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Double Jeopardy: Appeal by the State as Subjecting to Double Jeopardy

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an attempt to organize thereunder, and (3) actual user of the corporate franchise. . . ." *Tulare Irrigation Dist. v. Shepard*, (1901) 185 U. S. 1.

DOUBLE JEOPARDY:

Appeal by the State as subjecting Defendant to double jeopardy.

The Federal Constitution and most State Constitutions contain provisions which declare, "No person shall be twice put in jeopardy for the same offense." This ancient maxim of the criminal law originated as a principle of English Common Law and was first used by Blackstone about the time the pleas of *autrefois acquit* and *autrefois convict* were formulated. At the time of its inception no appeal was given to the King or the defendant from a judgment of guilty or acquittal. In England and the United States now, the defendant may appeal and in some jurisdictions the State is awarded the right of a new trial. The granting of this right to the State has given rise to a great deal of discussion over the question of whether or not the defendant by being subjected to a new trial following an appeal is also being subjected to a second jeopardy.

There seem to be two distinct views, which explains the conflict.¹ The first clings to the old Common Law concept of jeopardy and holds the right of appeal unconstitutional; the other allows the State the right of appeal. Those who accept the second view justify it upon the theory that the original jeopardy has not terminated at this stage of the procedure and the appeal is merely a continuation of the original jeopardy.

¹In Conn., the State may appeal and bring the defendant back into court for a new trial, even after acquittal. *State v. Lee* (1894) 65 Conn. 265, 30 A. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; *State v. Garvey* (1875) 42 Conn. 232.

In some States the right of appeal is refused in all cases. *City of Valdosta v. Goodwin* (1918) 21 Ga. App. 664, 94 S. E. 812; *Commonwealth v. Cummings* (Mass. 1849) 3 Cush. 212; *State v. Morgan* (1878) 4 Tex. App. 33; *Prescott v. State* (1907) 52 Tex. Cr. App. 35, 105 S. W. 192.

A statute granting the right of appeal to the State from an acquittal after the trial of the crime is unconstitutional in some jurisdictions. *People v. Miner* (1893) 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342; *State v. Harville* (1930) 171 La. 256, 130 S. 348; *People v. Erickson* (1900) 39 Ore. 1, 62 P. 753.

An appeal by the State merely to determine questions of law has been allowed in some States. *State v. Stunkard* (1911) 28 S. D. 311, 133 N. W. 253; *Pa. Commonwealth v. Bienkowske* (1939) 137 Pa. Super. 474, 9 A. (2d) 169; *Ex Parte Dexter* (1919) 93 Vt. 304, 107 A. 134.

The United States Supreme Court has held that the granting of the right of appeal to the Government is in conflict with provisions forbidding double jeopardy. The court said, "The verdict of acquittal was final, and could not be reviewed on error or otherwise, without putting the defendant twice in jeopardy and thereby violating the constitution."³ It should be noted that Justice Holmes wrote a vigorous dissent in this case. He maintains that a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. It is difficult to find a reason for construing an appeal as subjecting the defendant to double jeopardy. The reason most often advanced is that of the desirability of procuring a final judgment and ending litigation. This reasoning simply begs the question as to when the first jeopardy terminates.³

Though the question of whether an appeal granted to the State conflicts with provisions forbidding double jeopardy has never been decided in Montana, it may well arise.⁴ The revised codes grant the right of appeal to the State in a criminal case,⁵ and the Montana Constitution contains a pro-

³Kepner v. U. S. (1904) 195 U. S. 100, 49 L. Ed. 114, 24 S. C. 797.

⁴Some cases hold that jeopardy has attached upon indictment, i.e.—State v. Fields (1898) 106 Iowa 406, 76 N. W. 802; and State v. Crook (1898) 16 Utah 212, 51 P. 1091. State v. Gillespie (1907) 162 Ind. 298, 80 N. E. 829 stands for the proposition that jeopardy attaches when a jury is impanelled and sworn, and a Montana case, State v. Keerl (1905) 33 Mont. 501, 85 P. 862, may be cited as authority that jeopardy attaches at the commencement of the trial.

