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NOTES

CEMETERIES AS NUISANCES.—Cemeteries are common occurences, indeed necessities. One has been defined as "a place or area of ground set apart for burial of the dead, and created by act of setting ground apart for burial, marking and distinguishing it from adjoining ground as a place of burial." [1] There is no doubt but that to some persons they may become distasteful, but their necessity has never been really challenged. It will be the purpose of this note to determine the occasions when a cemetery may become a nuisance, either public or private.

The universal weight of authority seems to indicate that cemeteries are not nuisances *per se.*[2] An Illinois case, *Rosehill Cemetery Company v. Chicago* states this view lucidly, Justice Duncan giving the opinion,

[1] Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N. E. 104, 105 (1925).

[2] Hume v. Laurel Hill Cemetery, 142 Fed. 552 (1905 C. C.) (Avoiding an ordinance which arbitrarily forbid burials within entire county where public safety was not endangered); Bryan v. Birmingham, 154 Ala. 447, 45 So. 922 (1908); Union Cemetery Co. v. Harrison, 20 Ala. App. 291, 101 So. 517 (1924); McDaniel

"That a cemetery is not a nuisance *per se* is well established by the decisions of the courts. The right of local legislative bodies to regulate and prohibit the use of land for a cemetery is based upon the ground that it may endanger the lives and health of the people in the locality. . . . Before it can be abated or its use enjoined, it must be clearly and satisfactorily proven to be a fact." [3] Another case [4] from the same jurisdiction says that burial places are indispensable and concern the public health, and are not the subject of absolute prohibition by legislative action. "A cemetery is not a nuisance *per se*. It is a lawful and essential institution" says a Georgia case.[5]

This rule seems to extend to private as well as public burial places. A man has a legal right to build a tomb on his own land and such is

v. Forrest Park Cemetery Co., 156 Ark. 571, 246 S. W. 874 (1923); Los Angeles County v. Hollywood Cemetery Ass'n., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75 (1889); Carter v. Chotiner, 210 Cal. 288, 291 Pac. 577 (1930); Harper v. Nashville, 136 Ga. 141, 70 S. E. 1102 (1911); Hallman v. Atlanta Child's Home, 161 Ga. 247, 130 S. E. 814 (1925) (Allowed establishment of negro cemetery in white residential section); Lake View v. Letz, 44 Ill. 81 (1867); Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N. E. 104 (1925); Rosehill Cemetery Co. v. Chicago, 353 Ill. 11, 185 N. E. 170, 87 A. L. R. 742 (1933); Begein v. Anderson, 28 Ind. 79 (1867); Payne v. Wayland, 131 Iowa 659, 109 N. W. 203 (1906); Kuhlman v. Beloit, 123 Kan. 645, 256 Pac. 806 (1927); Musgrove v. St. Louis Church, 10 Ia. App. 431 (1855); Hardin v. Huckaby, 6 La. App. 640 (1927); Monk v. Packard, 71 Me. 309, 36 Am. Rep. 316 (1880); Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n., 111 Minn. 149, 127 N. W. 626, 34 L. R. A. (N. S.) 565, 20 Ann. Cas. 790 (1910); Normandy Consol. District v. Harral, 315 Mo. 602, 286 S. W. 86 (1926) (Court disregarded argument that intended cemetery would cause a loss in public revenue to the district because it would be exempt from taxes); St. Joseph v. Georgetown Lodge, 22 Mo. App. 1076, 11 S. W. (2d) 1082 (1928) (Avoiding an ordinance declaring a cemetery within the city limits to be a nuisance); Symmonds v. Novelty Cemetery Ass'n., 21 S. W. (2d) 889 (1930 Mo.) (Allowed cemetery even though it was adjoining property of valuable residential nature); Braasch v. Cemetery Ass'n., 69 Neb. 300, 95 N. W. 646, 5 Ann. Cas. 132 (1902); Morton v. St. Patrick's Roman Catholic Church Society, 56 Misc. 71, 105 N. Y. Supp. 1100 (1907); Moritz v. United Brethren Church on Staten Island, 269 N. Y. 125, 199 N. E. 29 (1935) rev. 244 App. Div. 121 (But see Moore v. United States Cremation Co., 286 N. Y. Supp. 639 (1936) where a declaratory judgment prevented the erection of a crematory or columbarium in zoned residential property); Ellison v. Washington, 58 N. C. 57, 75 Am. Dec. 430 (1859); Board of Health v. Lewis, 196 N. C. 641, 146 S. E. 592 (1929); Henry v. Perry Township, 48 Ohio St. 671, 30 N. E. 1122 (1891); Clinton Cemetery Ass'n. v. McAttee, 27 Okla. 160, 111 Pac. 392, 21 L. R. A. (N. S.) 945 (1910); Wygant v. McLaughlin, 39 Ore. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. Rep. 673 (1901) (Invalidating ordinance prohibiting burial of dead bodies as unreasonable); Mensi v. Walker, 160 Tenn. 468, 26 S. W. (2d) 132 (1930) appeal dismissed in 283 U. S. 791, 75 L. Ed. 1417, 51 S. Ct. 363 (1931); Dunn v. Austin, 77 Texas 139, 11 S. W. 1125 (1889); Elliott v. Ferguson, 37 Texas Civ. App. 40, 83 S. W. 56 (1904); Sherman v. Crawford, Texas Civ. App. 127 S. W. 1075 (1910); Farb v. Theis, 250 S. W. 290 (1923 Texas Civ. App.); Hite v. Cashmere Cemetery Ass'n., 158 Wash. 421, 290 Pac. 1008 (1930).

