

12-1950

## In Re State Appeals in Criminal Prosecutions

M. A. Shuler Jr.

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Shuler, M. A. Jr. (1950) "In Re State Appeals in Criminal Prosecutions," *South Carolina Law Review*: Vol. 3 : Iss. 2 , Article 7.

Available at: <https://scholarcommons.sc.edu/sclr/vol3/iss2/7>

This Note is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

## NOTES

### IN RE STATE APPEALS IN CRIMINAL PROSECUTIONS

#### INTRODUCTION

At the outset, the writer wishes to convey to his readers that it is not his purpose to review extensively the history of the law relative to appeal. To do so would be to attempt, unsuccessfully, to cover a subject which has been thoroughly covered.<sup>1</sup> Nor will the author attempt to cover in its entirety the criminal appellate field as it exists today in England and in this country. This too, has been substantially accomplished.<sup>2</sup> The intent of the author is to present certain aspects of this subject to the Bench, Bar, General Assembly, and future law-makers and dispensers of justice—the law student—of South Carolina for consideration relative to future legislation.

#### HISTORY

In order to establish a premise for further discourse, it seems proper to peer briefly into the pages of English history relative to appeal in criminal actions. One of the early instances of appeal was from a "verdict" in the action of appeal of felony. The appeal of felony must not be confused with the present day appeal in criminal cases; in reality it was the title of an action which existed in England after the Norman Conquest, and was a private accusation against a wrongdoer made by the one wronged or by his representative. In his work on Criminal Appeals<sup>3</sup> Professor Orfield writes:

The appeal was tried by battle. The appellor made a minute and highly formal statement before the coroner as to the nature of the offense. The coroner enrolled the statement. The appearance of the appellee was then secured by publishing the appeal at five successive county courts. If he failed to appear he was outlawed. If he did appear, he might resort to a number of pleas or exceptions. If he did not plead or pleaded inadequately, battle was waged except where there was a very strong case against the appellee. If the appellee was defeated before the stars appeared he was hanged. If not, or if he won, he was acquitted. At one time the appellee in spite of such acquittal could still be tried by jury on indictment. After 1846,

1. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939); MILLER, APPEALS BY THE STATE IN CRIMINAL CASES, 36 Yale L. J. 486 (1927).

2. Note 1, *supra*.

3. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939), p. 14.

indictments were usually tried first, *the defendant still being subject to an appeal even though acquitted by the jury.* [Italics added.]

Perhaps that which has influenced our present day judicial process more than any other one thing is the writ of error. The date at which the writ entered the judicial process seems to be somewhat obscure. It seems certain however, that the writ of error did not issue as a matter of right prior to the American Revolution. Lord Mansfield, in reviewing the history of the writ of error, made the following observations:<sup>4</sup>

After a writ of error was granted by the king the attorney-general never made any opposition; because either he had certified there was error, and then he could not argue against his own certificate; or the crown meant to shew favor, and then he had orders "not to oppose". The king, who alone was concerned as a prosecutor, and who had the absolute power of pardon, being willing that the outlawry should be reversed, this court [King's Bench] reversed upon very slight and trivial objections, which could not have prevailed if any opposition had been made.

In commenting on the writ of error, Sir William Blackstone stated:<sup>5</sup>

A judgment may be reversed by a *writ of error*: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment of other parts of the record: . . . These writs of error, *to reverse judgment in case of misdemeanors, are not to be allowed of course,* [Italics Added] but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiae*. But writs of error to review attainders in capital cases are only allowed *ex gratia*; and not without express warrant under the king's sign manual, or at least by the consent of the attorney-general . . . These therefore can rarely be brought by the party himself, especially where he is attainted for an offense against the state: but they may be brought by his heir, or executor, after his death, in more favorable times: which may be consolation to his family . . .

4. Rex v. Wilkes, 4 Burr 2527, 98 Eng. Rep. 327 (1770).

5. 4 BLACKSTONE'S COMMENTARIES 384, 385 (4th Ed. 1771).

