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# Recent Criminal Cases

# RECENT CRIMINAL CASES

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GAMING — POSSIBILITY OF RECOVERING MONEY LOST.—[Federal] While playing cards aboard a steamship en route from New York to San Francisco one Richter lost $36,620 to a professional gambler. When they arrived in San Francisco he wrote a check for the amount of the debt payable on the Continental Illinois Bank and Trust Co. of Chicago. The check having been paid in Illinois the plaintiff, Richter, sought to recover the payment upon the interpretation of an Illinois gambling statute (Smith-Hurd Illinois Statutes, c. 38, §330) which provides that any person who shall in a game of chance lose money or goods exceeding in value ten dollars, and having paid it to the winner, can recover the same or its full value by an action at law. However, if the loser does not within six months sue for the recovery of the money, "it shall be lawful for any person to sue for, and recover treble the value of the money, goods, chattels and other things; one half to the use of the county, and the other to the person suing." The Court based its decision on a conflicts of law rule to the effect that "a State statute which allows a recovery by the loser against the winner of money paid, within the State, in satisfaction of a gambling debt, has no application if the gambling debt was incurred in another jurisdiction, unless by the laws of that other jurisdiction the debt was illegal or void." In view of the fact that there was nothing in the declaration to show what the law was where the debt was incurred a demurrer to the complaint was sustained. *Richter* v. *Empire Trust Co.*, 20 F. Supp. 289.

Despite the fact that the actual decision was based upon the conflict of laws, the case gives rise to an interesting problem of the result of criminal statutes upon the civil liability of gamblers. Gaming is an agreement between two or more persons to risk their money or property in a contest or chance of any kind where one may be the gainer and the other the loser. *Portis* v. *State*, 27 Ark. 360 (1872).

At early common law in England gambling contracts, when fair and free from cheating, were assumed by the courts, without discussion, to be valid and the winner was allowed to recover his profits. *Sherbon* v. *Colebach*, 2 Vent. 175, 86 Eng. Reprints 377 (1671). However, when such contracts were *contra bones mores* (against good morals) they were void and unenforcible. *Atherfold* v. *Beard*, 2 T. R. 610, 100 Eng. Reprints 329 (1780).

Later the courts were not inclined to entertain actions based on gambling contracts. This was the result of a theory of discretion upon the part of the trial judge, who tried such cases only after all others were disposed of, and the appellate court in some instances even went so far as to intimate that the trial judge would have discretion to refuse to try such cases at all. *Brown* v. *Leeson,* 2 H. Bl. 43, 126 Eng. Reprints 419 (1792); *Egerton* v. *Furzeman,* 1 C. & P. 613, 171 Eng. Reprints 1338 (1825); *Thornton* v. *Thackeray,* 2 Y. & J. 156, 148 Eng. Reprints 872 (1828). This doctrine was repudiated in *Evans* v. *Jones,* 5 M. & W. 77, 151 Eng. Reprints 34 (1839) and the courts returned to the original rule that such contracts were valid and actionable, except certain classes of wagering contracts; among which are those forbidden by statute; those prejudicial to the interests and feelings of third persons, *Elthan* v. *Kingsman,* 1 B. & Ald. 683, 106 Eng. Reprints 251 (1818) (wager that one of two public carriers would be used by a certain person); those prejudicial to the public peace, *Gilbert* v. *Sykes,* 16 East 150, 104 Eng. Reprints 1045 (1812) (wager on the life of Napoleon); and lastly those contrary to public policy, *Hartley* v. *Rice,* 10 East 22, 104 Eng. Reprints 683 (1808) (restraint on marriage); *Lacaussade* v. *White,* 2 Esp. 629, 170 Eng. Reprints 478 (1798) (wager based on a war).

In America a number of the States refused to adopt the Common Law of England on gambling contracts because unsuited to the conditions and institutions in the new country, and, as a result, all gambling contracts were declared void by their common law. *Eldred* v. *Mallory,* 2 Colo. 320 (1870); *Cleveland* v. *Wolff,* 7 Kan. 184 (1871); *Love* v. *Harvey,* 114 Mass. 80 (1873); *Beattie* v. *Hoyt,* 3 Mont. 140 (1878).