3 352 Ill. 11, 185 N. E. 170, 87 A. L. R. 742 (1933).

4 Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71 (1873).

5 Hall et. al. v. Moffett et. al., 170 S. E. 192 (1933 Ga.).

not in itself a nuisance unless from the particular circumstances surrounding it the public health is endangered.[6] An old case from Alabama, *Kingsbury v. Flowers,*[7] outlines this matter of private cemeteries well. "Burial places for the dead are indispensable. They may be the property of the public, devoted to the uses of the public, or the owner of a freehold may devote a part of his premises to the burial of his family or friends. . . . It is quite an error to suppose that of itself a burying ground is a nuisance to those living in its immediate vicinity. Much depends upon the mode of interment whether it can be justly asserted that in any event injury will result from it."

Although it has been fairly well established that cemeteries are not nuisances *per se,* the authorities are agreed that under certain circumstances they may be enjoined or abated.[8] Whether or not a cemetery is a nuisance is a question of fact, to be determined by the circumstances of each case. The question of nuisance depends largely upon the position and extent of the grounds and the manner in which they are drained and the burials therein affected.[9] Equity will enjoin the use of land for cemetery purposes so situated that the burial of the dead will injure life or health, either by corrupting the atmosphere or the water of wells or springs.[10] A leading Iowa case, *Payne v. Town of Wayland,*[11] granted an injunction against a cemetery, recognizing the fact that the cemetery was built on a mound between two natural streams, that the soil was chiefly sand and clay, especially adapted for the carrying of subterranean waters, that the south side of the mound was perpetually wet showing percolation, and that these circumstances of drainage and seepage would cause nearby springs and streams to become contaminated, thus injuring the health of man and the watering livestock. In *Cheektowaga v. Sts. Peter and Paul Greek Russian Orthodox Church,* the New York court held a cemetery a private nuisance where there were upwards to thirty drinking water wells in close proximity, and from the depth that human bodies were usually buried there were left only six feet of open, porous stony sand and loam as a barrier of safety between the decaying bodies and the drinking water supply of the neighborhood.[12] Where cellars neighboring the cemetery were filled with

6 Barnes v. Hathorn, 54 Me. 124 (1866).

7 65 Ala. 479, 39 Am. Rep. 14, 15 (1880).

8 Payne v. Wayland, 131 Iowa 659, 109 N. W. 203 (1906); Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n., 111 Minn. 149, 127 N. W. 626 (1910); Lowe v. Prospect Hill Cemetery Ass'n., 58 Neb. 94, 78 N. W. 488 (1899); Clark v. Lawrence, 59 N. C. (6 Jones Eq.) 83, 78 Am. Dec. 241 (1860); Surrat v. Dennis, 199 N. C. 757, 155 S. E. 865 (1930); Jung et al. v. Neraz, 71 Texas 396, 9 S. W. 344 (1888); Austin v. Austin City Cemetery Ass'n., 28 S. W. 1023 (1895 Texas Civ. App.).