The prevailing viewpoint seems to be that a person is first put in jeopardy when he has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impanelled and sworn. For illustration see: People v. Fischer (1856) 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; State v. Hastings (1882) 86 N. C. 596; Alexander v. Com. (1884) 105 Pa. 1; Stuart v. Com. (1887) 69 Va. (28 Grat.) 950. The precise question was raised in State v. Thierfelder (1934) 114 Mont. 14, 132 P. (2d) 1035 and was briefed by counsel, but was not finally passed upon as it was not in the issue in the case. In that case the State appealed in a criminal prosecution from an order of the court made at the close of the State's case in chief, directing the jury to return a verdict in favor of the defendant. The court said, "While we do not decide this question here for the reason that it is not in issue, we will say in passing that the decisions of this court do not tend to show that the defendant has yet been once in jeopardy for the offense charged." Although they said the defendant had not yet been once in jeopardy, it may be assumed that the Court actually meant the jeopardy had not terminated, since they cite State v. Keerl and State v. Aus as standing for the proposition.

⁵R. C. M. 1935, §12108.

"An appeal may be taken by the state

1. From a judgment for the defendant on a demurrer to the indictment;

vision against double jeopardy.⁶ However, it may be assumed that Montana will decide that the statute granting the State the right of appeal is constitutional. This conclusion seems justified by the language of the Supreme Court in two leading Montana cases,⁷ which though not deciding the question under discussion, seem to indicate that the Montana Court favors the theory that an appeal is merely a continuation of the original jeopardy. In *State v. Keerl*, the defendant was tried for murder and the jury was discharged because of inability to agree. The precise question was whether or not this discharge was equivalent to an acquittal permitting the defendant to avail himself of the plea of former jeopardy. In that case the Court made the statement,

“The jeopardy which is forbidden is not a new jeopardy. A mistrial or new trial secured by the *plaintiff or defendant* continues the jeopardy and does not renew it.”⁸

In *State v. Aus*, a much later case, the Montana Supreme Court has followed the above language in saying that,

“When a new trial has been granted the defendant is not placed in a new jeopardy by the second trial but is merely subjected to the same jeopardy that he was in on the first trial.”⁹

In that case the defendant was convicted of larceny and had served part of his sentence when he procured a new trial. He then objected to further prosecution on the ground that the second trial would subject him to double jeopardy. It was held that where one convicted of a crime is granted a new trial, he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had.

Logically, the theory of double jeopardy should be a question of procedure. As in a civil action, the rights of the parties cannot be determined until all questions arising thereunder have been finally adjudicated by a court of last resort. The State should not be precluded from such final adjudication

2. From an order granting a new trial;
3. From an order arresting judgment;
4. From an order made after judgment, affecting the substantial rights of the State.
5. From an order of the court directing the jury to find for the defendant.”

⁶MONT. CONST. Art. III, §18.

⁷See *State v. Keerl* (1905) 33 Mont. 501, 85 P. 862 and *State v. Aus* (1937) 105 Mont. 82, 69 P. (2d) 584.

⁸*State v. Keerl* (1905) 33 Mont. 501, 85 P. 862. (Italics supplied).

⁹*State v. Aus* (1937) 15 Mont. 82, 69 P. (2nd) 584.

NOTE AND COMMENT

59

merely because a criminal case is involved. Justice would seem to dictate that the action be pursued to its ultimate end, especially today when society needs as much protection against its offenders as does the accused against an avenging government.

