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Criminal Procedure--Justice of the Peace Courts--Increased Penalty upon Trial De Novo

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STUDENT NOTES

Criminal Procedure — Justice of the Peace Courts — Increased Penalty Upon Trial De Novo

Appeal from a criminal conviction in a justice of the peace court is generally held to be an absolute right. However, some problems and uncertainties surround this right — in particular the constitutionality of an increased penalty imposed after conviction in a trial de novo, the usual appellate procedure in such cases. The recent Supreme Court decision in *Colten v. Kentucky*[1] seems to dispose of this problem, holding that an increased penalty given in a trial de novo offends neither constitutional due process rights nor constitutional prohibitions against double jeopardy. On closer examination, however, the decision seems to create more problems than it solves. The Court failed to address the basic problem of a defendant's procedural rights in a trial before a justice, determining the case instead on a much narrower ground.

Implicit in the Court's decision is a view of the justice of the peace system that is, in some respects, inconsistent with the West Virginia view. This inconsistency creates problems in applying the decision to the West Virginia justice of the peace courts. The fundamental issue is the basic nature of the proceeding before a justice: If it is a true judicial proceeding, one set of consequences will follow, but if it is devoid of any judicial considerations, the result will differ.

The Supreme Court, in *Colten*, characterized the Kentucky justice system as a hearing, devoid of any judicial authority or dignity. Justice White labeled them courts of convenience not "designed or equipped to conduct error-free trials . . . ."[2] Their purpose is to provide speedy adjudication but not necessarily a trial with full constitutional protections.

The West Virginia court, on the other hand, views the justice of the peace trial as a genuine judicial proceeding in which full state con-

[1] 407 U.S. 104 (1971). The defendant was arrested on a complaint and warrant charging him with disorderly conduct, for which the maximum penalty was six months in jail and a $500 fine. He was tried in the quarterly court, convicted, and fined $10. Colten appealed his conviction to the criminal division of the circuit court under KY. R. CRIM. P. 12.02. In a trial before the judge, Colten was again found guilty, but was fined $50. The increased fine was upheld by the Kentucky Court of Appeals in Colten v. Commonwealth, 467 S.W.2d 374 (Ky. 1971). The United States Supreme Court affirmed.

[2] 407 U.S. at 117. The Court was quoting directly from Colten v. Commonwealth, 467 S.W.2d 374, 379 (Ky. 1971).

stitutional protections are available. Close control of the courts was established as an early tenet of West Virginia jurisprudence.[3] Statutes were enacted to protect a defendant's procedural rights both prior to and during trial.[4] By allowing presumptions as to the correctness of the justice court's procedure, the West Virginia court has in many instances accorded the justice system somewhat the same stature as courts of record.[5] The justice system is envisioned as a court of law, not merely as a mechanism for a speedy trial.

Yet, to characterize the magistrate system as either a complete judicial system or a totally non-judicial system is to fail to discern the issue. In reality, the justice system is a hybrid, existing at some point on the spectrum between these two polar concepts. A further examination of the Kentucky and West Virginia justice systems reveals the fallacy of simple categorization. In *Colten*, Justice White described the Kentucky magistrate courts as non-judicial mechanisms, yet these

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[3] W. VA. CONST. art. VIII, § 28, establishes the jurisdiction of justices as well as the right to appeal from a justice's decision:

> The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. . . . Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.

These powers are to be governed exclusively by statute, and any action by a justice not within the boundaries of statutory law is void. State v. McKain, 56 W. Va. 128, 49 S.E. 20 (1904).

[4] The statutes setting forth the requirements for warrants are illustrative. Proceedings before a justice require an arrest warrant issued in the name of the State, except where the offense is committed in the presence of the justice having jurisdiction or in the presence of a constable. W. VA. CODE ch. 50, art. 18, § 2 (Michie 1966). The warrant must be directed to and carried out by a person authorized by the law to arrest those charged with crimes against the State. *Id.* § 3. Procedure following the issuance of the warrant is governed by and subject to the same strictures as apply to procedure in any criminal trial. W. VA. CODE ch. 50, art. 18, § 4 (Michie 1966), provides that the provisions of W. VA. CODE ch. 62, art. 1, § 1 (Michie 1966), shall apply after the warrant is issued. A further indication of this concern for constitutional rights is the statute providing the right to a jury trial wherever a fine exceeding five dollars or imprisonment is authorized as a possible penalty. W. VA. CODE ch. 50, art. 18, § 7 (Michie 1966).