In others it was held that the English Statutes against gaming passed prior to the American Revolution, were in force in their jurisdiction as part of the common law, (*Higdon* v. *Heard,* 14 Ga. 255 (1853); *Gough* v. *Pratt,* 9 Md. 526 (1856); *Evans* v. *Cook,* 11 Nev. 69 (1876)) or as adopted by statutes in general terms. An example of such a statute is to be found in Smith-Hurd, Illinois Statutes, c. 28, §1, which says "That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, . . . and are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." Also see *Sardo* v. *Fougeres,* 21 Fed. Cas. 490 (1829); *In re Opinion of the Justices,* 73 N. H. 625, 63 Atl. 505 (1906). Still another class of states held that the common law of England on the subject of gambling contracts was in force, and that gambling contracts not of the forbidden classes were valid, and enforceable by their common law. *Grant* v. *Hamilton,* 10 Fed. Cas. 978 (1842); *Ross* v. *Green,* 4 Harr (Del.) 308 (1843); *Campbell* v. *Richardson,* 10 Johns. (N. Y.) 406 (1813).

It is only natural that on a subject so near to the public interests and prejudices, the legislatures would soon alter the Common Law. Legislation in England slowly be-

gan to confine and restrict gambling. Thirty-Three, Henry VIII, chapter 9, did not make any game unlawful, but only made it unlawful to keep a gaming house. Sixteen Charles II, chapter 7 directed its force against fraud and deceit in play, still not holding gaming of itself unlawful. Excessive and fraudulent playing were made an indictable offense by Nine Anne, chapter 14. The Twelfth George II, chapter 28 was the first statute to specifically name the playing of certain enumerated games as unlawful. Thirteen George II added more games to the list of unlawful ones. The game of roulette was made illegal by 18 George II, chapter 34, §1. Such was the state of the law on gaming until Eighth and Nine Victoria, chapter 109 (1845) which legalized all games of skill but kept the penalties to be imposed on unlawful gaming. This statute expressly repealed 16 Charles II, 9 Anne, and 18 George II. *Jenks* v. *Turpins,* 13 Q. B. D. 505 (1884). From these statutes it may be assumed that where a contract does not violate the criminal statute the winner can enforce the debt against the loser.

In the United States legislation has been of three distinct types. A few of the States allow gaming, and a gambling contract in them is legal and binding upon the parties. Nevada held gaming illegal until 1931 when a statute was passed which permitted the licensing of gambling by the sheriff of the particular county where the gambling was to take place. One can readily see the effect of this statute by picturing Reno, which is a haven not only for divorcees but for gamblers as well, thus inflicting upon the soon-to-be divorced husbands the duty of paying their former wife's gambling losses as well as alimony. The second group of states hold gambling to be illegal and any contract resulting thereof void, the civil liability being *in pari delicto,* leaving the parties as they were with no redress in a court of law.

The last group have statutes making gaming illegal, but they also have a provision whereby the loser or a third person can recover from the winner the money lost. These statutes are patterned after the Ninth Statute of Anne, chapter 14, which gave to the loser of a gambling contract the right to resort to Equity for recovery. The state statutes, however, are by no means uniform. Some allow only the loser to recover (Compiled Statutes of Nebraska, c. 28, §945, permitting only heirs, legal representatives or creditors to recover; New Mexico Statutes Annotated, c. 58, §101); others put a time limitation on his right to recover and allow, after that has elapsed, any person to sue and recover three times the amount owed. Smith-Hurd Illinois Statutes, c. 38, §330. This latter group is also divided, the greater majority of the states allow the third person to keep the penal amount sued for; and second, those which require that one-half of the amount recovered be turned over to some county or state-supported institution. In this latter group are Illinois (Smith-Hurd, c. 38, §330), New York (Cahill's Consolidated Statutes, c. 41, §995), New Jersey (Compiled Statutes, c. 85, §6) and Ohio (Throckmorton's Code Annot. §5966).