The Criminal Appeal Act, 1907,<sup>6</sup> abolished the writ of error. This Act allows a defendant a review of his case on its merits, with the absolute right vesting in the defendant to appeal on a question of law, or on a question of fact with permission of the Court of Criminal Appeals, or upon the certificate of the trial judge, or on questions of mixed law and fact, or on any other ground appearing to the court to be sufficient. The Court of Criminal Appeal is granted wide powers in the disposition of a case. It may go to the extent of quashing the sentence of the trial court, of directing an acquittal, or of substituting a more or less severe sentence.

The Act provides that on a question of law of exceptional public importance, the Director of Public Prosecutions, or the prosecutor, or the defendant, with the sanction of the Attorney-General, may appeal from a decision of the Court of Criminal Appeals to the House of Lords.<sup>7</sup>

Whether the crown could appeal prior to passage of the Criminal Appeal Act presents a question on which there is divided opinion. Mr. Justice Buchanan, in *State v. Buchanan*,<sup>8</sup> affirmatively answers the question, concluding that "in the opinion of Lord Hale, the king might have a writ of error in a criminal case; since it would be absurd to say that a man who had obtained a judgment of acquittal for a defect in the indictment, or on a special verdict, could never again be indicted for the same offense, until that judgment was reversed by a writ of error, if a writ of error would not lie."

On the other hand, the Supreme Court of the United States, per Mr. Justice Gray, has taken the opposite view.<sup>9</sup> It has said that the theory of the king having a writ of error after judgment for the defendant had little support beyond sayings of Lord Coke and Lord Hale, which seemed to apply, but by no means affirmed it as a fact. It is apparent that Mr. Justices Buchanan and Gray referred to the same quotations of authority, the latter jurist discounting Lord Hale to be such authority as to establish as a fact the right of the crown to appeal. Judicial consensus affirms the opinion of Mr. Justice Gray.

#### CONFUSION IN APPELLATE LAW IN THE UNITED STATES TODAY

It has been shown that a state of confusion in regard to criminal appellate law existed in England until passage of the Criminal

6. 7 EDW. 7, § 20 (1907) Effective April 18, 1908.

7. Note 6, § 1(6) *supra*.

8. 5 H. & J. 317, 9 Md. Rep. 259 (1821).

9. United States v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445 (1892).

Appeal Act, 1907. Some of this confusion carried over into the jurisprudence of the United States and is in existence today. This can be explained in part by the fact that the colonists from England brought with them only so much of the Common Law of England and acts of parliament as were applicable to their new conditions and surroundings. A great part of this law remained with them when they became independent states, some of it being incorporated into the constitutions of the several states, other portions being adopted by statute.<sup>10</sup> Because of the existing disorder in the appellate law of England, the several states apparently enacted legislation as the state deemed expedient, in order to obviate any internal confusion in regard to criminal appellate practice.

On one point, however, there is no substantial diversity of legislation, for no state refuses to allow an accused the right of appeal, so long as the rules of criminal procedure of the state are adhered to.

A manifest lack of uniformity crops out when state appellate legislation is reviewed. In a majority of the states appeals are allowed the prosecution.<sup>11</sup> Several of the states however, deny the prosecution any right of appeal.<sup>12</sup> To bear out the diversity of criminal appellate legislation, consider the following legislation:

Minnesota refuses to allow the state to appeal or seek a review in a criminal case at any time, regardless of circumstances, even on a point of law arising prior to trial. That court conceded however, that the legislature might properly confer upon the state the authority to secure the opinion of the court of last resort upon questions of law arising at the trial, before subjecting the party charged to a final trial.<sup>13</sup> The pertinent sections of the Minnesota statutes reveal that the legislature has not seen fit as yet to grant to the state that right,<sup>14</sup> as clearly the statute speaks only in terms of appeals by the defendant.

Under a section of the Penal Code of California providing that "an appeal may be taken by the people . . . from an order made after judgment, affecting the substantial rights of the people," it was held that the people could appeal from a court order amend-

10. CLARK, HANDBOOK OF CRIMINAL LAW (1894), p. 17.

11. For a very comprehensive, if not exhaustive, coverage of state statutes allowing appeals by the prosecution, see Notes, 92 A.L.R. 1137, 113 A.L.R. 636, 157 A.L.R. 1065; MILLER, APPEALS BY THE STATE IN CRIMINAL CASES, Note 1, *supra*.

