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Comments

EXCLUSION OF TENANT FROM POSSESSION

Not infrequently when a person enters into a lease he finds himself excluded from possession either by the lessor, a person holding under paramount title, or by one who is a total stranger to the title and is a mere wrongdoer or trespasser. It is proposed to inquire as to what are his legal rights when placed in such a situation, other than possible efforts to oust the one in possession.

First, we shall consider whether such exclusion of the lessee gives him any affirmative right against the lessor for damages. But before considering the

various factual situations, it seems desirable to determine what the form or the nature of such an action would be, assuming that there is such a right of action.

There have been some decisions to the effect that a failure on the part of the lessor to see that the premises are open to the lessee at the time named for the beginning of the term constitutes a breach of the covenant for quiet enjoyment.[1] This covenant, though often expressed in the lease is, in absence of such express covenant, implied from the fact that the relationship of landlord and tenant exists.[2] In opposition to this view however, it has been held in some cases that, while the lessee is entitled to recover damages for the lessor's refusal to comply with the agreement, he cannot recover for a breach of the implied covenant for quiet enjoyment when he has never been in possession of the land.[3] The reason for this view seems to be the narrow rule that there can be no breach of this covenant unless there is an eviction, and here, there being no antecedent possession by the lessee, technically there can be no eviction.[4]

Although the courts seldom refuse to grant relief when the lessee has been excluded, it is often difficult to ascertain what the theory of the relief is. The courts that follow the strict rule that there can be no breach of the implied covenant for quiet enjoyment unless there has been an eviction, and hold that there can be no eviction without an antecedent possession, generally allow the lessee to recover damages from the lessor by holding that, in the lease, there is an implied promise by the lessor to put the lessee into possession.[5] The language of the court in *Thomas v. Croom*[6] is representative of this tendency. The court there says, "We are of the opinion, however, that, by virtue of a lease contract, there is an implied covenant that the demised premises shall be open to entry to the lessee at the time fixed in the lease for the beginning of the term; and that,

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1. McAlester v. Landers, 70 Cal. 79, 11 Pac. 505 (1886); Kammerer v. U. S. Silica Co., 196 Ill. App. 527 (1915); Riley v. Hale, 158 Mass. 240, 33 N. E. 491 (1893); Gardner v. Keteltas, 3 Hill 330 (N. Y. 1842); Garrison v. Hutton, 118 App. Div. 455, 103 N. Y. Supp. 265 (3d Dep't 1907); Brennan v. Jacobs, 15 Atl. 685 (Pa. 1888); Ft. Terrett Ranch Co. v. Bell, 275 S. W. 81 (Tex. Civ. App. 1925).

2. See Adrian v. Rabinowitz, 116 N. J. L. 586, 186 Atl. 29 (1936), holding that where there is an exclusion of the lessee from possession this is a breach of the express covenant for quiet enjoyment, but that no covenant for quiet enjoyment will be implied from the mere relationship of landlord and tenant.

3. Schwartsman v. Wilmington Stores Co., 32 Del. 362, 123 Atl. 343 (1924); same case on prior appeal, 32 Del. 7, 117 Atl. 739 (1922) (holding that while the lessee is entitled to recover damages for failure of the lessor to put him into possession, he cannot recover for breach of an implied covenant for quiet enjoyment where he never entered into possession of the premises); Stiger v. Monroe, 109 Ga. 457, 34 S. E. 595 (1899); Wallis v. Hands, [1893] 2 Ch. 75.

4. Stiger v. Monroe, 109 Ga. 457, 34 S. E. 595 (1899).

5. Rose v. Wynn, 42 Ark. 257 (1883); Thomas v. Croom, 102 Ark. 108, 143 S. W. 88 (1912); L'Hussier v. Zallee, 24 Mo. 13 (1856); Hughes v. Hood, 50 Mo. 350 (1872); Rieger v. Welles, 110 Mo. App. 166, 84 S. W. 1136 (1903); Brown v. Wall, 186 Mo. App. 150, 171 S. W. 586 (1914); Herpolsheimer v. Christopher, 76 Neb. 352, 111 N. W. 359 (1906); Sloan v. Hart, 150 N. C. 269, 63 S. E. 1037 (1909); Bloch v. Busch, 160 Tenn. 21, 22 S. W. (2d) 242 (1929).

6. 102 Ark. 108, 143 S. W. 88 (1912).

if the lessee is prevented from obtaining possession by some one holding the premises, then such covenant is violated, and the lessee is entitled to recover from the lessor the damages which may be sustained by him."

Whether or not the lessee will be able to recover damages on any of the above mentioned theories depends on whether he was excluded by the lessor himself; by a person having paramount title; or by an intruder having no right, such as a holdover tenant or a trespasser. When the lessee is excluded from possession by one having paramount title, this means that he has not been given the legal right to possession; while if he is excluded by a previous tenant holding over after the expiration of his term or by any other intruder not lawfully in possession, he has been given the legal right, but the premises are not actually open to his entry.