9 Farb v. Theis, 230 S. W. 290 (1923 Texas Civ. App.).

10 Braasch v. Cemetery Ass'n. of Evangelical Lutheran Soc., 69 Neb. 300, 95 N. W. 646 (1903).

11 131 Iowa 659, 109 N. W. 203 (1906).

12 123 Misc. 458, 205 N. Y. Supp. 334 (1924).

water which could not have been surface water, and there was a probable connection between the water in the basement and that which would percolate from the graves through the clay soil permeated with sand and gravel seams, a Minnesota court enjoined a cemetery.[13] In *Lowe v. Prospect Hill Cemetery Ass'n.*[14] the tribunal decided against the defendant cemetery company, saying that germs flourish in decomposing bodies for an indefinite period of time, that this soil was not of a type as would act as a germicide, that since the cemetery was on a crest of a hill and the soil beneath not impervious to seepage, people would become infected by the use of water into which these germs could easily come from seeping moisture from the burial place. A Texas case, *Jung v. Neraz* [15] enjoined the creation of a proposed burial ground on the basis that drainage would poison the wells, and that malodors would injure the health of the plaintiffs and render their homes uninhabitable. In this case, the plaintiffs had been living in the neighborhood for a long time, and it seemed that there were other equally as good spots to place the proposed cemetery. A Connecticut court decided that a long unused cemetery in a densely populated section of the city of Waterbury had become obnoxious and was to be regarded as a public nuisance so as to enjoin further interments.[16] In another case where some of the graves had been left open, or coffins poorly covered with dirt so that they could be seen, and unhealthy and disgusting odors therefrom made the plaintiff and his wife ill, the cemetery was decided to be a nuisance and was abated, the court stating that the right to pure air was a right to be thus protected.[17]

However, a cemetery will not be enjoined because it offends merely the esthetic sense of an adjacent proprietor,[18] nor will unpleasant reflections as to death and possible damnation warrant equitable interference even though caused by the nearby cemeteries.[19] The Maine court in an old case, *Monk v. Packard,* stated the law's views upon this matter of graveyards and sensibilities well; "Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art or skill can suggest, while

13 Nelson v. Swedish Evangelical Lutheran Cemetery Ass'n. of Chicago City, 111 Minn. 149, 127 N. W. 626 (1910). (See Rea v. Tacoma Mausoleum's Ass'n., 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541, where owners of land adjoining cemetery containing mausoleum were not entitled to injunction restraining an addition thereto, the blank wall of which will be within twenty feet of their line, and which will be so constructed that no damage from seepage or noxious odors can accrue.)

14 58 Neb. 94, 78 N. W. 488 (1899).

15 71 Texas 396, 9 S. W. 344.

16 Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350 (1892).

17 Union Cemetery Co. v. Harrison, 20 Ala. App. 291, 101 So. 517 (1924).

18 Sutton v. Findlay Cemetery Ass'n., 270 Ill. 11, 110 N. E. 315 (1915).

19 McDaniel v. Forrest Park Cemetery Co., 156 Ark. 571, 246 S. W. 874 (1923).

to others of morbid or excited fancy or imagination they become unpleasant and induce mental disquietude from association exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both merely fanciful." [20] The court in that case disregarded the plaintiff's pleas that the cemetery had been moved so that tombstones were visible from the front windows of the house. The fact that a cemetery lot "was unsightly and disfigured, and needed to be filled and graded to put it in proper condition" did not warrant its being declared a nuisance in *Woodstock Burial Ground Ass'n. v. Hager*,[21] the court declaring that the law does not cater to men's tastes.