12. A review of the state statutes discloses that denial of appeal in behalf of the state is the law in Massachusetts, Minnesota, Texas, Florida and Illinois.

13. City of St. Paul v. Stamm, 106 Minn. 81, 118 N. W. 154 (1908).

14. MINN. CODE, § 632.01 through § 632.10 (1941).

ing and modifying a judgment of conviction by substituting a fine for an original prison sentence.<sup>15</sup>

Nebraska allows the county attorney to bring a bill of exceptions to the state supreme court to determine a question of law to govern in pending cases, or that may arise subsequently in similar actions, but determination of the law has no effect on the accused in the action appealed from.<sup>16</sup>

Where the punishment is by fine alone, Kentucky allows the state to appeal, even from a directed verdict for the defendant, in misdemeanor cases.<sup>17</sup> The Supreme Court of Georgia has gone so far as to hold that it will not consider points raised by the state on an appeal taken by the defendant.<sup>18</sup> Louisiana only allows appeals by the state from judgments quashing indictments which charge capital offenses; or offenses whose penalty may be imprisonment at hard labor.<sup>19</sup> But in Maryland, even in the absence of a statute allowing the state to appeal, it has been held that the state is entitled to a review of a judgment in favor of a defendant if such judgment is rendered prior to a verdict.<sup>20</sup>

In South Carolina, the state is granted the right of appeal from an order granting a new trial, where the grant was wholly predicated on an error of law,<sup>21</sup> or from an order quashing an indictment,<sup>22</sup> or from a judgment which substantially amounts to a quashing of an indictment.<sup>23</sup> But the state may not appeal from an acquittal. For example, in a prosecution for assaulting and resisting an officer, under the charge of the trial judge, the defendants were acquitted. The state appealed, alleging error in the charge. Our Supreme Court, basing its decision on the immunity from double jeopardy as is found in the state constitution,<sup>24</sup> said: "Whether or not the circuit judge erred in his rulings of the law, the defendants were acquitted and are now out of court".<sup>25</sup>

15. *People v. Maggio*, 96 Cal. App. 409, 274 Pac. 611 (1929).

16. NEB. REV. STAT., § 29-2314 through § 29-2316.

17. *Commonwealth v. Williams*, 230 Ky. 71, 18 S. W. 2d 881 (1929); *Commonwealth v. Bowman*, 267 Ky. 602, 102 S. W. 2d 382 (1936).

18. *Bryan v. State of Georgia*, 3 Ga. App. 26, 59 S. E. 185 (1907).

19. *State v. Harrison*, 154 La. 1011, 98 So. 622 (1923).

20. Note 8, *supra*.

21. *State v. Deschamps*, 126 S. C. 416, 120 S. E. 491 (1923).

22. *State v. Young*, 30 S. C. 399, 9 S. E. 355 (1888); *State v. Bouknight*, 55 S. C. 353, 33 S. E. 451 (1891).

23. *State v. Long*, 66 S. C. 398, 44 S. E. 960 (1903).

24. S. C. CONST. Art. 1, § 17.

25. *State v. Gathers*, 15 S. C. 370 (1881), followed in *State v. Ivey*, 73 S. C. 282, 53 S. E. 428 (1905).

## DOUBLE JEOPARDY

Thus far, attention has not been directed to a statute providing for an appeal by the state from an acquittal of a defendant of a crime punishable either by death or imprisonment. Prior to 1886, no state enacted a statute allowing the state to appeal under such circumstances.<sup>26</sup> Why? The denial of the state to appeal from such acquittals rested, and still rests in forty-six of the United States, partly on the historical background, partly on our constitutional law, and partly on public policy. But without doubt, the true basis for such denial rests on the doctrine of double jeopardy.<sup>27</sup>