The Statutes which allow recovery only to the loser are merely remedial (*Sofas* v. *McKee,* 100 Conn. 541, 124 Atl. 380 (1924); *Mann* v. *Gordon,* 15 N. M. 652, 110

Pac. 1043 (1910); *Wall* v. *Metropolitan Stock Exchange Co.*, 168 Mass. 282, 46 N. E. 1062 (1897), and their purpose was to discourage gambling by making the winnings insecure, and should not be too narrowly construed.

The second group are statutes which are both remedial and penal, *Cole* v. *Grove*, 134 Mass. 471 (1883); *Huntington* v. *Attrill*, 146 U. S. 657 (1892); *Wilson* v. *Head*, 184 Mass. 515, 69 N. E. 317 (1904). But penal statutes are not enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because of their resemblance, or because they be equally and in the same way demoralizing and injurious. *Shaw* v. *Clark*, 49 Mich. 384, 13 N. W. 786 (1882).

It seems that criminal laws against gambling are to a great extent ineffective and unenforceable due to the public feeling and political corruption that is prevalant in our larger cities. Also as a general rule the civil liability resulting from gambling has little effect on the prevalence of the crime. If the parties are left *in pari delicto* the civil law can have no effect. The latter type of statute giving the loser or a third person the right to recover money lost at gambling would be the most effective way for a civil law to enforce criminal gambling laws if it were not for certain practical difficulties. If a third party actually succeeded in getting judgments against gambling syndicates for treble the amount of their winnings it would wipe out gambling and gambling syndicates in a short time. Such a third person could make a fortune and the treasury of the state or some state institution would begin to resemble an endowment fund of some of our largest universities. However, this possibility has its drawback in the fear of all good citizens of retaliation by violence. If gambling syndicates were absent from the scene in most cities such a statute as the one in Illinois would be more effective in wiping out gambling than the most powerful police force.

BERNARD H. BERTRAND.

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CONSTITUTIONAL LAW—EX POST FACTO LAWS.—[Supreme Court] A Washington state court convicted the defendants of the crime of grand larceny. At the time of the offense, the Washington statute provided that sentence should be fixed by the court at a definite term within a fifteen year possible maximum. The statute also provided for an earlier release by parole at the expiration of a minimum term. A later statute passed after the commission of the offense, but before sentence, required the court to impose the maximum provided by the law. The Board of Prison Terms and Paroles was then to fix the duration of the prisoner's confinement. A sentence imposed on the defendants under the later statute was sustained by the highest state court. On appeal to the United States Supreme Court there was a reversal. Held: The amended statute was unconstitutional as an ex post facto law when applied retroactively to an offense committed before it was enacted. Constitution of the United States Art. 1 §10, *Lindsey* v. *Washington*, 301 U. S. 397 (1937).

Past construction of the Constitution has outlined rather definitely the limitation of the phrase ex post facto. It has been held that the restraint is solely upon the exer-

cise of legislative power and does not prevent a court from departing from a prior decision even if it would be to the detriment of a defendant who committed an offense when the prior ruling was in force. *Frank* v. *Mangum,* 237 U. S. 309 (1915); *Ross* v. *Oregon,* 227 U. S. 150 (1912). Further, from the first significant interpretation of ex post facto it has been held to apply only to criminal law. *Calder* v. *Bull,* 3 Dall. 386, 1 Law. Ed. 648 (1798). Cooley in his treatise, however, stated that the confinement of ex post facto to criminal law was in direct opposition to what seemed to be the natural meaning of the term. Cooley, Constitutional Limitations, Vol. 1, p. 541. Although there have been many attempts to expouse a formula which would serve as a measuring stick in determining when a law is ex post facto, probably none has been more effectively applied than the one laid down in *Kring* v. *Missouri,* 107 U. S. 221 (1882), e. g. ". . . any law is ex post facto which is enacted after an offense is committed and which in relation to it or its consequences alters the situation of the accused to his disadvantage."