The authorities seem to be in accord that cemeteries will not be enjoined or abated merely because they might bring about a depreciation in the value of neighboring property.[22] They are necessary and therefore one establishing a burial ground is not liable in damages or subject to equitable action merely because of the fact that people are less willing to live near a cemetery, thus lowering the rental or sale value of the land.[23]

Private convenience must yield to the convenience of the public when it comes to establishing sites for burials and the mischief must be undoubted before there is any interference by the court.[24] A Pennsylvania court refused to grant an injunction, even in the face of plaintiff's pleas that a cemetery would contaminate his water supply, because the matter was a question of public necessity, the cemetery was located outside the town in a sparsely settled district, and there was insufficient evidence that the anticipated injury would ever occur.[25] It is not enough that the injury be probable or contingent,[26] and the cases seem agreed that the burden of proof in showing facts sufficient to allow equitable action is upon the one asserting that a nuisance exists.[27] Thus it would seem that courts try to favor the cemeteries as much as is equitably possible.

Leon L. Lancaster, Jr.

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20 71 Me. 309, 36 Am. Rep. 315, 317 (1880).

21 68 Vt. 488, 35 Atl. 341 (1896).

22 Hume v. Laurel Hill Cemetery, 142 Fed. 552 (1910 C. C.); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N. E. 170, 87 A. L. R. 742 (1933); New Orleans v. St. Louis Church, 11 La. Ann. 244 (1856); Hardin v. Huckaby, 6 La. App. 640 (1927); Barnes v. Hathorn, 54 Me. 124 (1866); Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315 (1880); Dunn v. Austin, 77 Texas 139, 11 S. W. 1125 (1889); Robert v. Les Cure et Marguillier, Rap. Jud. Quebec 9 C. S. 489 (1896).

23 Reid v. Memphis Memorial Park, 5 Tenn. App. 105 (1927).

24 Hardin v. Huckaby, 6 La. App. 640 (1928).

25 Wahl v. Methodist Episcopal Cemetery Ass'n. of Williamstown, 197 Pa. 197, 46 Atl. 913 (1900).

26 Sutton v. Findlay Cemetery Ass'n., 270 Ill. 11, 110 N. E. 315 (1915).

27 Elliott v. Ferguson, 37 Texas Civ. App. 40, 83 S. W. 56 (1904).

CRIMINAL LAW — FORMER JEOPARDY — WHEN JEOPARDY ADHERES. —No person, by the Fifth Amendment of the Constitution of the United States, and by similar amendments in the various constitutions of the forty-eight states, is subject to be twice placed in jeopardy of life or limb for the same criminal offense. The fact that the United States has a dual form of government wherein both the federal and state governments are sovereign in their own right, gives rise to a peculiar qualification of former jeopardy in this country. Where each sovereignty makes a specific act a crime, assuming they each have the power to do so, conviction or acquittal by one does not give to the convicted or acquitted an immunity from successful prosecution by the other.[1] Otherwise, if it in law and in fact exists, a former conviction or acquittal for the identical offense now charged is everywhere in the United States a complete bar to any further prosecution of the accused. But at what point in the procedure of a trial does jeopardy attach? What bearing does the fact that the indictment or information is invalid have on the attaching of jeopardy? What role does the failure to arraign a defendant and to have him plead, have on his being placed in jeopardy? What effect is there on jeopardy already attached when the trial judge discharges a juror or the jury? And lastly, what effect does the lack of jurisdiction in the court have on the attaching of jeopardy? These questions are to be treated broadly in the above order, and present the scope of this note.

Jeopardy attaches, according to the general rule, when a person has been placed on trial on a valid indictment or information, has been arraigned and has pleaded, and a jury has been impanelled and sworn in a court of competent jurisdiction.[2] There are many qualifications of this rule, some of which hereinafter will be noted. The reason for this holding is, broadly, that at that time a person's jeopardy, that is, danger and peril to life or limb, is real; and the constitutional amendments referring to jeopardy contemplate precisely that reality. Jeopardy, as used in the constitutions of this country, is construed as a prohibition not against being twice punished, but against being twice placed in danger of being punished for the same offense. In Maryland,[3] it is held that the plea of former jeopardy is not available where there has been no verdict rendered by the jury in the former trial. In Mississippi,[4]