It has been said that the doctrine of double jeopardy is no more than the adoption of the Common Law pleas of *autrefois acquit* and *convict*,<sup>28</sup> with the important distinction that the former pleas presuppose a *verdict*, while the latter may serve to discharge an accused prior to a verdict.<sup>29</sup> A voice of authority states that the double jeopardy doctrine grew up in England at a time *when there was no right of appeal*.<sup>30</sup>

Double jeopardy is applicable to cases in which an accused is placed in danger of life and limb; or, as stated to be South Carolina law, jeopardy attaches when a legal jury is sworn and empaneled to try the accused on a valid indictment in a competent court.<sup>31</sup> Consequently, double jeopardy does not apply to an order quashing an indictment,<sup>32</sup> nor to one sustaining a demurrer to an indictment.<sup>33</sup> In neither of these instances has the accused been placed in jeopardy as no jury has been impaneled and sworn. Certainly the doctrine is not applicable after an acquittal if the decision on which the state is appealing is merely to settle a point of law, with no adverse effect whatever upon the one acquitted.<sup>34</sup> Nor does double jeopardy apply in a case over which the court has no jurisdiction,<sup>35</sup> and it does not lie from an order granting an accused a new trial,<sup>36</sup> this being based on the theory that the accused has waived his immunity from prosecution. One cannot, by one and the same act, protect himself by using his sword as a shield. Nor can the

26. In 1886, Connecticut enacted such a statute, GEN. STAT. § 1637. See note 41, *infra*.

27. Note 3, p. 56-58, *supra*.

28. WHARTON, CRIMINAL PLEADING AND PRACTICE, p. 353 (9th Ed. 1889).

29. Note 28, p. 355, *supra*.

30. Note 3, p. 292, *supra*.

31. State v. Rountree, 127 S. C. 261, 121 S. E. 205 (1924).

32. State v. Ray, 1 Rice 33 (1938).

33. State v. Hall, 27 Wyo. 224, 194 Pac. 476 (1921).

34. Territory v. Gomez, 14 Ariz. 139, 125 Pac. 702 (1912).

35. Marshall v. Commonwealth, 61 Va. 652 (1871).

36. State v. Gillis, 73 S. C. 318, 53 S. E. 487 (1905).

defendant be said to be twice in jeopardy by a ruling on a question of law adverse to the state where the defendant appeals from a conviction.<sup>37</sup>

A case of far reaching influence in the field of double jeopardy is *Kepner v. United States*.<sup>38</sup> In that case, a practicing attorney—a resident of the Philippine Islands—was tried and acquitted of the crime of embezzlement. In appellate proceedings by the United States, the Supreme Court of the Philippine Islands reversed the judgment of the trial court, and imposed a prison sentence upon the accused. Error was assigned in the appellate court on the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against twice placing a person on trial for the same offense, and contrary to the Constitution of the United States. The United States Supreme Court reversed the Supreme Court of the Philippine Islands, holding the defendant to have been twice placed in jeopardy in violation of a Congressional Act providing immunity from second jeopardy for the same criminal offense. In the majority opinion of the *Kepner* case, per Mr. Justice Day, the court makes a cursory examination of the case of *State v. Lee*<sup>39</sup> as being in opposition to the view of double jeopardy as taken by the majority. In speaking of the *Lee* case, Mr. Justice Day states: "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 . . . discloses no provision upon the subject of jeopardy, and we conclude there is none". From this language, the inference may be drawn that a second trial of one for the same offense could be sanctioned by the Supreme Court of our land if there was no state constitutional provision against it.<sup>40</sup> In the dissenting opinion of the principal case, delivered by Mr. Justice Holmes, and concurred in by White and McKenna, J. J., it is said that "one would no more be placed 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".

37. It is obvious that in such a case the initiative is taken by the defendant; if he does not wish to appeal, the rulings may not be reviewed. Such rulings will probably not receive very careful attention as the defendant is trying to upset a conviction, while the state is not trying to upset an acquittal. Note 3, p. 64, *supra*.

38. 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114 (1904).

39. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894).

