Yale Law Journal

Volume 14
Issue 1 *Yale Law Journal*

Article 7

1904

EDITORIAL

YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

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WHAT CONSTITUTES JEOPARDY.

The decision in *Kepner v. U. S.*, handed down by the Supreme Court on the thirty-first of May, is noteworthy, not so much for the ruling of the majority that—under the extension of the constitutional guarantee to the Philippine Islands, there can be no review by an appellate court of a verdict of acquittal in a criminal cause—as for the strong dissenting opinion written by Justice Holmes and concurred in by Justices White and McKenna. This, after referring to the very prevalent idea that under our present system, there is more danger of the escape of guilt than of the punishment of innocence, maintains that too broad a construction has been placed on the constitutional provisions by which it is forbidden that any person shall be "twice put in jeopardy of life or limb."

The majority of the courts have held that jeopardy commences when a jury has been called and sworn. *Com. v. McCormick*, 149 Mass. 7; *People v. Taylor*, 117 Mich. 583. The intention is to prevent the state from bringing one trial to an inconclusive termination that it may institute another, to suit its own convenience, but to the manifest disadvantage of the prisoners. 1 *Bish., New Crim. Law*, § 1019. Yet, without so broadly interpreting this provision, the prisoner would seem to have ample protection in the common law rule that he, or the court, must consent to the entering of a *nol. pros.*; *Com. v. Tuck*, 20 Pick. 356; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; in the passage of statutes to the same effect; *Pep. & Lew., Dig. of the Laws of Penn.*, 1412, § 159; 3*Ga. Code.* 957; and in the unquestioned constitutional guarantees of the right to a speedy trial; while the courts might be saved from countenancing the clear

failure in logic consequent upon the impossibility of distinguishing this case from those in which a retrial is permitted after a miscarriage of justice because of disagreement of the jury, or mischance happening to the court, or similar cause. *Com. v. Purchase*, 2 Pick, 521; *People v. Webb*, 38 Cal. 467. The better view, and that which has been supported by the English courts and certain of those of the states, and has been favored by the Federal judges, is that only a verdict can constitute jeopardy. *Reg. v. Charlesworth*, 9 Cox. C. C., 44; *People v. Goodwin*, 18 Johns. 187; *U. S. v. Haskell*, 4 Wash. (U. S.) 402; *U. S. v. Gilbert*, 2 Lumn. (U. S.) 19.

And, as Justice Holmes argues, even a verdict ought not to suffice, where resort is made to an appellate court for its reversal. That it does, where the prosecution alleges the error, is perhaps too firmly established by repeated decisions to admit of change. *U. S. v. Sanges*, 144 U. S. 310. That it does not, where the prisoner sues out the writ, is equally clear. The cases are distinguished on the ground either that by himself seeking the reversal, the prisoner has waived his right of exemption from another trial, *People v. McKay*, 18 Johns. 212; or that the miscarriage of justice has prevented any such jeopardy as the maxim regards. *Com. v. Roby*, 12 Pick. 502. But, as to the former, Justice Holmes points out that it is very doubtful whether the fundamental guarantees of the constitutions can be waived. *Thompson v. Utah*, 170 U. S. 343. And, for the latter, it is difficult to perceive why an error resulting in a failure of justice to the prisoner's advantage, does not equally with one to his advantage, prevent the consummation of the jeopardy. The true basis of the granting of a new trial would seem to be that an appellate proceeding merely continues the cause; *Watrous v. Johnson*, 24 How. 205; and that jeopardy is not complete until a verdict is reached which finally concludes the merits of the case. *State v. Lee*, 65 Conn. 265. The logical, if impractical, conclusion, then, is that the state should have the right to secure the reversal of an erroneous acquittal.

LEGISLATION AGAINST GREAT COMMERCIAL COMBINATIONS.

