified the utility of the clause, since Article VI of the Constitution already protected from state abridgment rights derived from these sources.[20] A strong dissent in this and other cases maintained that the privileges and immunities guaranteed against state abridgment under the Fourteenth Amendment were those "fundamental rights which belong to citizens of all free governments."[21] This contention being denied, a further argument was advanced that, while the first eight amendments, as limitations on power, apply only to the Federal Government and not to the states, yet so far as they declare or recognize fundamental, common-law

[16] Kepner v. United States, 195 U. S. 100, 24 S. Ct. 797 (1904).

[17] Barron v. Baltimore, 7 Pet. (32 U. S.) 242, 8 L. Ed. 672 (1833); Commonwealth v. Perrow, 124 Va. 805, 97 S. E. 820 (1919); Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587.

[18] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" [§ 1, cl. 2].

[19] 16 Wall. (83 U. S.) 36 (1873).

[20] Article VI (2): "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

[21] Field, J., in dissent to the Slaughter House Cases, 16 Wall. (83 U. S.) 36 (1873). Also Bartemeyer v. Iowa, 14 Wall. (81 U. S.) 129 (1873); Butcher's Union v. Crescent City, 111 U. S. 746, 4 S. Ct. 652 (1884); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908). For a discussion of the development of the Court's interpretation of the privileges and immunities clause of the Fourteenth Amendment, see Warren, "The New Liberty under the Fourteenth Amendment," 39 HARV. L. REV. 431 at 436 ff. (1926).

rights of persons, these rights are theirs as citizens of the United States, and that the Fourteenth Amendment was intended to protect, at least, these rights from state abridgment.[22] Justice Harlan in a dissenting opinion[23] specifically designated the exemption from being put twice in jeopardy of life or limb for the same offense as one immunity that the Fourteenth Amendment must have included. The contention was flatly disposed of in *Maxwell v. Dow*,[24] in which the Court stated that the privileges and immunities under the Fourteenth Amendment are those which attach to a person *exclusively* as a United States citizen and specifically held that neither the Fourth, Fifth, nor Sixth Amendments granted rights which were of that character. These decisions precluded an attack on state appeals under this clause of the Constitution. But in the recent case of *Colgate v. Harvey*,[25] the Court for the first time declared a state statute unconstitutional under this clause and protected a specific "natural" right. This would indicate that the Court may be adopting a fundamental rights theory in interpreting the privileges and immunities clause of the Fourteenth Amendment.[26] If that is so, there would seem to be opened up a possible attack through this clause on permitting state appeals. Oddly enough, such an attack was attempted in a still more recent case[27] in the Supreme Court and dismissed with a citation of *Maxwell v. Dow*, the Court making no mention of *Colgate v. Harvey*.

3.

May the due process clause of the Fourteenth Amendment be invoked as a weapon in an attack on allowing the state to appeal in a criminal prosecution? The problem is particularly important to the

[22] This argument appears to have been first advanced in Spies v. Illinois, 123 U. S. 131 (1887), but the Court, deeming it not necessary to the decision of the case, declined to consider it. In GUTHRIE, LECTURES ON THE FOURTEENTH AMENDMENT 61 (1898), the author, having examined the reports and papers of the framers of this amendment, concludes, "it would seem to be entirely clear that the intention was that the essential rights of life, liberty, and property distinctly recognized in the Constitution and in the first eight amendments should, by the Fourteenth Amendment, be made the indisputable and secure possession of every citizen of the United States beyond the power of any state to abridge."

[23] Twining v. New Jersey, 211 U. S. 78 at 117, 29 S. Ct. 14 (1908).

[24] 176 U. S. 581, 20 S. Ct. 448 (1900).

[25] 296 U. S. 404, 56 S. Ct. 252 (1935). The right protected was the right of a citizen of the United States to transact business in other states without interference by the state of his residence. See particularly the dissenting opinion of Justice Stone, 296 U. S. at 445, where he points out that the majority is departing from their previous holding. It is difficult, however, to ascertain the precise purport of this decision.

[26] See 24 CAL. L. REV. 728 (1936); DODD, CASES ON CONSTITUTIONAL LAW, 2d ed., 871, note (1937), for discussion of this point.