1 United States v. Lanza, 260 U. S. 377, 67 L. ed. 314 (1922).

2 United States v. Van Vliet, 23 Fed. 35 (District Court, Mich. 1885); Savell v. State, 150 Ala. 97, 43 So. 201 (1907); Patterson v. Police Court, 123 Cal. 453, 56 Pac. 105 (1899); O'Donnell v. People, 224 Ill. 218, 79 N. E. 639 (1906); Gillespie v. State, 168 Ind. 298, 80 N. E. 829 (1907); Paul v. Benzie Circuit Judge, 163 Mich. 543, 128 N. W. 739 (1910); State v. Sommers, 60 Minn. 90, 61 N. W. 907 (1895); State v. Hows, 31 Utah 168, 87 Pac. 163 (1906); State v. Herold, 68 Wash. 654, 123 Pac. 1076 (1912).

3 Anderson v. State, 86 Md. 479, 38 Atl. 937 (1897).

4 Roberts v. State, 72 Miss. 728, 18 So. 481 (1895).

New Jersey,[5] and South Carolina,[6] by their constitutions, former jeopardy may not be pleaded in a second trial for the same offense unless there has been a conviction or acquittal in the first. In *Roberts v. State of Mississippi, supra,* the court stated that such a clause in its constitution changes the old rule and "wisely puts an end to the unmeritorious escape of persons charged with crime, who had been technically, not really, tried. It was put into the constitution in the interest of the due and proper administration of the criminal law." The holding of these four states represents a decided minority. And, in regard to the remaining questions of this note as set forth above, the holding of these four states simplifies the answering of them. Bishop in his treatise on criminal law criticizes the minority ruling on the grounds that its effect is to make these constitutional amendments referring to jeopardy read that no man shall be twice "tried" for the same offense, thus confounding the danger or jeopardy of the thing and the thing itself.[7] To conclude this first question, in those criminal cases where a jury is waived, the peril of jeopardy arises before a judge acting alone, under the same circumstances as before a judge and jury.[8]

It is the general rule that jeopardy cannot attach if the indictment or information is substantially invalid for one reason or another.[9] But out of this rule arises a situation about which there is a conflict of judicial opinion. In the case of *United States v. Ball,*[10] the defendant was charged with murder in an indictment lacking the requisite fullness and precision. The defendant, nevertheless, pleaded to the merits and was subsequently acquitted. Thereafter, the defendant was again brought before the court for the same offense, and this time he pleaded former jeopardy. The Supreme Court of the United States held that a general verdict of acquittal upon the issue of not guilty to an indictment charging murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment. The court felt that since the acquittal had been gained through a meritorious defense, and a discharge did not result because of the insufficiency of the indictment, it would obviously violate the prohibition against being twice placed in jeopardy of life or limb for the same offense. In this view, a minority in the United States concur either by statute or decision.[11] It is conceded by the minority that when the defendant is

5 Smith v. New Jersey, 41 N. J. L. 598 (1879).

6 State v. Wise, 33 S. C. 582, 12 S. E. 556 (1879).

7 1 BISHOP, NEW CRIMINAL LAW (8th ed. 1892) 1018.

8 People v. Garcia, 120 Cal. App. 767, 7 Pac. (2d) 401 (1932); State v. Pittsburg Paving Brick Co., 117 Kan. 192, 230 Pac. 1035 (1924).

9 16 C. J. 376.

10 163 U. S. 662, 41 L. ed. 300 (1896).

11 Tufts v. State, 41 Fla. 663, 27 So. 218 (1899); State v. Holton, 88 Minn. 171, 92 N. W. 541 (1902); State v. Hall, 141 Mo. App. 701, 125 S. W. 229 (1910); State v. Littschke, 27 Ore. 189, 40 Pac. 167 (1895); Jones v. Morris, 97 Va. 43, 33 S. E. 377 (1899); State v. Burns, 54 Wash. 113, 102 Pac. 886 (1909).

relieved of the consequences of a criminal indictment because of his successful attack on its insufficiency, he cannot later claim former jeopardy when prosecuted anew for the same offense.[12] This follows because the defendant's course throughout the proceeding was unmeritorious. The majority of the states hold that where the indictment or information is too defective to form the basis for a judgment, a trial thereunder cannot afford jeopardy, as against a good indictment charging the same offense.[13] A conviction rendered on a fatally defective indictment or information is not void, but voidable by writ of error. When it has been set aside, however, the former conviction is a nullity and cannot form the basis for a plea of former jeopardy. Where the accused has been released because of the fatal defect in the indictment or information, or acquitted, such an indictment or information is a nullity and does not preclude the issuing of another indictment for the same offense. Since in both instances, the indictment is a nullity, the majority considers it is a contradiction of terms to say that a person has been in jeopardy by an indictment under which he could not be convicted.