If the various states in the union had all adopted a plan of prison sentence which prescribed a set term for each offense, there would be little difficulty encountered in determining whether or not a new statute fixing a different term was disadvantageous to the accused. Fortunately, as most criminal psychologists will testify, this is not the usual type of statute, but on the contrary considerable leeway is allowed for the individual case. There are maximum and minimum provisions, indeterminate sentence provisions and countless modes of parole. Under such provisions it often becomes difficult to ascertain whether a newly enacted statute is more or less advantageous to an accused from the standpoint of actual length of incarceration. In many cases it would seem that an accurate determination could only be made by looking to the application of the newly enacted statute in the particular case before the court. The Supreme Court has held, however, that the ex post facto nature of a statute is to be determined by the standard erected in the statute and not the actual sentence imposed on the complaining defendant. 11 Amer. Juris. 1184.

In view of the fact that a statute fixing a more advantageous sentence for an accused is not ex post facto (*State* v. *Malloy,* 237 U. S. 180 (1915)), a statute diminishing the minimum period of imprisonment does not violate the constitution. *People* v. *Hayes,* 140 N. Y. 484, 35 N. E. 951 (1894). Also, a reduction of a maximum sentence is not ex post facto. *People ex rel. Liebowitz* v. *Warden of New York Penitentiary,* 174 N. Y. S. 823 (1919). However, where a statute reduced the maximum sentence, but increased the minimum, the statute was said to be ex post facto because the accused was deprived of the possibility of a smaller sentence which he might have gotten under the old law in force when the offense was committed. *Garvey* v. *People,* 6 Colo. 569 (1883).

A law shortening the time between sentence and execution has been held ex post facto on the theory that a person desires to live as long as possible, (*In re Tyson,* 13 Colo. 482, 22 Pac. 810 (1889)), and on the same reasoning a new statute extending the time between sentence and execution has been

considered advantageous to the prisoner. *Rooney* v. *North Dakota,* 196 U. S. 319 (1905). A law depriving a life termer of the benefits of parole was considered ex post facto when retroactively applied. *State* v. *Board of Paroles,* 155 La. 699, 99 So. 534 (1924). Also, the repeal of a statute which allowed a defendant to escape a death sentence by pleading guilty to a first degree murder charge was held ex post facto when applied to a defendant who committed murder while the statute was in force. *Kring* v. *Missouri,* 107 U. S. 221 (1882). On the other hand a statute enhancing the punishment for a second or subsequent offense is not ex post facto merely because the first or prior offense occurred before the statute was enacted. *Carlesi* v. *New York,* 233 U. S. 51 (1914). An indeterminate sentence law, operating retroactively, has been quite generally held not to be ex post facto if falling within the maximum and minimum sentence of the prior law. The new indeterminate sentence law was said merely to prescribe a different method of fixing the period of incarceration of the prisoner. *Davis* v. *State,* 152 Ind. 37, 51 N. E. 928 (1878); *Commonwealth* v. *Kalck,* 239 Pa. 533, 87 A. 61 (1913). *Contra: Ex Parte Lee,* 177 Cal. 690, 171 Pac. 958 (1918); *State* v. *Callaghan,* 109 La. 931, 33 So. 931 (1903).

Reverting now to the instant case, on the fact of the newly enacted statute it would seem more disadvantageous to the defendant than the former statute, for the defendant under the new procedure is automatically given the maximum sentence while under the old statute a definite term was to be fixed somewhere between the maximum and a minimum. Under both statutes there is provision for parole at an earlier date than the sentence fixed by the court. Under both statutes there is possibility that a defendant might serve a full 15 year term, but under the earlier procedure a defendant might get a reduction from the maximum, first, when the judge set the definite sentence, and second, by way of parole later. Under the later enacted statute the defendant could look only to the Parole Board for a reduction in term from the maximum sentence. The newly enacted statute clearly seems more disadvantageous to an accused for he is deprived of the possibility that the judge, when making the sentence after the trial, will reduce the term.