[27] Palko v. State, 302 U. S. 319 at 327, 58 S. Ct. 149 (1937).

criminal defenders in those states which have no constitutional provision regarding double jeopardy.[28] There are several standard methods of approach used to ascertain whether a given right may be protected against state action under the due process clause.

One of the tests most frequently resorted to in determining the content of this clause is to ascertain whether the matter at hand is one of "those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[29] Undoubtedly the rule against double jeopardy was a well recognized doctrine of ancient common law, was part of the Magna Charta,[30] and was "acted on" by the state and federal governments, hence meeting the historical test. The rule that the state may not appeal in a criminal prosecution, however, was formulated as a part of the principle of double jeopardy for the first time by American courts. This historical test is not to be resorted to as conclusive, and if the procedure is necessary to provide protection to the state and society its novelty will not vitiate it.[31]

Another method used to ascertain the content of the due process clause is to apply a comparative test. The argument is that the restraints imposed by the due process of the Fifth and Fourteenth Amendments are identical; that the Fifth Amendment does not include any of the guarantees specifically enumerated in the first eight amendments, since the Constitution is not to be construed as redundant and repetitous; hence the Fourteenth Amendment does not contain these guarantees either. This argument was used by the Supreme Court in *Hurtado v. California* in determining that the institution of grand jury was not an essential element of due process in the Fourteenth Amendment[32] and its application would also exclude double jeopardy from the protection of that clause. The Court, however, has not adhered to this limited use of due process which it had earlier stated; it has come to view the character of the right, without regard to specific mention in the Constitution, as determinative of the content of

[28] See note 11, supra.

[29] Twining v. New Jersey, 211 U. S. 78 at 100, 29 S. Ct. 14 (1908). Due process is said to be the same as "law of the land" in Magna Charta. Hurtado v. California, 110 U. S. 516 at 545, 4 S. Ct. 111 (1884).

[30] State v. Felch, 92 Vt. 477, 105 A. 23 (1918); Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587; Ex parte Lange, 18 Wall. (85 U. S.) 163, 21 L. Ed. 872 (1873).

[31] 3 WILLOUGHBY, CONSTITUTIONAL LAW, 2d ed., 1707 (1929).

[32] 110 U. S. 516 at 534, 4 S. Ct. 111 (1884).

due process, and in recent years has held freedom of religion,[33] speech,[34] press,[35] and assembly[36] all of which are rights enumerated in the first eight amendments to be within the protection of the Fourteenth Amendment.[37] It has been conjectured[38] that if the Supreme Court continues its present expansion of the due process clause, every one of the rights which are guaranteed by the Bill of Rights (which, of course, would include the principle of double jeopardy) will be protected from deprivation by the state without due process.

Whether we consider the right of freedom from state appeals in a criminal prosecution as part of substantive due process under "liberty," or as purely procedural due process, the final test in ascertaining whether the right falls within the protection of the due process clause is whether abolition of the right violates a principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.[39] The test of fundamental rights is an approach more commensurate with the usual judicial thought processes than is any test of mere application of mechanical rules of construction. Through this test and by the process of judicial inclusion and exclusion of particular rights, a body of fundamental rights may be built up which give a real content to the due process clause. The approach is similar to that applied in determining the use of the privilege and immunities clause by Justice Field in his dissenting opinion to the *Slaughter House Cases*.[40] There is a distinction, however, between the protection given by the privileges and immunities clause and that given by the due process clause. In the former, if a fundamental right is said to come under it,

[33] Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571 (1924); Hamilton v. Regents of University, 293 U. S. 245, 55 S. Ct. 197 (1934).

[34] Herndon v. Lowry, 301 U. S. 242 at 259, 57 S. Ct. 732 (1937); De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937).

[35] Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936); Gitlow v. United States, 268 U. S. 652, 45 S. Ct. 625 (1925).

[36] DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937).

[37] A complete discussion of this subject may be found in Warren, "The New Liberty Under the Fourteenth Amendment," 39 HARV. L. REV. 431 (1926). See also 21 J. CRIM. L. 618 (1931); 32 COL. L. REV. 1430 (1932); 31 MICH. L. REV. 245 (1933); 35 MICH. L. REV. 1373 (1937).