The report made at the last meeting of the American Bar Association by the Committee on Commercial Law, dealing, as it does, with the very timely topic of legislation to curb the abuses arising from great aggregations of capital, has challenged the attention of the legal fraternity. Surely the position taken by the committee is too radical. The picture which, as an introduction, it draws of a "General Industrial Company," which is to embrace all the business of the country, selling all products for what it wills, buying its labor as it chooses, far transcends the bounds of possibility, for it disregards those economic laws which require for labor a living wage, and which decree that, as the inability to purchase an article increases, its price decreases; those laws of human nature which limit the

field that the executive brain of man can compass; those laws of progress which are building up, over against the combinations of capital, equally powerful combinations of labor. The remedy which it advocates—doubtless, under the decision in *McCulloch v. Maryland*, 4 Wheat. 316, legally possible—that corporations engaged in interstate commerce shall be incorporated by the Federal authority, and that other, of doubtful validity, that the Federal government, in order to maintain the principle of competition, shall, in the last resort, itself become a general producer, would be long strides in the growth towards centralization of government which now seems to threaten our political system. Nor would the assertion that the Sherman Act has reached the limit of its usefulness commend itself to the judges who dissented from the decision in the *Northern Securities Case*, 193 U. S. 197. Yet in two respects the report is worthy of close attention—on the one hand, for its originality; on the other, for its wisdom. In the first place, its proposition that gigantic combinations of wealth shall be prevented by requiring a franchise fee which shall increase in proportion to a greater capital; that in very truth the power to tax shall involve the power to destroy, violates no constitutional provision. Yet, after all, the danger threatens not so much from great single organizations, as from the absorption and combination of several corporations. Quite as efficacious, perhaps, would be a stronger enforcement of the Sherman Act, affecting, as it does, existing bodies as well as those of the future, and a closer check upon the ability of one corporation to obtain the shares of another. Secondly, the report does well to emphasize, as least by implication, the principle that a stronger light of publicity must be thrown upon the affairs of these combinations. As this has influenced the more recent legislation, so must it lie at the basis of all future reform. 32 *Stat. at L.*, I. Ch. 552; 25 *Stat. at L.*, Ch. 382.

THE GEORGIA CHAIN-GANG FOR PETTY OFFENSES.

The creators of our Federal Constitution would doubtless be greatly surprised, and many of them deeply grieved, could they arise and view the Fourteenth Amendment and its results. They might feel, with some reason, that the fine balance they established between central power and local freedom is being rudely shaken and that the prospects of its restoration to an even level are far from bright. And they would find that not a few among the men of to-day look on the Fourteenth Amendment as a source of serious national problems.

For better or for worse, we have entered on a new era of our national existence, by attempting the "benevolent assimilation" of races whose customs and conditions of life are radically at variance with our own. We have found that some of our most beneficent institutions are for the present, at least, unsuited to their use. For example, the jury system for crim-

inal trials has met with but little success in Porto Rico. 8 *Law Notes*, 302.

On the other hand, we have found it necessary to tolerate evils in our dependencies, though the parallel evils in our own lands have been abolished. Thus it is a matter of common knowledge that among the Sulu Islanders we are permitting domestic institutions which are tantamount to slavery. We have found it impracticable to civilize those communities at wholesale by immediate legislation. We have rather chosen to let these new clans work out their own salvation with a considerable degree of freedom.

In sharp contrast to the tolerance we are thus showing to backward peoples beyond the sea, we have, as a nation, interfered directly with several institutions of the South during the past forty years. Yet it would be hard to show that our national endeavors have brought the South appreciably nearer to a solution of its vexing local problems. And so it is but natural that a novel instance of Federal intervention, involving the overthrow of a state law as unconstitutional, meets with a divided public opinion.

The case in question is that of *Jamison v. Wimbish*, 130 Fed. 351, decided by Judge Emory Speer in the U. S. District Court in the Western Division of the Southern District of Georgia. The facts were as follows: The petitioner, a colored man, was sentenced by a police judge to seven months of hard labor on a local chain-gang for alleged drunkenness and disorderly conduct. The chain-gang was employed on the public roads by a contractor, under arrangements with the City of Macon and with the commissioners of Bibb County. The petitioner sought relief through *habeas corpus* from the Federal Court, averring that his trial, sentence and commitment were illegal and void, and that he was thereby deprived of his liberty and subject to infamous punishment without due process of law. Thus by *habeas corpus* the police court sentence was submitted for review to the distinguished author of the handbook on "Removal of Causes from the State to Federal Courts."