GERALD MILLARD.

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EVIDENCE—ADMISSION OF PRIOR OR SUBSEQUENT CRIMINAL CONDUCT OF A DEFENDANT IN A CRIMINAL CASE. —[North Carolina] The defendant was found guilty of conspiracy to rob and robbery. The alleged co-conspirator, after entering a plea of guilty turned state's witness. On cross examination the co-conspirator was impeached and thereupon as a means of corroborating his testimony the state introduced evidence that the defendant and the co-conspirator, after the offense charged, conspired to and did burn an automobile with intent to defraud the insurer. The defendant objected to the evidence of the subsequent crime, but the trial court admitted it on the ground that it showed intent. On appeal affirmed. *State* v. *Flowers,* 211 N. C. 721, 192 S. E. 110 (1937).

In criminal trials evidence showing the commission by the defendant of a separate and independent

crime from the one for which he is being tried is generally inadmissable. *People* v. *Goldman,* 318 Ill. 77, 148 N. E. 873 (1925); *Johnson* v. *State,* 19 Ala. App. 141, 95 So. 583 (1933). The reason for excluding evidence of prior or subsequent crimes is probably twofold. First, the admission of such evidence tends to violate the rule against allowing the state to introduce the bad character of the defendant before he has put his good character in issue. This rule has its foundation in that, "it is very difficult for juries to understand clearly the precise purpose for which such testimony is allowed and more difficult still for them not to be influenced in making up their verdict by the general impression of the testimony rather than by the particular effect intended for it to have." *State* v. *Jeffries,* 117 N. C. 727, 728, 23 S. E. 163 (1895). The second and more important reason for excluding the evidence is that proof of another crime committed by a defendant is only circumstantial evidence that he committed the crime in question. As circumstantial evidence it will be admitted only if its relevancy outweighs its prejudicial effect. There can be little doubt of the prejudicial effect on the jury when evidence of another crime committed by the defendant is introduced. It is generally felt that such evidence is not sufficiently relevant to warrant its admission for there is a logical impropriety in inferring from the commission of one crime, such as rape, that the defendant committed a second crime such as bank robbery.

Nevertheless in certain situations where a logical inference can be drawn the law has been crystalized into exceptions. Thus where intent is in issue, as no intent to steal in larceny, evidence of another similar crime of larceny prior to the one in question may be introduced to show that the taking was not innocently done. *People* v. *Sharp,* 107 N. Y. 468, 14 N. E. 319 (1887). Also, where knowledge is in issue, as in receiving stolen goods, proof of a prior commission of a similar crime will be allowed circumstantially to show knowledge that the goods were stolen in the case being tried. *Sapir* v. *United States,* 174 Fed. 219 (C. C. A. 2d, 1909). The recent notorious poison case involving Anna Hahn, illustrates another exception where other crimes can be introduced to show a scheme or design involved in both cases.

In the instant case the court said that it admitted the evidence of the subsequent conspiracy to defraud an insurance company to prove the intent necessary in the crime of conspiracy to rob. Intent does not seem to be the gist of the crime of conspiracy, but rather the combining or associating of an unlawful purpose. But even assuming that intent to commit an unlawful act was in issue it would seem that the intent involved in the two crimes was different for one crime involved an intent to defraud an insurance company and the other case an intent to rob. Thus on the intent issue the crimes were not "similar" and the court seems to have erred.

The evidence of the subsequent conspiracy might have been introduced on the analogy to the sex cases, for in both situations the criminal association is the gist of the crime. In adultery cases evidence is admissible of prior or subsequent acts of adultery between the same person. *People* v. *Peter-*

*son,* 102 Cal. 239, 36 Pac. 436 (1916); *Commonwealth* v. *Bell,* 166 Pa. 405, 31 Atl. 123 (1895). The admission is rationalized by reasoning that evidence of another sexual relationship with the same person indicates a propensity between the parties to associate in this way and consequently there is a logical propriety in assuming from the past act, that the association in question took place. Although there would seem to be less of a propensity to conspire with the same person than to engage in sexual relations, the likelihood seems sufficient to justify admission on analogy.

