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Effect of New Trial on Plea of Autrefois Acquit

Berkeley Minor Jr.

EFFECT OF NEW TRIAL ON PLEA OF *AUTREFOIS ACQUIT*

In the many discussions of late in the magazines on the alleged unfair advantages given the accused under our procedure, no attention has been paid, so far as the writer has observed, to a decision of our Supreme Court of Appeals, the effect of which has been to offer a powerful inducement to writs of error in criminal trials.

It was decided in *State v. Cross*,[1] that, where the accused, upon an indictment charging varying degrees of criminal responsibility for an act in different counts, or charging in one count the highest degree of criminal responsibility for an act upon which a lesser degree of criminal responsibility can be found, if he is convicted of a lower degree of criminal responsibility, and, on his application, he is granted a new trial, he cannot, on the second trial be convicted of any greater degree of criminal responsibility or offense. The court followed the Virginia case of *Stuart v. Commonwealth*.[2]

All courts agree that by seeking a new trial, the accused waives the benefit of the plea of *autrefois acquit* of the degree of criminal responsibility of which he was found guilty and can, on another trial, be found guilty of that or any less degree of criminal responsibility for his act; the only question is the extent of the waiver.

The decision in these cases is based on the ground that it is unfair to the accused to compel him to waive the verdict of acquittal of the higher degrees of criminal responsibility, involved in his conviction of the lesser degree, for instance a verdict of manslaughter on a murder indictment, as a condition of his seeking relief from alleged errors in his conviction of the lesser offense. This is unquestionably a strong argument, if we assume that the verdict of a jury is the expression of the unanimous opinion of the jury, on the evidence, of the accused's innocence of the higher degrees of criminal responsibility; but a candid appraisal of the usual jury verdict forces us to admit that it is nearly always the result of compromise between the varying opinions of the jury as to the degree of the guilt of the accused. Therefore it would not be unjust to compel him to submit his whole case to the second jury, when he seeks a review.

[1] 44 W. Va. 315, 29 S. E. 527 (1898).
[2] 28 Grat. 950 (1877).

The practical effect of this rule is that the accused has nothing to lose and everything to gain by asking for a new trial, and our appellate courts are congested with applications for writs of error and new trials. If the accused had to take equal chances with the State on the new trial, he would be much less likely to seek the new trial.

The state courts are divided on the question, but the Supreme Court of the United States in *Trono v. U. S.*[3] has repudiated the doctrine, although there is an express prohibition in the Fifth Amendment to the Federal Constitution against a person's being put twice in jeopardy for the same offense, and the prohibition is statutory only in West Virginia, not constitutional. In this case the court said:

> "And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and when so set aside and reversed the judgment is held as though it had never been."

It would seem therefore that this prolific source of delay in criminal proceedings could, without injustice and in harmony with the decisions of courts of high, if not the highest, standing, be abolished, either by a re-consideration of the question by our court of last resort or by legislative action, as no criminal can be said to have a vested right in such a rule of practice, which is hardly more than procedural. Notice of change could be given by adopting a rule of court, or the Act of the Legislature could except writs of error then pending.

—BERKELEY MINOR, JR.

[3] 199 U. S. 521, 26 S. Ct. 121 (1905).