It is well settled that there is contained within a lease, in absence of an express provision to the contrary, an implied covenant to put the lessee in possession or to have the premises open to possession as against the lessor or someone having paramount title.[7] It seems that, where the lessee is excluded by one having paramount title, even if he were not entitled to sue on the implied covenant for quiet enjoyment or an implied covenant to give possession, he could sue on the implied covenant of power to demise.

In regard to whether the lessee can recover damages from the lessor when he has been excluded by a wrongdoer, the authorities are in direct conflict. One line of decisions follows what is referred to as "the American Rule." This group holds that in the absence of an express provision in the lease, the lessor impliedly covenants that the lessee shall have the legal right to possession at the beginning of the term, but that there is no implied covenant to put the lessee in possession as against a wrong-doer or intruder.[8]

There are other jurisdictions which follow what is generally termed as "the English Rule." These courts hold that the lessor impliedly covenants that the premises shall be open both legally and actually, to the lessee on the day specified for the beginning of the term.[9] Consequently, in the jurisdictions

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7. Gardner v. Keteltas, 3 Hill 330 (N. Y. 1842); see also Rice v. Biltmore Apartments Co., 141 Md. 507, 119 Atl. 364 (1922).

8. Gazzolo v. Chambers, 73 Ill. 75 (1874); Rice v. Biltmore Apartments Co., 141 Md. 507, 119 Atl. 364 (1922), holding in effect that, while a covenant to protect the tenant against a paramount title or against anyone claiming under the landlord will be implied, a stranger or a mere trespasser wrongfully in possession, such as a tenant holding over after his term, will not be. But as to such wrongdoer, it remits the tenant to the assertion and establishment of the title and right of possession under the lease. Also, in accord: Snider v. Deban, 249 Mass. 59, 144 N. E. 69 (1924); West v. Kitchell, 109 Miss. 328, 68 So. 469 (1915); Pendergast v. Young, 21 N. H. 234 (1850); Gardner v. Keteltas, 3 Hill 330 (N. Y. 1842); United Merchants' Realty and Improv. Co. v. Roth, 193 N. Y. 570, 86 N. E. 544 (1908). See also Hannan v. Dusch, 153 S. E. 824 (Va. App. 1930).

9. King v. Reynolds, 67 Ala. 229 (1880); Thomas v. Croom, 102 Ark. 108, 143 S. W. 88 (1912); Morrison v. Weinstein, 151 Ark. 255, 236 S. W. 585 (1921); Miller v. Ready, 59 Ind. App. 195, 108 N. E. 605 (1915); Dilly v. Paynsville Land Co., 173 Iowa 536, 155 N. W. 971 (1916); Mattingly's Ex'r v. Brents, 155

following this view, where the term of the lessee is to begin *in futuro*, it is the duty of the lessor to oust anyone who may then be in possession.

The "English Rule" seems to be the better view, because it is more in accordance with what the actual intention of the parties to the lease probably was. The "American Rule," though followed in many jurisdictions, and sustained by a substantial number of decisions,[10] does not seem to be in accord with the probable intention of the parties. This rule has been the object of much criticism. In *Bloch v. Busch*,[11] the Tennessee Supreme Court said, "In some jurisdictions, based upon early rulings in the state of New York, it is held that there is no such obligation (to actually hold the premises open) on the lessor, when his title is good in law and the leased premises are held by a person without right. However, the rule which we regard as the more sound is that the lessee bargains for the possession and not merely for the chance of a law suit, and that from the lease contract there is an implied obligation on the landlord to deliver possession or, at least, to hold the premises open to the entry of his lessee." This language represents the attitude of those courts following the "English Rule," from the time of *Coe v. Clay*,[12] the earliest English case, down to the present time. This is the view taken by the Missouri courts.[13]

It must be borne in mind that the courts which hold that there is such an implied covenant do not extend the period beyond the day when the lessee's term is to begin. If, after that time, a trespasser obtains and withholds the possession of the premises from the lessee, his remedy is against the trespasser and not the lessor. This obvious distinction between a wrongful possession at the time fixed for the commencement of the term, and the acts of intruders after the lessee has taken possession under the lease, has apparently been overlooked in some of the cases rejecting the "English Rule."[14]

In the jurisdictions which imply the covenant to so hold the premises open on the specified day, apparently the lessee has his option whether he will bring an action for the ejectment of the intruder or sue the lessor for damages resulting from breach of his implied covenant. While there are no direct holdings to this effect, the dicta in many of the cases indicate such option.[15] Also, it has been held that where a lessee entered into partial possession of the leased

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Ky. 570, 159 S. W. 1157 (1913); L'Hussier v. Zallee, 24 Mo. 13 (1856); Kean v. Kolkschneider, 21 Mo. App. 538 (1886); Brown v. Wall, 186 Mo. App. 150, 171 S. W. 586 (1914); Herpolsheimer v. Christopher, 76 Neb. 352, 111 N. W. 359 (1906); Shelton v. Clinard, 187 N. C. 664, 122 S. E. 477 (1924); Block v. Busch, 160 Tenn. 21, 22 S. W. (2d) 242 (1929); Coe v. Clay, 5 Bing. 440 (C. P. 1829); see Adrian v. Rabinowitz, 116 N. J. L. 586, 186 Atl. 29 (1926); also Hughes v. Hood, 50 Mo. 350 (1872).