Decisions which deal with the question of the effect of a failure of arraignment and plea are not numerous. In *United States v. Riley*,[14] a jury had been impanelled and sworn before the defendant had been arraigned and made his plea. On discovery of this fact, the jury was dismissed, arraignment was made, and the defendant entered a plea of former jeopardy. It was held that the defendant had not been in jeopardy and that the former proceeding was a mere nullity. That the arraignment and plea are essential to a criminal proceeding, and until a person has been arraigned and has pleaded, he is not in jeopardy though a jury had been impanelled and sworn to try him, is consistently held.[15] Under such circumstances, as the cases bring out, it becomes the duty of the court to dismiss the jury, to arraign the defendant and have him enter his plea, and to then re-impanel and re-swear the jury to try him. The case of *State of Washington v. Kinghorn*,[16] presents an op-

12 United States v. Ball, 163 U. S. 662, 41 L. ed. 300 (1896); State v. Goddard, 162 Mo. 198, 62 S. W. 697 (1901); Commonwealth v. Willcox, 111 Va. 849, 69 S. E. 1027 (1911).

13 Sims v. State, 146 Ala. 521, 41 So. 413 (1906); O'Brien v. State, 39 Ariz. 298, 6 Pac. (2d) 421 (1932); McIntire v. State, 151 Ark. 458, 236 S. W. 619 (1932); Culpepper v. State, 44 Ga. App. 351, 161 S. E. 849 (1932); Shepler v. State, 114 Ind. 194, 16 N. E. 521 (1888); State v. Brown, 110 La. 591, 34 So. 698 (1903); Kenny v. State, 121 Md. 120, 87 Atl. 1109 (1913); Timon v. State, 34 Tex. Cr. Rep. 363, 30 S. W. 808 (1895); State v. Empey, 65 Utah 609, 239 Pac. 25 (1925).

14 5 Blatchf. 204, Fed. Cas. No. 16, 164 (1864).

15 Prince v. State, 140 Ala. 158, 37 So. 171 (1904); Peavey v. State, 153 Ga. 119, 111 S. E. 420 (1922); State v. Heard, 49 La. Ann. 375, 21 So. 632 (1897); State v. Bronkel, 5 N. D. 507, 67 N. W. 680 (1896); Yerger v. State, 41 S. W. 621 (Tex. Cr. Rep. 1897).

16 56 Wash. 131, 105 Pac. 234 (1909).

posite view holding that the mere fact that a defendant has not been arraigned and a plea entered before the jury is impanelled and sworn, is an irregularity that may be rectified during the trial without re-impanelling and re-swearing a jury.

Where the trial judge discharges a juror or the jury, the plea of former jeopardy is not available providing there existed a necessity for such discharge. This principle is generally followed.[17] In *United States v. Perez,*[18] it was so held in the following language: "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere." Thus, necessity and public justice unattaches jeopardy which, by the general rule discussed at the outset of this article, would otherwise have continued; and in legal contemplation, it is as though the trial had never been. Whether the necessity exists to discharge a juror or the jury is a matter of discretion with the trial judge. If there is a clear abuse of this discretion, the accused is considered as acquitted by reason of the unnecessary discharge of the jury.[19] But where the accused consents to, or is blamable for the discharge of the jury without a sufficient legal reason, he waives or loses his right to subsequently successfully plead former jeopardy.[20] As was observed in the quotation from *United States v. Perez,* the circumstances which give rise to a necessity to discharge a juror or the jury are of a various nature. Sickness of a juror, the judge, or of one in the immediate family of either, the impossibility of the jury to agree, subsequent discovery of a juror's prejudice and the insanity of a juror are illustrations that do give rise to this necessity.