40. The United States Supreme Court must decide a case in the light of the law of the state in which the case arose, provided the state law does not impinge upon the Federal Constitution. *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1937). This case overruled *Swift v. Tyson*, 41 U. S. 1, 10 L. Ed. 865 (1842).



The expressions of these two eminent jurists leads to a discussion of the statutes — of which there are two in the United States — by which the state is allowed to appeal from an acquittal of a defendant.

In Connecticut, there exists a statutory provision whereby appeals from the rulings and decisions of the superior court or the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with permission of the trial judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused.<sup>41</sup> In the application of the statute, the well reasoned opinion of *State v. Lee*<sup>42</sup> holds that the function of all courts is to settle controversies according to law, such being secured only by the correction of errors in the application of the law. "The end is not reached, the cause is not finished, until both the facts, and the law applicable to the facts, are finally determined. The principle of finality is essential; but not more essential than the principle of justice." The court is of the opinion that judicious legislation for securing a full, fair, and legal trial of each criminal cause is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. And placing in jeopardy is held to mean a jeopardy which is real, and has continued through every stage of one prosecution, *as fixed by existing state laws relative to procedure.*

The state of Vermont has a statute of substantially the same effect as that of Connecticut.<sup>43</sup> The application of the Vermont statute is not based on the "continuous process" theory as applicable in Connecticut, but rather that the statute does not impinge upon the provisions of either the Fifth or Fourteenth Amendments of the Federal Constitution.<sup>44</sup> The court reviews cases<sup>45</sup> wherein the United States Supreme Court has held that the Fifth Amendment, forbidding double jeopardy, was not intended to limit the powers of the State government in respect to their own people, but was merely to operate as a restraint upon federal action. Further, that the due process of law referred to in the Fourteenth Amendment, wherein restraint is imposed upon state action, *is due process according to the Constitution and laws of the particular state*

41. CONN. REV. STAT., § 8812 (1949). See note 26, *supra*.

42. Note 39, *supra*.

43. VT. REV. STAT., § 2356 (1947).

44. *State v. Felch*, 92 Vt. 477, 105 Atl. 23 (1918).

45. *Ex Parte Spier*, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. Ed. 80 (1887); *Hunter v. City of Pittsburg*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907).

involved, provided the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" are not violated.<sup>46</sup>

#### CONSTITUTIONALITY OF STATE APPELLATE LEGISLATION OPERATING AFTER ACQUITTAL

In the landmark case of *Palko v. Connecticut*,<sup>47</sup> the state criminal appellate statute of Connecticut withstood the test of constitutionality. There the accused was indicted for murder in the first degree, convicted of murder in the second degree. The State appealed, alleging error on the part of the trial judge in excluding certain evidence. The appeal was heard by the State Supreme Court of Errors and Appeals, and was promptly reversed for a new trial. On the second trial, the accused was convicted of murder in the first degree and sentenced to death. The accused appealed to the Supreme Court of the United States on the ground that the statute permitting the state to appeal was repugnant to the due process clause of the Fourteenth Amendment of the Federal Constitution, that whatever is forbidden by the Fifth Amendment is also forbidden by the Fourteenth Amendment, and that the Fifth Amendment expressly forbids one being placed in jeopardy twice for the same offense.

Mr. Justice Cardozo, in writing the opinion of the court, held that what would be a violation of the first eight amendments—the Bill of Rights—would not necessarily be unlawful by force of the Fourteenth. In repudiating the defendant's contention in regard to the Bill of Rights being carried over in toto to the Fourteenth Amendment, Mr. Justice Cardozo launched into a discussion of the various innovations of the states which subsequently were held not to violate the provisions of the Federal Constitution. The Fifth Amendment, *inter alia*, provides that no person shall be held to answer for a capital or other infamous crime unless on presentment or indictment of a grand jury. This edict of necessity must be followed by the Federal Government in its prosecutions, but the Supreme Court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer.<sup>48</sup> A further provision of the Fifth Amendment is that no person shall be compelled to be

46. *Ex Parte Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519 (1880).

47. 302 U. S. 319, 58 Sup. Ct. 149, 32 L. Ed. 238 (1937).