After stating the facts, the Court shows that this chain-gang sentence must be considered "infamous punishment" as defined in *Ex-parte Wilson*, 114 U. S. 428, where Justice Gray says: "For more than a century, imprisonment at hard labor in the state prison or the penitentiary, *or other similar institution*, has been considered an infamous punishment in England and America." And since the chain-gang constituted infamous punishment, the Court holds that "due process of law" would necessarily include the right of appeal. "One man," says the learned judge, "cannot adjudge infamy." And why could the petitioner not have appealed to higher state courts? The Court answers: "An appeal to the courts of the state would have brought him no relief. . . . It seems that he might apply for writ of certiorari to the judge of the superior courts. *Acts General Assembly*, 1902, p. 105. Could he have given bond

and paid the costs that judicial officer might in his discretion have superseded the judgment of conviction. But the local lawmaker, keenly appreciative of the value of a poor man's labor, stipulates that in such appeals, if unable to pay costs or give bond, the prisoner shall not be discharged. Then it is true, that before his cause, with all its importance, could have been heard, had the petitioner survived, the punishment would have been suffered and the judgment on appeal would have been worthless even had he prevailed." "The sentence against him is void . . . for want of due process of law."

We must all agree that the court has here touched a vital point. "Due process of law" is a phrase hard to define, but this case seems a good precedent for a sound principle, that in convictions involving infamous punishments, "due process of law" requires a fair right of appeal—that "one man shall not adjudge infamy."

But with this clear basis for the decision, we must look on certain other portions of the decision as *obiter dicta*, and cannot wholly agree with the principles which they seem to set forth. It is well-established that the first ten amendments to the United States Constitution restrict only the national government and not the states. Citing 10 *Rose, Notes on U. S. Reps.* 1074, the court seems to hold that "due process of law" in prosecutions for infamous crimes by the states requires presentment or indictment by a grand jury, therein apparently running counter to the Supreme Court decision in *Hurtado v. California.* 110 U. S. 516, 4 Sup. Ct. 111. In like manner the syllabus by the court holds trial by jury to be a right of the accused in such cases—a statement which would seem to reverse the doctrine of *Livingston v. Moore*, 32 U. S. (7 Pet.) 55; *Justices v. Murray*, 76 U. S. (9 Wall.) 278; *Edwards v. Elliott*, 88 U. S. (21 Wall.) 557. Of course the decision is not based on the first ten amendments, directly, but these *dicta* seem to attain the same result by reading the first ten amendments into the words "due process of law" as used in the fourteenth. Possibly this is a logical necessity from the wording of the Fourteenth Amendment.

The poor policy of such Federal restraint on the action of the states was clearly pointed out by Chief-Justice Marshall in *Barron v. Baltimore*, 32 U. S. (7 Pet.) 250. It seems unwise for the national government to attempt any narrow regulation of the judicial procedure of every local jurisdiction. So while we can agree with the policy of defending the right of appeal in cases of infamous crime, we trust that the *dicta* of this case may not be followed to the extent of reversing *Hurtado v. California*, *supra.*

DEPRIVING FOREIGN CORPORATIONS OF THE BENEFIT OF THE STATUTE OF LIMITATIONS.

The familiar doctrine announced in *The Bank of Augusta v. Earle*, 13 Pet. 538, that a corporation is the creature of positive law, and where that law ceases to operate can have no existence,

was applied specifically to the exclusion of a foreign corporation from the benefits of the Kansas Statute of Limitations by a somewhat recent decision of the Supreme Court of that state. *Williams v. Metropolitan St. Ry. Co..*, 74 Pac. 600. The statutory language applicable to the case is as follows: "If when a cause of action accrues against a person he be out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state." It was held that a foreign corporation operating a street railroad within the state, and having agents there upon whom service of process could be made, was a person out of the state within the meaning of this clause of the statute.

This question as to the right of a foreign corporation to take advantage of the statute of limitations first arose in 1829 in the case of *U. S. Bank v. McKenzie*, 2 Brock. (U. S. C. C.) 393, an action brought in Virginia by The Bank of the United States, a corporation existing under the laws of Pennsylvania, against the indorser of a note discounted at its branch bank at Richmond. The statute of limitations was pleaded against the bank and it was held that the plaintiff did not come within the saving clause of "beyond seas or out of the country," the residence of the corporation being at Richmond and not at Philadelphia so far as the clause applied to the locality of the plaintiffs.