[5] The docket and transcript of the trial are prima facie correct and are not void for lack of complete recital of the facts. *Ex parte* Samuel & Slivoo, 82 W. Va. 486, 96 S.E. 95 (1918); State v. Emsweller, 78 W. Va. 214, 88 S.E. 787 (1916). The court, in *Emsweller*, noted that at common law a recital of facts was necessary in order for the docket to be valid but that this requirement had been changed by statute. The orders and judgments of the justice court are granted the same presumption of validity as those of courts of general jurisdiction. State v. Vendetta, 86 W. Va. 186, 103 S.E. 53 (1920); Rush v. Brannon, 82 W. Va. 58, 95 S.E. 521 (1918). However, one case has noted that a judgment from a justice court is open to impeachment on the question of jurisdiction, whereas a judgment from a court of record is held conclusive except where lack of jurisdiction appears on its face or is a matter of record. State v. Emsweller, 78 W. Va. 214, 223, 88 S.E. 787, 791 (1916).

courts are authorized to conduct judicial proceedings and mete out punishment in terms of fines and imprisonment.[6] In contrast, the West Virginia court's conception of the justice system is somewhat idealized; in practice the statutory safeguards are not and cannot be provided. Although procedural guarantees have been statutorily adopted,[7] these provisions are not as comprehensive as those governing trials of record. Furthermore, no provisions exist requiring preparation and maintenance of a record, an all important prerequisite for the intelligent review of any decision. In addition, justices of the peace lack the training[8] and, to a certain degree, the interest[9] necessary to properly carry out those procedures that have been established.[10]

[6] Justices of the peace in Kentucky have exclusive jurisdiction over all penal and misdemeanor cases in which punishment is limited by a fine of not more than $20. They have concurrent jurisdiction with judges of the circuit court over all penal and misdemeanor cases where the fine is limited to not more than $500 or imprisonment of not more than twelve months or both. KY. REV. STAT. § 25.010 (1971). Furthermore, certain procedural rights are accorded, such as the right to a jury trial, *Id.* § 25.014, and the right to an appeal de novo, *Id.* § 25.070. While Kentucky terms this right an "appeal," the right is unconditional and does not require a showing of error. KY. R. CRIM. P. 12.06. The criminal court is not bound by the justice court's finding and, indeed, does not even take that finding into consideration. The right of appeal extends even to convictions entered upon a plea of guilty. Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1956). *Compare* W. VA. CODE ch. 50, art. 18, § 1 (Michie 1966) (referring to jurisdiction of the court); W. VA. CODE ch. 50, art. 18, § 10 (Michie 1966) (providing a right to de novo trial); W. VA. CODE ch. 50, art. 18, § 7 (Michie 1966) (setting forth provisions for the right to trial by jury).

[7] For a summary of these guarantees, see note 4, *supra.*

[8] C. DAVIS, E. ELKINS, & P. KIDD, THE JUSTICE OF THE PEACE IN WEST VIRGINIA 9-11 (1958). In a survey conducted in 1958, only four out of 144 respondents had any legal training: One had 1 year, one had 1.5 years, one had 2 years, and one had a law degree but did not practice. The following chart gives an indication of the education background of the justices:

FORMAL EDUCATION OF JUSTICES*

Extent of Education	Number of Justices	Percent of Total
Ph.D.	1	.69
L.L.B.	1	.69
M.A. or equivalent	5	3.47
B.A. or equivalent	8	5.56
1-3 years college	18	12.50
Business college	4	2.78
High school	38	26.39
9-11 years	15	10.42
6-8 years	50	34.72
Less than 6 years	2	1.39
No answer	2	1.39
Totals:	144	100.00

* Source: Questionnaires to Justices.

Id. at 9. The average education of a justice was 10.6 years, compared to 8.5 years for all West Virginians and 9.3 years for all United States citizens.

These conflicting views oversimplify the characterization of each justice court system, but it is difficult to quantify the judicial and non-judicial elements found within the system. The important factor, however, is that both elements seem to be present in each state and must be considered in analyzing any problem arising from such systems.