10. Note 8 *supra*.

11. 160 Tenn. 21, 22 S. W. (2d) 242 (1929).

12. 5 Bing. 440 (C. P. 1829).

13. L'Hussier v. Zallee, 24 Mo. 13 (1856); Kean v. Kolkschneider, 21 Mo. App. 538 (1886); Brown v. Wall, 186 Mo. App. 150, 171 S. W. 586 (1914).

14. See Snider v. Deban, 249 Mass. 59, 144 N. E. 69 (1924). See also 16 R. C. L. 724 *et seq.*

15. See the cases in note 9 *supra*.

premises, knowing the other part was occupied by a third person, the payment of the entire rent by the lessee constituted a waiver of the implied covenant.[16]

Assuming a situation where the lessee can recover damages arising from the breach of the implied covenant to give possession,[17] what is the measure of damages? The ordinary measure of damages for the lessee's exclusion from possession is the difference between the actual rental value of the premises and the rent reserved.[18] Thus, if there is no such excess, it seems that nominal damages only could be recovered.[19] Besides these "general" damages, the lessee may, according to the weight of authority, recover such "special" damages as result directly from the lessor's breach of the implied covenant.[20] However, in order to recover such "special" damages, they must be properly alleged and proved.

It is both reasonable and logical that the lessee should recover from the lessor all expenses arising from the lessor's failure to give possession, though in a Missouri case the lessee's expense of breaking up his former home and preparing to take over the leased premises was denied him.[21]

The earlier decisions, in both England and this country, indicate that profits were excluded as an element of damages recoverable. However, this rule has been generally abandoned and the right to recover profits is usually determined by the same rules that govern the recovery of other damages. Loss of profits is therefore a proper element of damages, when such loss is the direct and necessary result of the defendant's act, or when such loss may reasonably have been within the contemplation of the parties when the contract was made, as a probable result of its breach, and where the profits can be determined with reasonable certainty.[22] However, many decisions have denied such recovery for the reason that if the business of the lessee is not an established one, the loss of profit is conjectural.[23]

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16. Rieger v. Welles, 110 Mo. App. 166, 84 S. W. 1136 (1903).
17. As to measure of damages where there is a breach of covenant for quiet enjoyment, see Note (1929) 62 A. L. R. 1311.
18. Huyler's v. Ritz-Carlton Restaurant & Hotel Co., 6 F. (2d) 404 (D. Del. 1925); King v. Reynolds, 67 Ala. 229 (1880); Nunnally Co. v. Bromberg & Co., 217 Ala. 180, 115 So. 230 (1928); Thomas v. Croom, 102 Ark. 108, 143 S. W. 88 (1912); Shoemaker v. Crawford, 82 Mo. App. 487 (1900); Orlando v. Brown, 296 S. W. 245 (Mo. App. 1927); Herpolsheimer v. Christopher, 76 Neb. 352, 111 N. W. 359 (1906); Jarman v. Sexton, 264 N. W. 305 (Neb. 1936); Adrian v. Rabinowitz, 116 N. J. L. 586, 186 Atl. 29 (1936); Burkhard v. Morris, 206 App. Div. 366, 201 N. Y. Supp. 225 (4th Dep't 1923); Sloan v. Hart, 150 N. C. 269, 63 S. E. 1037 (1909); Dills v. Calloway, 52 P. (2d) 707 (Okla. 1935), See Hughes v. Hood, 50 Mo. 350 (1872). There is no breach of implied covenant to give possession when there is merely a contract to give a lease. See St. Louis Brewing Ass'n v. Niederluecke, 102 Mo. App. 303, 76 S. W. 645 (1903).
19. Rose v. Wynn, 42 Ark. 257 (1883); Phillips v. Bossung, 108 Neb. 658, 189 N. W. 172 (1922).
20. See the cases in Note (1936) 104 A. L. R. 149.
21. Hughes v. Hood, 50 Mo. 350 (1872). See Orlando v. Brown, 296 S. W. 245 (Mo. App. 1927).
22. 8 R. C. L. 501.
23. Leslie E. Brooks Co. v. Long, 67 Fla. 68, 64 So. 452 (1914); Alexander v. Bishop, 59 Iowa 572, 13 N. W. 714 (1882); Jarrait v. Peters, 145 Mich. 29, 108 N. W. 432 (1906); Walter Box Co. v. Blackburn, 157 S. W. 220 (Tex. Civ. App. 1913).