Later, the question came up in New York in 1845. It was held in *Faulkner v. The Delaware and Raritan Canal Co.*, 1 Denio 441, that a foreign corporation could plead the statute of limitations; that the cases excepted were against persons who had for a time been out of the state, but had afterwards returned within its limits; that the provision manifestly applied to natural persons only and could not be made to embrace corporations. This case was followed in 1857 in *Olcott v. The Tioga R. R. Co.*, 26 Barb. 147.

These cases were, however, overruled in *Olcott v. The Tioga R. R. Co.*, 20 N. Y. 210, in 1859, and the rule has ever since been settled in New York that a foreign corporation is within the exception of the statute of limitations as to persons absent from the state when a cause of action accrues against them. In Nevada, under the provisions of a statute similar to that of New York, it was held that a foreign corporation could not set up the domestic statute of limitations as a defense to an action brought in the domestic state either in real or personal actions. In an action of ejectment brought against a foreign corporation, the court ruled that under the statute a foreign corporation could not obtain title to land in that state by adverse possession. Later the New York rule was adopted in Wisconsin, and now by Kansas.

The majority of decisions maintain a rule which it is believed is more consonant with justice. The rule, briefly stated, is "that if, under the laws of the domestic state, the corporation has placed itself in such a position that it may be served with process, it may avail itself of the statute of limitations when served." *Wall v. Chicago, etc., R. R. Co.*, 69 Ia. 498.

Service of process is the test. The corporation must place itself in such a position that at all time service of process may be had upon its agents. A foreign corporation whose business is such that it is not incumbent upon it to put itself in a position to be at all times subject to the service of process, ought not to be permitted to shield itself behind the statute of limitations, because it may at some time or times (perhaps unknown to one having a cause of action against it), have an agent in the state upon whom process could be served. *Winney v. Sandwich Mfg. Co.*, 86 Ia. 608. There is no presumption that the corporation has at all times been amenable to process so as to enable it to take advantage of the domestic statute of limitations. This is a fact to be shown by the corporation. *Hubbard v. United States Mortgage Co.*, 14 Ill. App. 40.

The Supreme Court of Illinois has held the "residence "of a corporation "to be where its business was done"; "where it exercises its corporate franchises." *Bristol v. The Chicago and Aurora R. R.Co.*, 15 Ill. 436. Judge Dillon, in *Stilwell v. The Empire Fire Ins. Co.*, 4 Cent. Law Jour. 463, regarded the proposition as reasonable and just, and said that if he were not foreclosed by other decisions, referring doubtless to those of Mr. Justice Nelson in *Day v. Newark India Rubber Co.*, 1 Blatch. 628. and *Pomeroy v. N. Y. & N. H. R. R. Co.*, 4 Blatch. 120, he would be strongly inclined to hold that a corporation created by the law of one state and doing business by permission in another, although a citizen of the former, was an "inhabitant" of the latter for purposes of jurisdiction. These views were approved by the Supreme Court of the United States in *Ex parte Schollenberger*, 96 U. S. 369. The justices held that the jurisdiction attaches upon the act of the party, and not by virtue of the state law, which has no other effect than to authorize the act; that the corporation is thereby found to be in the state, so as to be amenable, like those of its own creation, to the process of the courts established within it. They say that this was really settled, and *Day v. Newark India Rubber Co.*, 1 Blatch. 628, and *Pomeroy v. N. Y. & N. H. Co.*, 4 Batch. 120, overruled, by *Baltimore and Ohio R. R. Co. v. Harris*, 12 Wall. 65, in which decision Judge Nelson fully concurred. The decided weight of authority is to the effect that in this class of cases the foreign corporation is resident where by proper permission it carries on its business. New York, in its Code of Civil Procedure, has provided for personal service by summons on foreign corporations by delivering a copy to a person designated for that purpose. Such designation must specify a place within the state as the office and residence of the person designated, and the designation remains in force until the filing of a written revocation. While this designation remains in force, the corporation can claim the benefit of the statute of limitations. It is apparent that this course will in time be followed by those states which have followed the rule originally laid down in New York, depriving foreign corporations of the right to plead the statute of limitations. *Norris v. Atlas S. S. Co.*, 37 Fed. 426.