48. *Hurtado v. People of State of California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232 (1884).

a witness against himself in a criminal case; but in prosecutions by the state, this exemption will end if the state so chooses.<sup>49</sup> The Sixth Amendment requires a jury trial in criminal cases, and the Seventh requires a jury trial in civil cases at Common Law where the value in controversy shall exceed twenty dollars. But the Supreme Court has ruled that trial by jury in state actions may be modified or abolished.<sup>50</sup>

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by statute the guaranty of free speech given by the First Amendment,<sup>51</sup> or the freedom of the press,<sup>52</sup> of the free exercise of religion,<sup>53</sup> or the right of peaceable assembly, without which free speech would be unduly trampled,<sup>54</sup> or the right of an accused to the benefit of counsel.<sup>55</sup> In these situations immunities are valid as against the federal government by force of the specific pledges of the particular amendments comprising the Bill of Rights, having been found to be, in the words of Mr. Justice Cardozo, "implicit in the concept of ordered liberty," and are thus valid as against a state, via the Fourteenth Amendment. With reference to the various provisions of the Bill of Rights as pointed out above, "they are not of the very essence of a scheme of ordered liberty, and to abolish them would not violate any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

In reviewing the statute under consideration, the court held that it was not the states intent to "wear the accused out" by a series of trials; but that the statute only asked that the trial go on until a trial should be had which was free from corrosive error.

It cannot be said that the court regarded the instant case as one of double jeopardy, for Mr. Justice Cardozo used the phrase "if double jeopardy it may be called". He also cast a doubt as to whether a case of like facts and circumstances would constitute double jeopardy under the Fifth Amendment.

49. *Twining v. State of New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).

50. *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 488, 44 L. Ed. 597 (1900); *N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667 (1917).

51. *De Jonge v. State of Oregon*, 299 U. S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937); *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732, 31 L. Ed. 1066 (1937).

52. *Near v. State of Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931).

53. *Cantwell v. State of Connecticut*, 310 U. S. 296, 600 Sup. Ct. 900, 84 L. Ed. 1213 (1940).

54. Note 51, *supra*.

55. *Powell v. State of Alabama*, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

An interesting and logical observation has been made of the principle case<sup>56</sup> to the effect that the Supreme Court, in determining the constitutionality of the Connecticut statute, might have predicated its decision on either of two rationales. It could have considered the original trial, reversal, and retrial as one proceeding — obviating the question of double jeopardy, or it could have held that the statutory procedure was not such an unreasonable deprivation of the rights of the accused as to be prohibited by the Fourteenth Amendment. The former rationale was not applied; probably because of the decision in *Kepner v. United States*,<sup>57</sup> in which the court recognized a separate proceeding. By basing its decision on the second rationale, the court, of necessity, held that the guaranty against double jeopardy “if double jeopardy it may be called” is not included in the protection afforded by the Fourteenth Amendment.

It is assumed that in cases of like fact subsequently arising in either Connecticut or Vermont, an appeal to the Supreme Court of the United States would result in a judgment alike to that reached in the *Palko* case.

But what would be the outcome of a case originating in a state prohibiting, in its Constitution, one to be tried twice for the same offense, but which had also enacted a statute allowing the prosecution to appeal from an acquittal. Would such a situation present a conflict of laws within the state, so that the statute would be battered down as being an impingement upon the constitutional provision against double jeopardy? The question can be answered in the negative, *provided* the state supreme court construes its own state constitution as following the “one continuous process” theory as adopted in Connecticut. If such process were adopted no second jeopardy could attach until a trial free from error was had. And certainly the double jeopardy clause of the state constitution would preclude a successful appeal by the state in a case in which no error was committed.

The *Palko* case does not present, by any means, the inescapable conclusion that the Fourteenth Amendment cannot be invoked to prevent successive jeopardies of an accused, thus, should a state statute attempt to sanction a second trial where no error had been committed in the original proceeding, the Fourteenth Amendment undoubtedly would be held to apply.<sup>58</sup>

An earnest attempt has been made to discover a South Carolina case by which the invocation of a statute granting the state the

56. 47 YALE L. J. 489 (1938).