But these same facts may give the lessee a defense to the lessor's claim for rent. Where the lessee is unable to obtain possession because of the fact that one having paramount title is in possession, he has a good defense to the lessor's claim for rent.[24] This is true even though the exclusion extends to only a part of the leased premises.[25] However, where the lessee takes possession of the part from which he is not excluded, he is liable to an action for use and occupation of such part.[26] Where there is partial exclusion by a paramount owner, so far as it affects his liability for the rent, it seems that the analogy of partial eviction has been applied so as to permit an apportionment of the rent.[27]

Where the lessee has been excluded by a stranger without right there is a conflict of authority as to whether such exclusion is a good defense to a claim for rent. Probably in the majority of jurisdictions this is no defense,[28] unless there is a specific provision in the lease. In some jurisdictions, including Missouri, it is held that, since the lessee has a right of action for damages in such case, the exclusion would be an absolute bar to a claim for rent.[29]

When the lessee is prevented from taking possession by the lessor himself, the analogy of eviction by the landlord is applied and the courts are quite agreed that the lessee has a defense when sued for the rent.[30] The fact that part of the premises are open makes no difference, because he is not bound to take part when he has bargained for the whole.[31]

There is some authority to the effect that, even though the lessee takes possession of part, he is, if excluded from part, not liable for rent or for the use and occupation of the premises.[32] This result could be reached by an analogy to partial eviction by the lessor. But there is some authority to the contrary.[33] It may be, however, where the lessee takes and retains possession of part, that he has "waived" his right to the remainder and may be held liable for the entire rent.[34] This is putting the penalty of the lessor's wrong on the lessee, and seems to be an improper application of the theory of "waiver."

In the ordinary situation it would seem, when the lessor and lessee enter

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24. Brandt v. Phillippi, 82 Cal. 640, 23 Pac. 122 (1890); Andrews v. Woodcock, 14 Iowa 397 (1862). See Mechanics' & Traders' Fire Ins. Co. v. Scott, 2 Hilt. 550 (N. Y. 1859).

25. Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138 (1888); Lawrence v. French, 25 Wend. 443, 7 Hill 519 (N. Y. 1844).

26. Tunis v. Grandy, 22 Grat. 109 (Va. 1872). See Lawrence v. French, 25 Wend. 443, 7 Hill 519 (N. Y. 1844).

27. Seabrook v. Moyer, 88 Pa. 417 (1879).

28. Ward v. Edesheimer, 43 N. Y. St. Rep. 138, 17 N. Y. Supp. 173 (1892); University of Vermont v. Joslyn, 21 Vt. 52 (1848).

29. Kean v. Kolkschneider, 21 Mo. App. 538 (1886); it is assumed in Rieger v. Welles, 110 Mo. App. 166, 84 S. W. 1136 (1903).

30. Penny v. Fellner, 6 Okla. 386, 50 Pac. 123 (1897); McClurg v. Price, 59 Pa. 420 (1868).

31. O'Brien v. Smith, 37 N. Y. St. Rep. 43, 13 N. Y. Supp. 408 (1891), *aff'd without opinion*, 129 N. Y. 620, 29 N. E. 1029 (1891).

32. Moore v. Mansfield, 182 Mass. 302, 65 N. E. 398 (1902); McClurg v. Price, 59 Pa. 420 (1868).

33. Eldred v. Leahy, 31 Wis. 546 (1872).

34. Prior v. Kiso, 81 Mo. 241 (1883).

into a lease, that it is the intention of the parties that the lessor is to have the premises open, both legally and actually, to the entry of the lessee, on the day set for the beginning of the term. Where there is a failure in this respect, for adequate protection to the lessee, he has not only a defense to a claim for rent but his affirmation action to recover damages for breach of the implied covenant.

DAVID R. HARDY.

THE RIGHT OF THE STATE TO APPEAL IN CRIMINAL CASES

For sometime there has been an open admission by the bar and the general public that our criminal law administration as it exists today is greatly in need of change. From time to time various methods of reform have been urged. Prominent among them is the suggestion that the state be allowed the same right of appeal as has the defendant. Much has been written upon this subject, and the recommendation has gained such recognition and support that it merits serious consideration by everyone. In dealing with such a suggestion it must be remembered that the federal and state constitutions must not be violated, and that justice must be furthered and not hampered. The latter involves most of all a consideration of the practical factors that exist in our criminal procedure today, for it is upon them that the ultimate justification for or against such a right of appeal in the state must lie.

Although neither the state nor the defendant has any common law right to appeal, yet by statutes the defendant has in all jurisdictions, save two, been given a broader right to appeal than has the state.[1] This, in itself, might seem to be strongly indicative of the lack of merit involved in such a right by the state, but if the question is approached historically such a contention loses much, if not all, of its force.