The theory behind each system of inferior courts affects its operation. This is illustrated by the *Colten* decision. The Court held that an increased sentence, rendered upon trial de novo from a conviction in a justice of the peace court, did not violate the defendant's procedural due process rights. The decision was based on the distinctions between *Colten* and the Court's earlier decision in *North Carolina v. Pearce.*[11] *Pearce* requires a judge, who imposes a stricter penalty upon retrial after a successful federal habeas corpus challenge to the original proceeding, to set forth information concerning the defendant's conduct, after the original trial, to justify the increased sentence. This strict procedure seeks to insure that vindictiveness toward a defendant, for successfully defeating his conviction, plays no part in the judge's sentencing.[12]

In distinguishing the two cases, the Court, in *Colten,* found no threat of vindictiveness on trial de novo from a justice of the peace

[9] *Id.* at 10-11. Of those justices who responded, only 5.56% listed their interest in the law as their reason for seeking office. While only 15.28% listed the income derived as their reason for seeking office, it should be noted that 47% of those responding received their total income from fees.

[10] *See* R. Staker, Proposed Enactment of Statute Empowering Trial Judges to Issue and Try Defendant on Warrant Upon Dismissal, for Variance or Invalidity, of Warrant in Case Appealed from a Justice's Court, Jan. 28, 1971 (unpublished paper in West Virginia University Law School Library). Judge Staker noted that, in his years on the bench, over half of the appeals from criminal convictions have involved warrants

> so deficiently and insubstantially drawn that they were fatally defective, as a matter of law, and had to be quashed, or else they have been drawn not in accordance with the true facts and before trial have had to be nolled anticipatorily, because a fatal variance with the proof would have developed during trial.

Id. at 1.

[11] 395 U.S. 711 (1969). The defendant was convicted in a court of record of assault with intent to rape and sentenced to 12 to 15 years in the penitentiary. He later instituted post-conviction proceedings that led to reversal of his conviction. Upon retrial he was convicted and sentenced to a longer term. The conviction was affirmed by the North Carolina Supreme Court. In habeas corpus proceedings in federal court, the harsher sentence was held unconstitutional, a decision that was affirmed by the Fourth Circuit in Pearce v. North Carolina, 397 F.2d 253 (4th Cir. 1968), and later, by the Supreme Court.

[12] While the Court's concern for vindictiveness seems to stand out as the principal reason behind the *Pearce* decision, there is a more fundamental reason underlying *Pearce*; the mere possibility that the petitioner might receive an increased penalty because he had embarassed the state court system was felt by the Court to have a chilling effect upon the defendant's exercise of his constitutional rights.

court.[13] Unlike *Pearce,* the court in Colten's retrial was a different forum from that which had originally passed sentence. Furthermore, there was no record from the justice of the peace court that could have been considered by the superior court. As a result, there was no indication that the defendant would be treated more severely by the de novo court than a defendant whose trial is an original action in that court.[14]

The Court pointed out that the defendant could secure a new trial automatically and did not have to predicate it upon error committed by the justice court. Since the defendant had a right to a de novo trial, it was not unfair to require the defendant to endure proceedings in an inferior court in order to secure a proper trial. The Court reasoned that the defendant was not thereby placed in a disadvantageous position: He received a simple, speedy, first trial and had an opportunity to learn about the prosecution's case without revealing his own.[15] These options were not available to the state, since the state had no right of appeal. Furthermore, the defendant could plead guilty and secure a prompt trial de novo in a court of record. The Court concluded that

> [i]n reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what is in effect no more than an offer in settlement of his case and seek a judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court.[16]

It is, however, not entirely clear whether the *Colten* decision is applicable in West Virginia since the West Virginia court has adopted an entirely different view of the justice system. The Court, in *Colten,*

[13] There is of course a vast difference between a de novo trial from a justice's conviction and a retrial from a successful habeas corpus proceeding in federal court. While the threat of vindictiveness is more substantial in the latter case, it is nonetheless a problem to be considered where there is a de novo trial. North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

[14] 407 U.S. at 117-18.

[15] *Id.* at 118-19.