57. Note 38, *supra*.

58. Note 57, p. 493, *supra*.

right to appeal would possibly have resulted in a more perfect dispensation of justice. No case has been found which fully restates an error of law committed in the original trial. However, the early Pennsylvania case, *Commonwealth v. Fitzpatrick, et al.*<sup>59</sup> will aptly illustrate the point.

The defendants were indicted and placed on trial for murder. On the fifth day of deliberation, with the term of court drawing to a close, the jury still had not reached a verdict. They had come into court repeatedly and affirmed that they could not agree. The judge stated that he was satisfied that it was useless to detain the jury longer, therefore, notwithstanding the objection of the defendants, the jury was discharged. The defendants were again called for trial the following month. At this time they pleaded the former trial and discharge of the jury without rendering a verdict in bar of any further trial for the same offense. The commonwealth demurred to this plea, judgment entered for the defendants on the demurrer. The state supreme court upheld the verdict and judgment on the ground that it was settled law in the state of Pennsylvania that a court has no power to discharge a jury after a trial begins, without a resulting discharge of the prisoner, unless it be done with his consent or because of an absolute necessity for so doing. The trial court was empowered to extend the term until the trial could be concluded, thus the inability of the jury to agree within a few hours or days when the term is about to expire, does not raise such a necessity. The court, per Mr. Justice Williams, stated:

The justice of sustaining a plea of former acquittal or conviction is unquestioned and unquestionable; but a plea of "once in jeopardy" stands on narrower ground. It alleges only that there might have been a conviction or an acquittal, if the judge trying the cause had not made a mistake in law which prevented a verdict. It is of no consequence how many mistakes he makes, if the trial results in a conviction. The mistakes can be corrected on a writ of error and the defendant tried over again. But if the mistake results in closing the trial without a verdict, this is remediless. The court that made it cannot correct it. The proper court of review cannot correct it. The consequence is that a defendant charged with taking the life of his fellow man goes out of the court and out of the reach of justice because of a mistake in law made after an honest

<sup>59</sup> 121 Pa. St. Rep. 109. This case was cited by Miller as proving the desirability of the Connecticut rule. Note 1, p. 495, *supra*.

and painstaking effort to be right . . . But the constitutional provision [double jeopardy] is plain and its enforcement by the courts has been uniform.<sup>60</sup>

#### STATE APPELLATE LEGISLATION — PRO

*Benefit to Society:* Society, in its fundamental concept, comprises all of citizens of the state. Law exists for the protection of society. The right of society to be protected from lawlessness is inherent in society itself. It is for this reason that the sovereign punishes the wrongdoer; fine and/or imprisonment being the end result, a trial in the court of General Sessions being the means to that end. To allow the means to be stopped short of attaining the just end, if the termination of the means is predicated on legal error, is to deny to society its inherent right. To liberate and cast into the midst of society one of ostensible, if not apparent, criminal tendencies without adequate procedure to determine the guilt of the accused, denies society the right the law of crime should be designed to give.

*Undue advantages of accused over the state:* Granting an accused the right to appeal while giving to the state no such right gives one charged with crime an undue advantage, when the acquittal is the result of an error in law prejudicial to the state. Rather than punish an innocent man, the law allows appeal to the court of last resort upon any provocation whatever, provided necessary motions and objections are timely made by counsel for the defense, from the solicitor's brow-beating of a witness to the commission of a serious error in law by the trial judge. On the other hand, the defense attorney need not labor under any apprehension that his court room behaviour, or a misperformance of the trial judge in construing or dictating the law, will subject his client to a new trial. For once an acquittal is had, the accused may not be tried again as he may not be placed twice in jeopardy for the same offense.

*Inconsistency in the criminal and civil law:* There exists a some what serious inconsistency in the civil and criminal law. On the one hand the sovereign state is all powerful in that, without its consent, it may not be sued. While on the other hand, in criminal prosecutions, the sovereign gives way to the superior rights of the accused. This is not to advocate an absolute parity in civil and criminal law and their processes, for the end results differ drastically. In a criminal action the accused may be fighting for his life, while in a civil

<sup>60</sup> Just when jeopardy attaches is a matter of diversified comment, but the rule in South Carolina is generally adhered to. See note 31, *supra*.

suit the stakes are not so great. On the other hand there should not exist such a disparity as to prevent justice from taking its proper toll.