Prior to 1700 neither the defendant nor the crown had a right to a writ of error or appeal. The defendant as a matter of the grace of the king was often granted a writ of error.[2] Soon thereafter the writ of error came to be regarded not merely as a matter of grace to the defendant but of right whenever there was probable error.[3] This writ was supplanted in 1907 by the Eng-

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1. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 112-113. Connecticut by statute (Gen. Stat. (1930) § 6494) allows the state to appeal as it does the defendant. See also United States v. Sanges, 144 U. S. 310 (1892); People v. Bork, 78 N. Y. 346 (1879); Miller, *Appeals by the State in Criminal Cases* (1927) 36 YALE L. J. 486; Orfield, *Appeal by the State in Criminal Cases* (1935) 15 ORE. L. REV. 306. For the argument that there may be a general statutory right of appeal, see Johnson, *The Right of the State to Sue Out a Writ of Error in Criminal Cases* (1933) 11 CHICAGO-KENT REV. 85.

2. In Rex v. Wilkes, 4 Burr. 2527, 2550 (K. B. 1770) Lord Mansfield said, "Till the 3d of Queen *Anne*, a writ of error in any criminal case was held to be merely *ex gratia*. . . . It never was granted, except when the King, from justice, where there really was error, or from favour, though there was no error, was *willing* the outlawry should be reversed."

3. Miller, *supra* note 1, at 490.

lish Criminal Appeal Act,[4] extending appeals to cover situations falling heretofore under the scope of the writs of error.[5]

Thus, when our states were first formed, it was generally assumed that England had developed no general right of appeal for the state in criminal cases. Nor did the American states develop such a right. One might well wonder why. Before he ascended to the bench the now Judge Justin Miller explains it upon the ground that this period happened to be coincident with a period of juristic thought which began to emphasize the liberties or privileges of man and subordinated the powers of government; a time when defendants were placed at tremendous disadvantage in criminal proceedings in that they appeared without counsel, without witnesses, or the right to be sworn in their own behalf; a time of great political oppression by the prosecution against those unfortunate enough to be brought into a criminal court. Because of these and other disadvantages of the accused there was a reaction in his favor. And it is Judge Miller's belief that the general development of rules of procedure was premised upon this reaction and was designed to equalize the position of the defendant and the state.[6]

If this is so, and the ablest of writers substantiate Judge Miller's position,[7] the question is open as to whether or not under present day conditions these rules premised upon the former oppression of the criminally-accused are still sound, or whether they are obsolete and are a hampering force in our criminal law administration.[8] This invites a study of the position of the criminal today with special reference to the relative power the state has and assumes in criminal prosecutions. If the accused is no longer in need of this equalizing factor, and if society will be benefited in the obtaining of an improved criminal procedure by giving the state a broad right of appeal then a change should be made.

One of the foremost proponents for an equal power in the defendant and the state to appeal is Judge Miller, who points out, among other reasons, that the success of the administration of criminal law as a protective agency is measured largely in terms of the apprehension and conviction of guilty persons, and that to refuse to the state the right of appeal from errors in the trial tempts and often results in intended misconduct on the part of the defense attorney,[9]

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4. 7 Edw. VII, c. 23, § 3 (1907).
5. Orfield, *History of Criminal Appeal In England* (1936) 1 Mo. L. Rev. 326; Miller, *supra* note 1, at 490.
5a. United States v. Sanges, 144 U. S. 310 (1892).
6. Miller, *loc. cit. supra* note 1.
7. Stephen, General View of the Criminal Law (2d ed. 1890) 171; 1 Stephen, History of the Criminal Law of England (1883) 415; 1 Wigmore, Evidence (2d ed. 1923) 994.
8. Orfield, *supra* note 1: "A proposal frequently reiterated in almost every comprehensive statement of the reform of criminal appellate procedure is that the state be given the right to appeal. There is an overwhelming unanimity of opinion to that effect." See also, Bostick, *Proposed Reforms in Criminal Procedure* (1920) 11 J. Crim. L. 216, 219; The American Law Institute Code of Criminal Procedure (1930) § 423.
9. Miller, *supra* note 1, at 509: "He (the prosecuting attorney) knows that