WILLIAM LIDSKER.

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CONSTITUTIONAL LAW—RIGHT OF THE STATE TO APPEAL.—[Supreme Court] The defendant was indicted for murder in the first degree in the State of Connecticut and was found guilty of murder in the second degree. The State with the permission of the trial judge pursuant to statute (Conn. Gen. Stat. (1930) §6494) appealed. The appellate court of Connecticut reversed the judgment for errors of law and granted a new trial (*State* v. *Palko,* 121 Conn. 669, 186 Atl. 657 (1936) in which the jury found him guilty of murder in the first degree and the court sentenced him to punishment of death. The Supreme Court of Errors of Connecticut affirmed the conviction and upheld the statute as not violating either the Constitution of Connecticut or of the United States. *State* v. *Palko,* 122 Conn. 529, 191 Atl. 320 (1937). On appeal to the Supreme Court of the United States, affirmed. *Held:* A statute permitting appeals in criminal cases by the state is not a denial of due process guaranteed by the Fourteenth Amendment of the Constitution of the United States. *Palko* v. *State of Connecticut,* 58 S. Ct. 149 (1937).

Under the Connecticut statute appeals by the state lie for all errors of law in the same manner and effect as if appealed by the accused. The Minnesota view, directly opposed, does not permit an appeal by the state under any circumstances even on a point of law before the actual trial. *State* v. *McGrorty,* 2 Minn. 187 (1858). Between these two extremes the states have reached a variety of results. Some state statutes provide for a limited appeal by the prosecution after the defendant has been convicted. In Illinois appeal by the state is a matter of right after a conviction in a quasi-criminal case. *Baldwin* v. *City of Chicago,* 68 Ill. 418 (1873). In Indiana an appeal is granted to the state if the Supreme Court can render a decision upon a matter of law without passing upon the facts of the case. *The State* v. *Overholser,* 69 Ind. 144 (1879). In Arkansas an appeal lies on behalf of the state to secure a correct and uniform administration of the law but without prejudice to the accused. *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057 (1910). The majority of states do not allow an appeal by the prosecution after the trial has begun, although most state statutes do provide for some degree of appeal by the state after an indictment has been quashed. In an early Maryland decision it was recognized that for purposes of "uniformity of decision, it is right and proper" for the state to appeal after an indictment has been quashed. *The State* v. *Buchanan,* 5 Harr. & J. 317, 330 (1821). Thus also an appeal may be had by the

state in Alabama if the constitutionality of a statute is questioned. *State* v. *Street,* 117 Ala. 203, 23 So. 807 (1897). In Michigan the judgment in favor of the defendant may be reviewed in behalf of the state providing the appeal is taken before the verdict. *People* v. *Swift,* 59 Mich. 541, 26 N. W. 694 (1886). For a summary of the law in all jurisdictions in regard to the right of appeal by the state from quashed indictments see (1935) 92 A. L. R. 1137. In the federal courts prior to the passage of any legislation by Congress it was held that under the Fifth Amendment a writ of error would not lie on behalf of the United States. *United States* v. *Sanges,* 144 U. S. 310 (1891). Since 1907 a limited right of appeal is allowed the federal government. (18 U. S. C. A. §682.)