If double jeopardy were treated as a procedural question, the principal would be limited to prevent an independent trial of the same cause of action. Whether the appeal was or was not an independent cause of action would depend upon whether such appeal were authorized by the procedure in that jurisdiction. This idea is expressed in *State v. Garvey* in which it is said,

“The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it.”¹⁰

This is in line with the viewpoint of J. Hammersley as brought out in *State v. Lee*, in which he states,

“After verdict is returned, a retrial is awarded only on further proceedings in the cause, which may or may not be authorized by the law regulating procedure. If such further proceedings are not authorized by the law regulating procedure, the cause is ended and the one jeopardy of the accused is exhausted. This results solely from the fact that the State, influenced by conditions of public policy, has decided to make the verdict the end of the controversy.”

“But when the State sees fit that further proceedings on motion of the accused, may be had, an unjust verdict resumes its normal position of a legal nullity, and when the State provides for like proceedings on the motion of the prosecution a similar result must follow.”¹¹

It is to be noted that both our own Court in *State v. Keerl*, and this able opinion would uphold an appeal by the defendant and one by the State on exactly the same ground—there is a continuation of the original jeopardy in both cases alike. Of course, no court has ever had any trouble holding constitutional a statute giving the defendant a right of appeal and providing for a new trial thereafter under the double jeopardy provision. Those courts, ruling that such right of appeal in

¹⁰*State v. Garvey* (1875) 42 Conn. 232.

¹¹*State v. Lee* (1894) 6 Conn. 265, 30 A. 1110.

the State is unconstitutional, characteristically deprive the defendant of the plea of former jeopardy upon a new trial following the *defendant's* appeal by declaring that he waived the right to so plead when he appealed. This theory is well put by Ruling Case Law thus:

“It is generally conceded that a person convicted of a crime waives his constitutional protection against being twice in jeopardy where at his request the verdict against him is set aside and a new trial is granted, defendant therefore under such circumstances may be tried again for the same offense ***** where a conviction and judgment are set aside on proceedings instituted by the defendant on the ground that he has been deprived of a right guaranteed to him by the constitution, the plea of former jeopardy cannot avail to prevent a second trial.”¹²⁸

Although the Court quoted this statement from Ruling Case Law in *State v. Aus*, along with its primary thesis that there was only a single jeopardy involved throughout, taken directly from *State v. Keerl*, it is submitted that it in no way intended to subscribe to the doctrine there enunciated. Either the doctrine of waiver or that of the continuation of jeopardy supported the actual ruling in that particular case, since it was the defendant who had appealed. So the Court's citation of Ruling Case Law was only to support the *result*, and not to establish the controlling grounds for that result. That is, both theories gave the desired result there. However, it is important that the two doctrines, basically in conflict with each other, are not confused. This basic conflict is quickly revealed when the constitutionality of the right of the State to appeal is raised. The doctrine of waiver *assumes* a former jeopardy. The idea that the original jeopardy continues throughout the proceedings *repudiates* that assumption.

To make the legal doctrine controlling the law of former jeopardy consistent, both appeals should be allowed—and the plea of former jeopardy upon a new trial thereafter—on exactly the same ground. In *State v. Keerl*, Justice Milburn states this position succinctly and effectively by saying,

“A mistrial or a new trial secured by *Plaintiff or Defendant* continues the jeopardy and does not renew it.”¹²⁹

Logically this position is the most tenable. There can be no new independent trial until every stage of procedure has been

¹²⁸R. C. L. 160.

¹²⁹*State v. Keerl* (1905) 33 Mont. 501, 85 P. 862. (Italics supplied).

NOTE AND COMMENT

61

covered which is authorized by the particular jurisdiction. Where an appeal is authorized either for the State or the defendant, such appeal is merely a continuation of the procedure which has been invoked.

It may be argued that it is impossible to uphold this theory if due regard is given to certain Montana Statutes. For example, the Montana Constitution and Statutes admit all persons to bail even after conviction upon an appeal subject to a qualification not pertinent here.¹⁴ Elsewhere it also has been ruled that the defendant is entitled to bail upon a new trial to the same extent as though he had never been tried. The argument would be that by so doing the defendant is placed in the same position as he was in at the commencement of the trial and that it would thus appear that he is again subjected to jeopardy upon the second trial. This argument is fallacious. It does not necessarily follow simply because the defendant is admitted to bail pending the appeal, that the jeopardy into which he was placed has terminated. Since the law presumes a man innocent until such time as his guilt is conclusively established, a defendant is admitted to bail on the theory that since he is at the time presumed innocent, he should not be unnecessarily deprived of his liberty. This is true even though the defendant or the State is appealing from a verdict of acquittal or conviction. The bailment statute operates quite independently of the provisions forbidding double jeopardy.