as well as causing the trial judge to lean toward the defense in all rulings of law.[10] The trial judge knows that the state cannot appeal even if the court unduly prejudices the state's case. He knows that if he rules against the defendant the conviction is subject to reversal and he, the trial judge, to the possibility of censure from the appellate tribunal. Furthermore, there is serious hindrance of a proper development of both substantive and procedural criminal law. We find an anomalous situation in that the supreme court is the final adjudicator of constitutional questions of a civil nature, yet our trial courts decide the constitutionality of all questions of criminal law from which the defendant does not appeal. The result of this is that sometimes the same criminal statute is found to be unconstitutional in one district of the state and constitutional in some other part of the state.[11] Also, to refuse appellate review in matters of errors in law is to free many criminals who escape conviction through incorrect rulings in the trial court. All of this can but tend to demoralize our criminal law system. On the other side of the controversy is the hardship which would be imposed upon the defendant if the state were permitted the general right to appeal. Many defendants are too poor to hire an attorney to take an appeal. The argument is made that it is truly an anomalous state of affairs if the state may subject a poverty-stricken defendant to a reconsideration of his case because of the faulty operation of its own judicial machinery, even though he, the defendant, has in no way been at fault.[12] This is an argument of considerable weight, yet it should be viewed in the light of the above faults of the present system with the further consideration that defendants in civil cases are subject to this hardship and without any serious question, and that society

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his sardonic opponent across the room, violating with impunity practically every rule of practice, and goading him deliberately into error, holds a whip hand against which it is almost impossible for him to compete. He knows that a record is being made of his words and actions upon which he may be later taken to task, but that he can make no record of the words or actions of the attorney for the defense which will serve any purpose." See also, Ferrari, *The Public Defender* (1917) 2 J. CRIM. L. 704.

10. Miller, *supra* note 1, at 511: "The result is, further, that trial judges become more and more subject to local influence and local pressure in favor of the defendant. Few persons are interested in urging the trial judge to stand up squarely for law enforcement. Practically every defendant, on the other hand, has friends in the church, in the lodge, in the union, or in the social group who make it their business to whisper their suggestions and intimations in favor of leniency. The weak, spineless trial judge is able to hide his weakness in a record upon which the state has no appeal and thus to do the bidding of his friends. The strong, fearless judge acquires the reputation of being "hard-boiled" of "railroading men to jail." If he rules on a disputed point in favor of the state and is reversed, he is punished from day to day by covert innuendoes and at election time by direct attack."

11. Commonwealth v. Cummings, 3 Cush. 212, 213 (Mass. 1849): "A worse uncertainty of the law can hardly be conceived, than where the legislative acts of a government, by which all persons within its limits ought to be equally bound and protected, should receive a different final construction, in different judicial tribunals, and thus have a different operation upon those who are alike subject to them."

12. Orfield, *supra* note 1, at 311. There, also, is made the suggestion that the state pay the appeal-fees of poor defendants.

is exposed to grave danger by freeing without a fair trial men that are under serious suspicion of being criminals.

Although most of the controversy of late has been over this question of whether or not the state should have a full right of appeal as does the defendant, several other possibilities of reform have been presented. One possibility suggested is that in order to obtain the ruling of law on those questions which the state wishes to appeal, the state should be allowed the right to appeal, but the appellate court's decision should not affect the defendant in the case but should be used for future guidance only. Such a suggestion is impractical and carries with it more evil than assistance.[13] We have long recognized that our legal system is founded upon an equilibrium of the various interests concerned, such equilibrium being found by recognizing and estimating the respective forces of these interests and giving effect to the more important of them as judged by our social scale.[14] The result of the moot appeal would be that the various conflicting interests would not be represented properly before the court, as the defendant would not have a sufficient interest to cause him to pay a competent attorney to represent his view. Only in rare instances would amicus curia appear, for other than the prosecuting attorney few have a real interest in such questions as a criminal case would present. It is in this that the moot criminal appeals differ from ordinary declaratory judgment proceedings.[15] Thus, although it is well known that our appellate judges lean most heavily, in these days of crowded dockets, upon the counsel for a proper presentation of the issues before them, such a presentation would be lacking. The practical effect of the trial court discharging the defendant only to be reversed upon the law in the case would be that people indicted for crime would be free to mingle among society without society having been assured that they were released only after a fair trial. Further, the defendant in such a situation would still carry in the eyes of the public the stigma attributed to a criminal, for society would know that the appellate court had declared the proceedings at the trial to be contrary to law. Then, too, it is admitted that the deciding of a moot criminal case is not a proper judicial function. It certainly assumes a legislative function, for the moot decision merely lays down a rule for the regulation of future conduct.[16]

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13. Orfield, *supra* note 1, at 313: "The defects of this type of appeal are so obvious as to have attracted more comment than all other types of appeal by the state except appeal from acquittal."

14. Hicks, *Moot Appeals by the State in Criminal Cases* (1928) 7 ORE. L. REV. 218, 221.

15. See *id.* at 219. Muskrat v. United States, 219 U. S. 346 (1911). 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 109. For the general discussion of declaratory judgments, see Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 105.