The Connecticut Constitution contains no provision against double jeopardy although one is found in the constitutions of most states and in the Fifth Amendment of the Constitution of the United States. Probably the reason why more state legislatures have not passed statutes similar to the Connecticut provision allowing the state a writ of error after the defendant has been tried is the fear based upon earlier decisions that such a statute would be unconstitutional as violating the double jeopardy provision of the state constitution. The principle of double jeopardy should not bar appeals by the state since logically and rationally there is but one jeopardy and one trial and the second trial after appeal by the state is not a new case but is a legal disposition of the same original case tried in the first instance. *State* v. *Lee,* 65 Conn. 265, 30 Atl. 1110 (1894). By a decision of five to four, in *Kepner* v. *United States,* 195 U. S. 100 (1894), the provisions of the Philippine Law taken from the Bill of Rights of the Constitution of the United States were construed to prohibit an appeal by the United States after a verdict of acquittal. In a cogent dissent written by Justice Holmes the same reasoning was followed as in *State* v. *Lee, supra.* Under the latter view there is but one continuing jeopardy from the beginning to the end of the cause which is not limited by any "rule that a man may not be tried twice in the same case." *Kepner* v. *United States, supra* at 134.

Reliance on the doctrine of double jeopardy to prevent an appeal by the state for errors of law in trial results in an absurd situation. If the result favors the defendant then the determination is final and conclusive regardless of error, but if it favors the state then it is subject to appeal if the defendant is so inclined. If the state is allowed an appeal, criminal defense counsel will realize that victory is not complete with an acquittal won by unfair tactics, or improper argument, and that success in getting unsound rulings may cost the defendant his favorable verdict. See Miller, *Appeals by the State in Criminal Cases* (1926) 36 Yale L. J. 486. The usual reasoning of the cases which hold that the constitutional guarantee against double jeopardy is violated if the state appeals is that otherwise an avenging sovereign could appeal until the defendant was convicted. *State* v. *Jones,* 7 Ga. 422, 425 (1849); *State* v. *Solomons,* 14 Tenn. 246 (1834). To this argument the observation of Justice Holmes is sound. "At the present time in this country, there is more

danger that criminals will escape justice than that they will be subjected to tyranny." *Kepner* v. *United States, supra* at 134.

Since the accused in the *Palko* case could not allege any infringement of double jeopardy under the Connecticut Constitution he contended that the Connecticut procedure was a denial of the due process clause of the Fourteenth Amendment. He asserted further that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. It has been held that the rights guaranteed by the Fifth Amendment are not automatically embodied in the Fourteenth Amendment. *Hurtado* v. *California,* 110 U. S. 516 (1883). However, in *Twining* v. *New Jersey,* 211 U. S. 78 (1908), the court held that "it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Twining* v. *New Jersey, supra* at 99.

In determining whether an accused has been deprived of his life or liberty without due process of law the Supreme Court has held that a fair hearing must be granted to the accused although a particular form of procedure is not required to be adopted by the state "so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." *Rogers* v. *Peck,* 199 U. S. 425, 435 (1905); *Walker* v. *Sauvinet,* 92 U. S. 90 (1875); *Frank* v. *Mangum,* 237 U. S. 309, 326 (1914); *Holmes* v. *Conway,* 241 U. S. 624 (1915). But the federal government should leave to the states "the right to decide for themselves what shall be the form and character of the procedure." *Maxwell* v. *Dow,* 176 U. S. 606, 605 (1899); *In re Converse,* 137 U. S. 624, 632 (1890). It is not to be presumed that if the freedom of a person is improperly restricted "that the state authorities will not afford the necessary relief." *Rogers* v. *Peck, supra* at 434. Nor does the Fourteenth Amendment "profess to secure to all persons in the United States the benefit of the same laws and remedies. Great diversities in these respects may exist in two states separated only by an imaginary line." *Missouri* v. *Lewis,* 101 U. S. 22, 31 (1879). The remedy if any exists to alter the procedure is with the state legislature as "the power of the people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by a forced construction of the Federal Constitution." *Twining* v. *New Jersey, supra* at 114.

Another frequently applied test to determine if due process has been violated has been to inquire whether the state action violates "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Herbert* v. *Louisiana,* 272 U. S. 312, 316 (1926). In applying the test of fundamental principles the court has sounded the warning that the rights of the state to regulate its procedure and their concept of policy should not to readily, lightly

or hastily be superseded on the ground that they deny due process since opinions may differ as to policy of fairness and the meaning of due process should not be strained because the Supreme Court may think the right to be of great value. *Snyder* v. *Massachusetts,* 291 U. S. 102, 122 (1933), noted (1934) 24 J. Crim. L. 1101; *Twining* v. *New Jersey, supra* at 113.