[16] *Id.* at 119. Colten pleaded a second defense of double jeopardy, charging that the Constitution did not permit the imposition of a more severe penalty on reconviction. The Court had rejected this argument rather summarily in *Pearce* and, in *Colten,* rejected it out of hand. Both decisions were based on the theory that double jeopardy places no restrictions upon the length of sentence imposed upon reconviction. While this rationale is dispositive of the point, it should be noted that the facts in *Colten* make that defense even less appropriate, for "the defendant [could] bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the appeal." *Id.* at 119-20.

stressed that the defendant had an automatic and complete right to a trial de novo. Decisions from the West Virginia court do not seem to guarantee that right. While the West Virginia court has generally accepted the rule that appeal must be granted automatically, it has curiously required some showing of error prior to allowing an appeal from a guilty plea. This limitation on the right to appeal is not expressly provided by the appeal statute:

> Every person sentenced to imprisonment by the judgment of a justice, or to the payment of a fine of ten dollars or more (and in no case shall a judgment for a fine of less than ten dollars be given by a justice if the defendant, his agent or attorney object thereto), shall be allowed an appeal to the court of the county having jurisdiction thereof upon application therefore within a reasonable time after such judgment is entered.[17]

In construing the statute, the court has held the appeal right absolute on the ground that it is necessary to protect the defendant's constitutional right[18] to trial by his peers.[19] Statutory requirements[20] as to recognizance,[21] the necessary fines,[22] and the time in which the appeal must be made[23] have been liberally interpreted in order to insure a new trial. Appeal is granted in the form of a trial de novo,[24]

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[17] W. VA. CODE ch. 50, art. 18 § 10 (Michie 1966).

[18] W. VA. CONST. art. III, § 14.

[19] Harshbarger v. Phipps, 117 W. Va. 134, 184 S.E. 557 (1936); State v. Richards, 91 W. Va. 22, 112 S.E. 187 (1922); State v. Tharp, 81 W. Va. 194, 94 S.E. 119 (1917); Vetock v. Hufford, 74, W. Va. 785, 82 S.E. 1099 (1914).

[20] W. VA. CODE ch. 50, art. 18, § 10 (Michie 1966).

[21] The failure to provide the necessary recognizance can be used to defeat a defendant's right to be released from custody but not to defeat his right to appeal. State v. Tharp, 81 W. Va. 194, 94 S.E. 119 (1917); Vetock v. Hufford, 74 W. Va. 785, 82 S.E. 1099 (1914).

[22] State v. Nangle, 82 W. Va. 224, 95 S.E. 833 (1918). The defendant was fined $2.00 and $5.00 for failing to compel a child of school age to attend school. He sought to have the fines increased to $10.00 (which was in excess of the limits established for that offense) in order to make an appeal. The court held that the right to appeal cannot be restricted where a fine of less than $10.00 has been imposed. The defendant need only ask for a heavier fine to bring his case within the provisions of the statute.

[23] *Id.* The court held that the requirement to appeal within a "reasonable" time, as required by W. VA. CODE ch. 50, art. 18, § 10 (Michie 1966), must be interpreted liberally to protect the defendant. Since the legislature established no set time limit, the period is determined on a case by case basis. In State v. Tharp, 81 W. Va. 194, 94 S.E. 119 (1917), a delay of six days was not an "unreasonable delay," and in State v. Richards, 91 W. Va. 22, 112 S.E. 187 (1922), an appeal made within eighteen days was valid. To further protect the defendant's rights, the court noted, in *Tharp*, that a justice may not delay an application so as to defeat the defendant's right to appeal.

[24] W. VA. CODE ch. 50, art. 18, § 10 (Michie 1966), requires that:

If such an appeal be taken, the warrant of arrest, the transcript of the

which does not consider or rule upon the possibility of error in the first trial.[25]

Nevertheless, an exception has arisen where the defendant pleads guilty in the original proceeding. This exception appears to have originated as dicta in *State v. Emsweller*.[26] While the court held that a plea of guilty to a void warrant would not prevent the defendant from exercising his right to a trial de novo, "[a] plea of guilty to a void warrant sufficiently charging an offense might preclude right to an appeal."[27] The West Virginia court has continued to adhere to this rule but has never decided a case in which the acceptance or rejection of this principle was crucial to the decision.[28] Specifically, appeal has been permitted where the plea was not entered voluntarily or where

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judgment, any bail and other papers of the case shall be forthwith delivered by the justice to the clerk of the court, and the court shall proceed to try the case as upon indictment or presentment, and render such judgment, without remanding the case, as the law and the evidence may require.