Another Montana Statute lays down the rule that, "The granting of a new trial places the parties in the same position as if no trial had been had."¹⁵ It may be argued that if this is true the defendant can say he has once been in jeopardy, and that therefore the Montana Courts' theory of continuation of jeopardy cannot be upheld. However, this statute should not be cited as being contra to the position taken by the court since it is a rule governing the introduction of evidence and other procedural matters and is independent of the jeopardy provisions. Since the better view is that a new trial continues jeopardy, a new trial granted on appeal should not be interpreted under this statute as placing the defendant in a position in which it could be said that jeopardy ever terminated.

If it is ever contended that the Montana statute authorizing an appeal by the State is unconstitutional, the Montana Supreme

¹⁴R. C. M. 1935, §§12135, 12137, 12138;

MONT. CONST. Art. III, §19;

Ex parte Patterson (1917) 81 Tex. Cr. R. 28, S. W. 861.

This decision would prevail under R. C. M. 1935, §12047.

¹⁵R. C. M. 1935, §12047.

Court should uphold the doctrine expressed in *State v. Aus.*, and *State v. Keerl* and limit the doctrine of double jeopardy so as to forbid a trial only in a new and independent case after the defendant or the State has exhausted its rights to further proceedings in the original case.¹⁶

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¹⁶Although stating in the commentaries thereto that, at present, the State can appeal from a general acquittal only in Connecticut, it is of interest to note that the American Law Institute has proposed that the State should have a right to a new trial after general acquittal where ". . . in the course of the trial a material error has been made to the prejudice of the State." AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW: DOUBLE JEOPARDY, Proposed Final Draft (1935) Sec. 13, comments, page 111 ff. It also recognizes that a new trial is only a continuation of the original proceedings in all cases. *Ibid.*, Sec. 14, comments page 116 ff.

Though R. C. M. 1935, §12108 does not expressly provide for such new trial for the State, and although R. C. M. 1935, §11612 provides that no person can be tried a second time after he is once acquitted, the doctrine of the *Keerl* and the *Aus* cases, that a new trial is only a continuation of the original prosecution will support the granting of a new trial to the State following a general acquittal. Cf.: *State v. Peck* (1928) 83 Mont. 327, 271 P. 707.

LIABILITY OF A MUNICIPAL CORPORATION FOR DEFECTIVE STREETS AND SIDEWALKS

From the beginning, apart from statute, thirty-four (34) states have held municipal corporations liable to private action for injuries resulting from defects or obstructions in streets or sidewalks based upon the common law right of recovery against a city for actionable negligence.¹ The contrary rule prevails in the New England States and a few others. But statutes now impose liability in most of the latter class of states.²

Montana decisions have consistently recognized the doctrine of municipal liability for damages to persons or property by reason of any negligently maintained defects or obstructions in streets and sidewalks. In one of the earliest cases, *Snook v. City*

¹MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1945) §2901 p. 8.

²MCQUILLAN CORPORATIONS (2d ed. 1945) §2901 p. 12.

Generally concerning a public way, the judicial decisions have established and imposed obligations upon municipal corporations for the following reasons: (1) Streets must be constructed in a reasonably safe manner, and to this end ordinary care must be exercised. (2) They must at all times be kept in proper repair or in a reasonably safe condition by the exercise of ordinary diligence and continuous supervision. (3) Reasonably safe condition or proper repair implies that bridges, dangerous embankments, walls and declivities near the way must be safeguarded by adequate railings, barriers or appropriate signals.