In the application of these principles by the Supreme Court the results have all followed the principle that liberty and justice can not be denied by the states to the particular defendant. Thus it has been held to be a denial of due process if a crimnial conviction is procured solely by the use of testimony known to the state authorities to be perjured, *Mooney* v. *Halohan,* 294 U. S. 103 (1934), noted (1935) 25 J. Crim. L. 943; or if the assistance of counsel is denied in a capital case, *Powell* v. *Alabama,* 287 U. S. 45 (1932), noted (1933) 23 J. Crim. L. 841; or if a conviction is procured by confessions extorted by torture, *Brown* v. *Mississippi,* 297 U. S. 278 (1935), noted (1936) 27 J. Crim. L. 125; or if the trial is under mob domination, *Moore* v. *Dempsey,* 261 U. S. 86 (1922); but see also *Frank* v. *Mangum, supra,* where under similar facts the determination by the state court was given great if not conclusive weight; or if the state statute creates a presumption of criminality that is arbitrary and unreasonable, *Manley* v. *Georgia,* 279 U. S. 1 (1928); or if the defendant is tried before a judge having a direct, personal and substantial interest in conviction, *Tumey* v. *Ohio,* 273 U. S. 510 (1926).

It has been held not to be a denial of due process to indict by information rather than by grand-jury, *Hurtado* v. *California, supra;* to take away the privilege against self-incrimination, *Twining* v. *New Jersey, supra;* or to provide for trial by jury of eight, *Maxwell* v. *Dow, supra;* or a struck jury in a criminal case, *Brown* v. *New Jersey,* 175 U. S. 172, 175 (1899); or to be tried by the court after waiving jury trial, *Hallinger* v. *Davis,* 146 U. S. 314, 319 (1892); or to deny to the defendant the privilege of being present at a view, *Snyder* v. *Massachusetts, supra;* or for the state to limit the right of appeal, *McKane* v. *Durston,* 153 U. S. 684, 687 (1893); or if the highest state court renders an erroneous decision while acting within its jurisdiction, *In re Converse, supra;* or upon a question of law holds contrary to prior decisions, *Patterson* v. *Colorado,* 205 U. S. 454, 461 (1906).

The *Palko* case decided that an appeal by the state for errors of law is not a denial of due process. It is hoped that other courts will follow the lead of the Supreme Court in this case in making constitutional and other guarantees, depend as far as possible, on substance rather than form. Whether a statute which gives an unlimited right of appeal to the state including the right to appeal from a verdict of acquittal not supported by the evidence although the trial is free from legal error would violate due process of law under the Fourteenth Amendment is not answered by the *Palko* case. If the reasoning of Justice Holmes in *Kepner* v. *United States, supra,* is followed it is clear that there would not be a violation of double jeopardy since he would limit the doctrine to double jeopardy to forbid

a trial in a new and independent case where the defendant had already been tried for the offense. To force an accused to be acquitted in a trial where the verdict is supported by the weight of the evidence might reasonably be said to violate his fundamental liberties guaranteed by the Fourteenth Amendment, especially in view of the much greater hardship which would be imposed in this situation than where the trial is required to be only free from legal errors.

However aside from constitutional difficulties, other factors should be considered before a state legislature should give the prosecution either a right to appeal on the weight of the evidence or for errors of law. The hardship involved for the defendant in the expense of appeal and the indictment hanging over his head for an indefinite period, as well as the desirability of finality of the judgment should be considered. Administrative expediency should also be weighed. The number of such appeals as compared with the number of cases coming to the prosecuting authorities which cannot even be tried because of inadequate facilities for trial might be urged as a reason for not giving the prosecution even more work after a jury has acquitted the defendant. These considerations to some extent counterbalance the unfairness to the state of giving the accused the advantage of all errors which take place during the trial.

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