The federal rule followed by the West Virginia court is that the appeal vacates the judgment of the justice and calls for a new trial without regard to the judgment set forth by the justice. Elkins v. Michael, 65 W. Va. 503, 64 S.E. 619 (1909). The appeal merely "removes" the action to a court of record where the case is tried as if it had originated in that court. *Id.* at 505, 65 S.E. at 620.

[25] The judgment and rulings of the justice court cannot be considered at the second trial. Thus, there is no foundation upon which error can be predicated or determined. State v. Kessinger, 144 W. Va. 209, 107 S.E.2d 367 (1959).

[26] 78 W. Va. 214, 88 S.E. 787 (1916). The defendant was convicted in a justice court of a violation of the liquor laws. He applied for a writ of habeas corpus, and upon denial of the writ he brought error. The judgment was reversed, and the defendant was discharged. From a judgment denying an appeal from the justice's conviction, the defendant brought error. The warrant charging the defendant was found to be void. Lacking any evidence upon which to try the defendant, the proceeding became moot (since the defendant had already been discharged), and the writ of error was dismissed.

[27] *Id.* at 227, 88 S.E. at 793. The court cited a Missouri case, City of Edina v. Beck, 47 Mo. App. 234 (1891), and a New Hampshire case, Philpot v. State, 65 N.H. 250, 20 A. 955 (1889), as authority. The Missouri case provided direct authority on this point. It held that a plea of guilty in a mayor's court precludes any appeal from the judgment entered on that plea, for once such a plea has been entered, there remains nothing for the circuit court to decide. The *Philpot* case does not provide such strong authority. Jurisdiction over the particular crime was conferred on the police court by statute only where the accused pleaded guilty or nolo contendere. Since the statute specifically afforded the defendant the right to be tried in a justice's court only upon such pleas, the court felt that granting an appeal after the guilty plea would run counter to legislative intent.

[28] Both Browsky v. Perdue, 105 W. Va. 527, 143 S.E. 304 (1928), and Niceley v. Butcher, 81 W. Va. 247, 94 S.E. 147 (1917), contain dicta supporting this rule. A more recent case, Wright v. Boles, 149 W. Va. 371, 141 S.E.2d 76 (1965), stated that "[A] writ of error ordinarily will not be granted upon a conviction by means of a guilty plea where the judgment is properly entered." *Id.* at 376, 141 S.E.2d at 79. That case concerned a plea of guilty in a court of record, although the court cited *Nicely* as authority.

the defendant did not understand the consequences of his plea.[29] Although the cases supporting this rule turn on very peculiar factual situations, they seem to stand for the proposition that where the defendant pleads guilty in the justice of the peace trial, some error, generally a denial of constitutional rights, must be shown before an appeal and the subsequent de novo trial can be granted.

There are basic reasons that should lead the West Virginia court to adopt a rule contrary to *Colten.* Although the West Virginia court has overemphasized the judicial nature of the justice tribunals, it has nonetheless, correctly recognized that a certain judicial integrity should be accorded them. Thus, it seems unfair to permit an increased penalty upon trial de novo. However, most courts that have ruled on the issue have not adopted this rationale, holding instead that an increased penalty upon trial de novo does not violate a defendant's constitutional rights.[30] An examination of the factors emphasized by these courts suggests the error of such a determination.[31]

Some courts have held that the justice's lack of legal training provides a strong argument for allowing an increased penalty on

[29] In Nicely v. Butcher, 81 W. Va. 247, 94 S.E. 147 (1917), the court held that before a guilty plea can be accepted, the person making the plea must understand what he is doing. In that case, the plaintiff had been arrested on a warrant charging her with adultery. When she appeared before the justice, she indicated her desire that the charges be dropped. The justice advised her that this could be done for $20 plus costs, which she paid. When she later looked at her receipt, she discovered that the justice had entered a guilty plea on her behalf. The justice refused to change the plea or grant an appeal. The court held that since the plea was not knowingly made, an appeal should have been granted. Similarly, in State v. Stone, 101 W. Va. 53, 131 S.E. 872 (1926), the court held that a plea of guilty must be voluntary before it can be accepted. The defendant was convicted on a plea of guilty to possession of intoxicating liquor. He was not allowed to get in touch with his family, was not advised of his right to bail or counsel, was threatened with a greater fine and confiscation of his automobile, and was surrounded by officers in a strange town. His motion for appeal was granted.