16. 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 183. United States v. Evans, 213 U. S. 297, 301 (1909): "It was long ago held by this court that the discharge of such a function was not an exercise of judicial power." Mills v. Green, 159 U. S. 651 (1895); Hammer v. Smith, 11 Ariz. 420, 94 Pac. 1121 (1908); State v. Le Clair, 86 Me. 522, 30 Atl. 7 (1894); State v. Kelsey, 49 N. D. 148, 190 N. W. 817 (1922), wherein the Supreme Court of North

Even those who contend for a full right of appeal in the state and thus avoid the problems involved in moot decisions are confronted with a denial of the constitutionality of such a right of appeal on the constitutional ground of double jeopardy. The various states' constitutions read differently on this matter. In seven states we find the constitutional provision to be that no person "after an acquittal" may be tried again for the same offense.[17] In one state the provision is that no person shall "after conviction or acquittal" of an offense be again prosecuted for the same offense.[18] In all of the other state constitutions that have a double jeopardy clause and in the federal constitution, the provision is that "no person shall twice be put in jeopardy . . ." for the same offense.[19] In five states (Massachusetts, Connecticut, Maryland, North Carolina, and Vermont) there is no constitutional provision against double jeopardy.[20] Yet where the defendant has been acquitted by the jury there are only two states (Connecticut and Vermont) that give to the prosecution the right by statute to appeal with the consent of the trial court to obtain a new trial.[21] Some of the courts that forbid this right do so on the constitutional grounds of

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Dakota held a statute providing for such appeals to be unconstitutional on the ground that it was an attempt to vest the court with legislative power. See also, Loring v. Young, 239 Mass. 349, 132 N. E. 65 (1921), wherein the Massachusetts Supreme Court refused to even consider a prior advisory opinion on the same point of law now before the court in an actual case. See, Grinnell, *The Constitutional History of the Supreme Judicial Court of Massachusetts* (1917) 2 MASS. L. Q. 383, 542.

17. MO. CONST. art II, § 23; ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 7; People *ex rel.* Robison v. Swift, 59 Mich. 529 (1886); State v. Spear, 6 Mo. 644 (1840); State v. Lee, 10 R. I. 494 (1873); State v. Burris, 3 Tex. 118 (1848). State v. Linton, 283 Mo. 1, 222 S. W. 847 (1920), held that while the constitution does not forbid a person from being twice tried after the jury has been sworn, the common law of the state forbids this. State v. Buente, 256 Mo. 227, 165 S. W. 340 (1914), upheld a statute authorizing a justice to discharge a man after a jury had been impaneled on trial for a lesser offense and hold him for a felony based on the same act. The court held that such a statute changed the common law as to that offense. *Cf.* MO. REV. STAT. (1929) § 4007: "In all criminal cases, where the defendant is charged with any offense against the laws of this state, the fact of the former acquittal or conviction of such offense may be shown under the general issue or plea of not guilty." Notice the exceptions under the Missouri constitution, article II, Section 23; ". . . but if the jury . . . fail to render a verdict, the court . . . may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court . . . ." ". . . if judgment be arrested after a verdict of guilty on a defective indictment" a new trial may be had. *Ibid.* ". . . if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law." *Ibid.*

18. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 7.

19. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 7. See discussion by Orfield, *supra* note 1; (1936) 27 J. CRIM. L. 917.

20. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 7.

21. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 7; Palko v. Connecticut, 58 Sup. Ct. 149 (1937); State v. Lee, 65 Conn. 265 (1894); State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918). The granting of an appeal of the state only in the discretion of the trial court is protected against the prosecutor's hounding a defendant.

double jeopardy.[22] Others have put it simply on the ground that there was no statute in the particular state allowing such a thing to be done and that it could not be done at common law.[23] As to when one is considered to be in jeopardy the American Law Institute in 1935 said: "It seems most likely that the framers of the constitutions that contain the phrase 'twice in jeopardy' used it with its common law meaning, viz., after conviction or acquittal. The courts, however, have given it a much broader meaning, and have held that a person is 'in jeopardy' as soon as a jury has been impaneled, or been sworn, or been 'charged' with the prisoner, and that after that the defendant cannot be tried again. Of course, the courts have introduced exceptions to the rule; the practical administration of the law required it and hence the rule has come to be that the prisoner may be tried a second time though he has been 'in jeopardy' on the swearing of the jury, if 'necessity' requires a discharge of the jury, though . . . the constitution makes no exception of necessity. 'Necessity' now covers a number of different matters including the inability of the jury to agree. It is not clear why the courts selected the swearing of the jury as the point in the proceedings at which the defendant came in jeopardy rather that at arraignment, or plea, or even at the finding of an indictment. It would seem to be more reasonable to hold that he was not in jeopardy until the evidence had shown a prima facie case against him, for there would be no danger of conviction until that point. The apparent reason is what seems to have been a confusion of thought which linked up the idea of 'double jeopardy' with a rule enunciated by Lord Coke that the jury should be kept together until they returned their verdict. This rule is denied by writers both before and after Coke—and even Coke does not say what would be the effect if the rule were disregarded."[24]

A further constitutional difficulty was removed by a recent United States Supreme Court decision holding that a statute giving the state a full right of appeal in criminal cases is not unconstitutional as being against the due proc-

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22. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) 111; State v. Hand, 6 Ark. 169 (1845); People v. Webb, 38 Cal. 467 (1869); People v. Royal, 1 Scam. 557 (Ill. 1839); Commonwealth v. Ball, 126 Ky. 542, 104 S. W. 325 (1907); State v. Anderson, 3 Smedes & M. 751 (Miss. 1844); State v. Spear, 6 Mo. 644 (1840); State v. Hubbell, 18 Wash. 482, 51 Pac. 1039 (1898); *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529 (1915).

