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Criminal Law--Double Jeopardy--New Trial After Reversal for Insufficient Evidence

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ship upon the defendant, while placing an excessive power in the hands of the prosecutor. In the instant case the defendant has been put on trial two times for the same violation, and, as a result of the denial of his motion for acquittal, will again be placed on trial. His jeopardy right has not been violated because there has been no final determination of his case, so until he is either acquitted or convicted his right will not be vested. The weakness illustrated by this case is that the defendant has no means of appealing from an order denying his motion for acquittal. Here the court in refusing to grant his appeal from the lower courts denial of his motion, held that the denial of the motion was not sufficiently final as to make it appealable.

An analogous situation exists in West Virginia where our court has consistently denied writs of error from an order of a lower court reversing the judgment of an inferior court and remanding the same for further proceedings. *Rainey v. Freeport Coal & Coke Co.*, 58 W. Va. 381, 52 S.E. 473 (1910), *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S.E. 649 (1896). The same concept was applied to original proceedings in a circuit court when in *State v. Martin*, 67 W. Va. 545, 68 S.E. 270 (1910), the court stated that if the law in *State v. Bluefield Drug Co., supra,* was correct, the same rule would apply to the judgment of a circuit court which was set aside.

The case of *State v. Bluefield Drug Co., supra,* presents an excellent parallel to the *Gilmore* case, and serves to point out more clearly the need for legislative or judicial relief in some form. The defendant in this case was indicted in 1894 for selling liquor without a license, and upon trial in the Criminal Court of Mercer County, received the verdict, but a new trial was granted upon the states exceptions by the circuit court. On appeal the supreme court awarded a writ of error, then held that it lacked jurisdiction. The defendant was tried and convicted and, upon appeal for the second time, the conviction was reversed and another new trial was ordered. In refusing to grant a writ of error after the initial reversal, the court recognized the need for some limitation upon the granting of new trials, stating that, "If the law operates harshly, the strict enforcement of it is the most certain way to secure its speedy amendment, and while it is more pleasurable to do equal justice in merciful disregard of the unbending forms of law, yet duty requires a strict adherence to every varying crook and turn."

To point out the existing weakness is relatively easy; to prescribe the cure a different matter. Several possibilities, however, do present themselves.

In England the power to order a new trial is rarely exercised, the feeling being that to allow a second trial serves no other purpose than to harass the defendant. Due to the vitality of this policy the prosecution is brought to the realization that it will have one, and only one, chance at the defendant. This tends to move it to more careful and thorough preparation of its case for the initial trial. The end result being that the long sought after ideal of the "perfect trial" is brought closer to actual realization. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23.

A later, and perhaps more practical, means was used by the Pennsylvania Supreme Court in the case of *Commonwealth v. Turner*, 189 Pa. 239, 133 A.2d 187 (1957). In this case upon appeal from the defendants fifth conviction, and after numerous reversals for insufficient evidence, the court ordered a reversal and granted a "conditional new trial." The condition being that the prosecution must be able to show that it can produce new evidence which would support another conviction. Although the court in the case acted due to the extreme situation involved, it does point the way to a means of judicial prevention of the reoccurrence of such injustices.

The two remedies refered to represent the extremes in correcting the difficulty. The former while eliminating the problem also eliminates the benefit. While the latter is invoked only after substantial hardship has already been wrought. There is perhaps a middle ground which would allow retention of the benefits of the present rule, while relieving some of the hardship which can result from its unbending application. But whatever the means it is evident that some method should be made available to the defendant, so as to protect him from this form or harrassment.

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