#### STATE APPELLATE LEGISLATION — CON

*Stare Decisis*: Under this doctrine, principles of law have been promulgated by constitutional conventions, by statutes enacted by the general assembly, but mainly under decisions of courts of last resort. It has become an almost unyielding custom in South Carolina, as well as most of the other states, to stand upon established principles, the reason being that principles of law have become so fundamentally imbedded in our juridical system that they have become almost adamant.

One of these principles relates to former jeopardy. For scores of years society has been satisfied with a rendition of a verdict of acquittal of one charged with crime, whether or not such acquittal was predicated upon legal error. To allow the state to appeal would work an innovation in the stabilized doctrine of *stare decisis*—to which hordes of the general public would object.

*State takes advantage of its own error*: To allow the state to appeal is to allow it to take advantage of its own error, through no fault of the accused. The state is sovereign, and as such, can commit no wrong. Therefore, when a judicial officer of the state commits an error in the administration of justice, the error inuring to the benefit of the defendant, by effecting an acquittal, the state should have no complaint.

*Expense incurred by accused*: Frequently crimes are committed by people who have had poor educational and cultural advantages. Many offenders have accumulated little from a monetary or material standpoint. They are oftentimes unable to procure paid counsel; and frequently appointed counsel has not had the benefit of experience necessary to defend adequately the accused. The duty of appointed counsel cannot be said to extend to an appeal; the taking of an appeal being merely discretionary. As a consequence the accused may be unable to procure satisfactory counsel.

#### REBUTTAL AND CONCLUSION

It is true that *stare decisis* dictates uniformity in the law. But must there be uniformity to the exclusion of justice? It is happily conceded that to expose one to a second trial, after a previous acquittal in a trial free from error, is to subject him to a danger shocking to the sense of decency and fair dealing. But is one unduly taken

advantage of by being subjected to a second trial for the express purpose of rectifying an error prejudicial to the state, and to society as a whole?

Can it really be said that the state is taking advantage of its own error by being permitted an appeal on a verdict in favor of one accused? Is not everyone—including officers of the court and jurists—subject to human frailties? Granting the state the privilege of rectifying errors perpetrated by one of its officers or judges is in reality a grant to society to avail itself of the right which the sovereign state owes to the public, and which heretofore the public has been denied.

The position in which an accused would be placed were he subject to an appeal by the state warrants sympathy, provided of course, the accused is the victim of the far reaching arm of poverty. Although the law as it exists apparently provides that appeals by appointed counsel are purely discretionary, it is inconceivable that an act granting the state the right to appeal would in turn deny to the defendant counsel. Such a denial would be, on its face, unconstitutional. The objection that such appointed counsel would not be as experienced as desired, if objections there be, could be corrected by the installation of a public defender.

The scope of this writing, as was stated at the beginning, is to present for consideration plausible reasoning for and against appeals by the state in criminal prosecutions. It does not purport to advise upon what terms state appeals should be allowed. In this connection, however, it might be noted that the statutes of Connecticut and Vermont form a sound pattern from which to proceed.

The writer is of the opinion that state appellate rights should, to some degree, be extended; and it has been affirmatively shown that an extension within reason would not abridge the constitutional guaranties of an accused.

The doctrine of double jeopardy—no man shall twice be tried for the same offense—is a profound and fundamental concept in the law which should be adhered to, provided the doctrine is not abrogated through a fiction in the law. The danger to which an accused is exposed should be a real and continuing one from the time jeopardy attaches until a trial free from error is terminated.<sup>60</sup>

Under the present application of the law of former jeopardy, is it not a fictitious absurdity to hold that on a second trial, one is being placed in danger of his life, limb, or liberty, for a second time when a verdict has been rendered in favor of the defendant in a former trial, but that he is not in second jeopardy when a verdict in favor