[38] Warren, "The New Liberty Under the Fourteenth Amendment," 39 HARV. L. REV. 431 at 460 (1926). For other expressions of the fundamental right test, see 3 WILLOUGHBY, CONSTITUTIONAL LAW, 2d ed., 1707 (1929); Taylor & Marshall v. Beckman, 178 U. S. 548 at 602, 20 S. Ct. 890 (1900); Hebert v. Louisiana, 272 U. S. 312 at 316, 47 S. Ct. 103 (1926); Powell v. Alabama, 287 U. S. 45 at 68, 53 S. Ct. 55 (1932).

[39] Hebert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 48 A. L. R. 1102 at 1106 (1926).

[40] 16 Wall. (83 U. S.) 36 at 95 ff. (1872).

the state is ipso facto precluded from abridging it; in the latter, it may still be abridged if to do so is not an unreasonable deprivation.[41]

Where the issue has been presented, the courts have not agreed whether the right to be free from state appeals and double jeopardy is one of the fundamental rights. In two early federal cases,[42] the question whether freedom from double jeopardy was a fundamental right to be protected by the due process clause of the Fourteenth Amendment arose but not through the issue of state appeals. Both courts emphatically stated that such right is one of those fundamental rights safeguarded by this clause in the Constitution. In *State v. Lee*,[43] an early Connecticut case, the question whether immunity from state appeals in a criminal prosecution as part of double jeopardy was such a fundamental right as to be under the protection of the due process clause was squarely presented to the court and, in a well reasoned opinion, it was held that the "natural rights of the individual" and the "essential principles of jurisprudence" are most accurately followed when the controversy is finally settled in accordance with the law after both sides have been given the opportunity to appeal for errors. The same issue was before a Vermont court,[44] which refused to enumerate or attempt to define just what fundamental rights are, but decided that "relief from the vexations of a second trial is not one."

Thirty-five years ago the question was raised before the Supreme Court for the first time.[45] The Court did not consider it since it was not necessary to the decision. Recently the issue was squarely before the Court in *Palko v. State*.[46] In that case the defendant was convicted of

[41] The distinction is not so apparent in due process as applied to procedure as it is as affecting property rights. In the former, the guarantee is said to be not so much that a certain result has been obtained as that it has been reached in a fair way. See Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 90 A. L. R. 575 at 596 (1931).

[42] Ex parte Ulrich, (D. C. Mo. 1890) 42 F. 587 (judge improperly adjourned the case in the middle of the trial, thus acquitting the defendant, who raised the double jeopardy plea on the new trial); In re Bennett, (D. C. Cal. 1897) 84 F. 324. In the latter case the defendant was first tried on charge of assault with attempt to commit murder, and found guilty of assault with deadly weapon. A plea of double jeopardy was interposed when, after granting defendant a new trial, the trial again proceeded on the charge of assault with attempt to commit murder. The court said, 84 F. at 326, "The right of a person, after acquittal by a jury to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted, is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guarantee of due process found in the Fourteenth Amendment to the Constitution of the United States was intended, among other things, to secure to the citizen this right."

[43] 65 Conn. 265, 30 A. 1110 (1894). See 19 L. R. A. 342 (1893).

[44] State v. Felch, 92 Vt. 477, 105 A. 23 (1918).

[45] Dryer v. Illinois, 187 U. S. 71 at 85, 23 S. Ct. 28 (1905).

[46] 302 U. S. 319 at 328, 58 S. Ct. 149 (1937).

murder in the second degree. The state of Connecticut appealed in the manner provided by a statute.[47] The appellate court reversed the judgment, ordering a new trial. In the second trial the defendant was convicted of murder in the first degree. There being no double jeopardy provision in the state constitution on which to rely, defendant appealed on the ground that the statute authorizing the state to appeal constituted a denial of due process. The Court used the test of fundamental rights, after a careful examination of those things which have and have not been held to be "fundamental," but made no mention of the early lower federal court decisions which had held that double jeopardy was a fundamental right; it decided that, at least, the kind of double jeopardy to which the statute had subjected the defendant here was not a "hardship so acute and shocking that our polity will not endure it," and was not a denial of due process.