23. United States v. Sanges, 144 U. S. 310 (1892); State v. Newkirk, 80 Ind. 131 (1881); State v. Johnson, 2 Clarke 549 (Iowa 1856); State v. Shields, 49 Md. 301 (1878).

24. ADMINISTRATION OF CRIMINAL LAW (Am. L. Inst. 1935) 8. See also, State v. Lee, 65 Conn. 265, 272 (1894): "The end is not reached, the cause is not finished, until both the facts and the law applicable to the facts are finally determined. The principle of finality is essential; but not more essential than the principle of justice." See (1926) 30 L. N. 2, to the effect that a constitutional provision against putting a prisoner twice in jeopardy forbids the granting of an appeal by the state from an acquittal where the effect of the reversal would be to allow a retrial of the case. See also (1926) 27 J. CRIM. L. 917.

ess clause of the Fourteenth Amendment, nor in derogation of the privileges and immunities clause of the Federal Constitution.[25]

The Federal government by the Criminal Appeal Act[26] has been permitted the right to appeal from a decision to quash, set aside or sustain a demurrer to any indictment . . . based upon the invalidity or construction of any statute upon which the indictment is founded, from an arrest of judgment of conviction for insufficiency of the indictment where validity or construction of the statute is in issue, and from a decision sustaining a special plea in bar when the defendant is not put in jeopardy. In Missouri the state's right to appeal extends only to appealing from sustained demurrers or exceptions to allegedly insufficient indictments or informations, or where judgments thereon are arrested or set aside for such insufficiencies—such appeal being in the court's discretion.[27]

Thus there is a great variance in the scope of the right of a state to appeal in criminal cases from Connecticut and Vermont who give the full right of appeal (there being no constitutional provision against double jeopardy in those states) to those extreme states that give no right of appeal, with the "in-between" states with varying scopes, to the Federal government who gives a comparatively broad right of appeal to the government. It would seem that it is well worth while to reconsider this phase of criminal procedure with a view toward improving the system. Especially is this true under the obvious miscarriage of justice under the present system whose historical basis now seems obsolete.[28] The American Law Institute in 1935 took this question under advisement and adopted the resolution that, "Where a person has been acquitted generally, and in the course of the trial a material error has been made to the prejudice of the State the State shall be entitled to a new trial."[29] This resolution is not meant to represent the holdings of those jurisdictions that have double jeopardy clauses, nor does it seem to represent that class of state that has no statutory right to appeal. Yet it does show the attitude of that body upon this question. In view of the fact that the criminal class today is still rampant and is often so well protected by able counsel and judicial tolerance, it would seem desirable that Missouri adopt as a part of its criminal procedure the above quoted resolution of the American Law Institute. To do this would necessitate an amendment of Section 23 of article II of the Missouri constitution. That section specifically provides that no person shall "after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or

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25. Palko v. Connecticut, 58 Sup. Ct. 149 (1937), *aff'g* 122 Conn. 529, 191 Atl. 320 (1937).
26. 36 STAT. 1246 (1907), 18 U. S. C. 862 (1927).
27. MO. REV. STAT. (1929) § 3753. See also, MO. REV. STAT. (1929) § 3775.
28. State v. Adams, 142 Ark. 411, 218 S. W. 845 (1920); State v. Spahr, 186 Ind. 589, 117 N. E. 648 (1917); Commonwealth v. Prall, 146 Ky. 109, 142 S. W. 202 (1912); Commonwealth v. Gritten, 180 Ky. 446, 202 S. W. 884 (1918); State v. Harrison, 154 La. 1011, 98 So. 622 (1923). See also (1937) 27 J. CRIM. L. 917.
29. ADMINISTRATION OF THE CRIMINAL LAW (Am. L. Inst. 1935) § 13.

liberty. . . ." Even if the state would secure a reversal on appeal the state would not be able to retry the defendant again under this section, and thus to grant any appeal without amending the section of the Missouri constitution would be to grant a moot appeal, whose evils and limitations have been discussed earlier in this article. To protect the defendant from unwarranted harassing by prosecutors who would act under this broadened right of the state to appeal, the appeal by the state can be limited to being granted only in the discretion of the trial judge. Missouri has so limited it in her present appeal statute as have many other states.

ELMO HUNTER.