[30] Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969); Cherry v. Maryland, 9 Md. App. 416, 264 A.2d 887 (1970); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Spenser, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), *cert. denied,* 403 U.S. 940 (1971); Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53 (1972); Evans v. Richmond, 210 Va. 403, 171 S.E.2d 247 (1969). *Contra,* Wood v. Ross, 434 F.2d 297 (4th Cir. 1970).

[31] *See* Aplin, *Sentence Increase on Retrial After North Carolina v. Pearce,* 39 U. CIN. L. REV. 427 (1970), which provides the analytical framework for the following discussion in the text. *See also* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant,* 74 YALE L.J. 606 (1965). This article provided the first major argument against increased penalties upon retrial, contending that such an increase violates constitutional due process and equal protection rights.

appeal.[32] The lack of such training probably prevents the sentencing justice from having any real understanding of proper punishment. If the presence of a legally trained justice is essential to a fair trial and sentence, the absence of such a justice seems to militate in favor of allowing an increased penalty.[33]

While this factor, taken alone, would seem to support such a decision as *Colten*, other more important factors tend to obviate that result. For example, most decisions permitting an increased penalty on trial de novo rely on the fact that the second sentence was imposed by a different court.[34] Yet, even though the trial is set in a different forum, the defendant remains faced with a dilemma. If he chooses to appeal, he risks the possibility of a harsher sentence. This possibility alone may inhibit a defendant from seeking a proper trial, even though such a trial will be de novo. Thus, his constitutional right to a proper trial is as greatly infringed as that of the defendant in *Pearce*.[35]

The most striking criterion stressed by the courts concerns the absolute right to a trial de novo. The courts have reasoned that, since the second trial is awarded as a matter of right without regard to error, the defendant gives up nothing in seeking the second trial; indeed, he gains a benefit.[36] The defendant has two full opportunities for acquittal, and, thus, it is fair that each trial begin at parity without regard to the justice's sentence.[37] This analysis fails to recognize the judicial aspects of the magistrate's court. Because a justice can punish and adjudicate, the justice courts can have a real effect on a defendant's rights and privileges. As such, its decisions cannot be ignored so easily. Appeals are granted to protect a defendant's rights and to

[32] *E.g.*, People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969). While this factor must be considered in reference to the justice system, it should be noted that in *Colten* the particular justice did have some legal training. The Court stated, however, that this is generally not the case. 407 U.S. at 114 n.11.

[33] Aplin, *supra* note 32, at 459. This argument is oriented toward the public's right to see that a defendant, properly tried and convicted, receives his due punishment. There is, however, an equally strong counter-argument based upon a defendant's right to a fair trial. Where the public fails to provide a trained justice, a prerequisite for a proper trial, it becomes unfair to require that a defendant risk the possibility of an increased penalty in order to protect his constitutional rights.

[34] State v. Spenser, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), *cert. denied*, 403 U.S. 940 (1971).

[35] Aplin, *supra* note 32, at 456. See note 11, *supra*.

[36] Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Spenser, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), *cert. denied*, 403 U.S. 940 (1971); Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53 (1973); Evans v. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).

[37] Lemieux v. Robbins, 414 F.2d 353, 355 (1st Cir. 1969).

insure an error-free trial, and it seems only logical that the defendant in a trial de novo be granted the same privileges as any other appellant. Principal among these privileges is the right to appeal, unhampered by the threat of an increased sentence.

Before the West Virginia court can rule on any of the problems attendant to an appeal from a justice court, it must first resolve the dilemma resulting from the inconsistent views of the justice of the peace system. The system defies hasty categorization, being neither totally devoid of judicial validity nor of equal status with the circuit court. When the system is viewed consistently by the court, problems such as harsher sentences on appeal can be resolved. The ultimate decision of the court on the issue of increased sentences upon retrial is problematical. The immediate task is to determine the position of the justice of the peace system on the judical spectrum and then establish the procedural requirements necessary to implement that theory.

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