It has been held that such things as freedom of speech, press, and assembly,[48] the right to be represented by adequate counsel,[49] the right not to be convicted on confessions procured by torture,[50] and the right to have a proceeding free from fraud,[51] partiality,[52] and mob domination[53] all are fundamental rights protected by the due process clause. On the other hand, the rights to a grand jury indictment,[54] to accompany the jury to the scene of the crime,[55] or even to have a trial by jury[56] have been held not to be within the protection of this clause. It would seem that the division is a proper one. That the former group are either essential substantive rights, or rights which are absolutely necessary to a fair and adequate judicial trial, seems self-evident. The immunity from prosecution except as a result of indictment and the right to trial by jury are certainly very important. But the process of

[47] Conn. Gen. Stats. (1930), § 6494: "Appeals from the rulings and decisions of the superior court or of any criminal 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."

[48] Supra, notes 34, 35, and 36.

[49] Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932), discussed 31 MICH. L. REV. 245 at 252 (1933).

[50] Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936), noted 12 IND. L. J. 66 (1936).

[51] 3 WILLOUGHBY, CONSTITUTIONAL LAW, 2d ed., 1713 (1929).

[52] 3 ibid., 1713; Berger v. United States, 255 U. S. 22, 41 S. Ct. 1230 (1920).

[53] Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936).

[54] Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884); Gaines v. Washington, 277 U. S. 81, 48 S. Ct. 468 (1928).

[55] Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 (1931).

[56] Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448 (1900); New York Cent. R. R. v. White, 243 U. S. 188 at 208, 37 S. Ct. 247 (1916); Frank v. Mangum, 237 U. S. 309 at 340, 35 S. Ct. 582 (1914).

prosecution by information adequately supplants the former; and few would any longer maintain that a fair and enlightened system of justice could not be carried on without the use of jury trial. Freedom from state appeals in criminal cases is surely no more fundamental than jury trial and the right of indictment.

A double jeopardy arising as the result of a new case being brought on the same matter, after an acquittal on an original trial free from error, would, it would seem, be shocking to our sense of justice and, as those early federal cases held, be a deprivation of a fundamental right. But an immunity from a state appeal because of some error in the trial or in some preliminary ruling by the court does not seem to be the very essence of a scheme of ordered justice. A close examination will show that more good than harm would come from allowing the state to appeal because of error in any stage of proceedings.

The restraint on the right of the state to have an equal opportunity with the defendant to appeal has a demoralizing effect on all the parties concerned. The defense attorney is permitted nearly absolute freedom in what he may say or do. If he asks improper questions or makes improper remarks, the state is not said to be prejudiced. The prosecutor, on the other hand, must move cautiously else some slip will be seized upon as error reviewable by an appellate court. The judge is also placed in an uncomfortable position. No judge wants to be reversed. He will be inclined to give all the instructions offered by the defense and will, naturally, be very lenient in his rulings for the defendant so as not to commit reversible error. But since he cannot be reversed in his rulings as to the prosecution, he will probably make up for his leniency to the other side.[57]

Is a right which brings about such an unbalanced and demoralized system of justice as this "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?" By refusing it would we violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" In short, is the right to be free from an appeal by the state in a criminal prosecution a fundamental right to be protected from abridgment by the states under the due process clause of the Fourteenth Amendment? It is submitted that the Supreme Court reached the correct result in answering the question in the negative. Relaxation of the strict rule against state appeals in criminal prosecutions is but a part of an awakened administration of criminal law which has as its

[57] These and other evils from the prevention of state appeals are fully discussed in Miller, "Appeals by the State in Criminal Cases," 36 YALE L. J. 486 (1927); Brennan, "The Right of the State to Appellate Review in Criminal Cases," 1 OHIO ST. UNIV. L. J. 93 (1935); Horack, "Prosecution Appeals in West Virginia," 41 W. VA. L. Q. 50 (1934).

end the apprehension and conviction of criminals rather than their protection. Criminal defenders should not be permitted to interfere with this effort by using the due process clause as a weapon against it.

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