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17 Spelce v. State, 20 Ala. App. 412, 103 So. 694 (1924); Franklin v. State, 149 Ark. 546, 233 S. W. 688 (1921); Rittenberry v. State, 30 Ga. App. 289, 117 S. E. 765 (1923); Harlan v. State, 190 Ind. 322, 130 N. E. 413 (1921); State v. Keppen, 191 Iowa 19, 180 N. W. 307 (1920); State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919); Smith v. State, 158 Miss. 355, 128 So. 891 (1930); Quinton v. State, 112 Neb. 684, 200 N. W. 881 (1924); State v. Chandler, 128 Ore. 204, 274 Pac. 303 (1929); Holt v. State, 160 Tenn. 366, 24 S. W. (2d) 886 (1930); State v. Shelton, 116 W. Va. 75, 178 S. E. 633 (1935).

18 22 U. S. (9 Wheat) 579, 6 L. ed. 165 (1824).

19 Bell v. State, 44 Ala. 393 (1870); Riley v. Commonwealth, 190 Ky. 204, 227 S. W. 146 (1921); People v. Brosky, 222 Mich. 651, 193 N. W. 194 (1923).

20 Pope v. People, 228 Ala. 609, 155 So. 79 (1934); People v. Baillie, 133 Cal. App. 508, 24 Pac. (2d) 528 (1933); State v. Ball, 34 N. M. 254, 280 Pac. 256 (1929); People v. Freiberg, 243 N. Y. S. 590, 137 Misc. 314 (1930); Allen v. State, 13 Okla. Cr. Rep. 533, 165 Pac. 745 (1917); Commonwealth v. Barille, 270 Pa. 388, 113 Atl. 663 (1921).

Jurisdiction is the power lawfully existing to hear and judicially determine a cause.[21] A criminal proceeding in a court which is without jurisdiction to try the case is a nullity, and one convicted or acquitted in such a court has no right to plead former jeopardy in a subsequent prosecution for the same offense. This principle has the support of the authorities.[22] Since conviction is impossible in a court lacking jurisdiction, jeopardy is considered likewise an impossibility. Thus, where the court has no power to determine the merits of an offense charged, or owes its existence to an unconstitutional act of the legislature, or is holding over a term of court unauthorizedly, or for some other reason has no power to hear the crime charged, no matter how far the proceedings have progressed, the accused has never been in jeopardy. Jurisdiction over the person is also essential. Each state in the United States is sovereign. Accordingly, if *A* is acquitted in Georgia for a murder he committed in Florida, he cannot successfully enter a plea of former jeopardy in a subsequent prosecution for the same offense in Florida.[23] And in the individual states, it is held that the proper forum for the trial of a crime committed in the state lies in the county where the crime was perpetrated. Consequently, an acquittal in a county where the crime was not committed is no bar to a successful prosecution in the county where it was.[24] Only that court in the county which is the *situs* of the crime has jurisdiction over the person who committed it.

Edwin Daniel O'Leary.

EVIDENCE — BLOOD TESTS TO DISPROVE PATERNITY.— By a review of all the cases in which paternity is disputed, it can readily be seen that blood tests are gaining recognition and importance in the courts of law. Before reviewing the cases concerned with the subject, it might be well to see just what these blood grouping tests consist of, and how they can be used as evidence in bastardy proceedings.

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21 People ex rel. Gaynor v. McKane, 78 Hun 154 (N. Y. 1894).

22 Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084 (1907); Stoner v. State, 7 Ind. App. 620, 35 N. E. 133 (1893); Cook v. State, 77 Miss. 800, 27 So. 605 (1900); Ogle v. State, 43 Tex. Cr. Rep. 219, 63 S. W. 1009 (1901); State v. Bruce, 68 Vt. 183, 34 Atl. 701 (1896); State v. Hubbell, 18 Wash. 482, 51 Pac. 1039.

23 Strobhar v. State, 55 Fla. 167, 47 So. 4 (1908); Phillips v. People, 55 Ill. 429 (1870).

24 Crowder v. State, 69 Ark. 330, 63 S. W. 669 (1901); Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621 (1884); State v. Bacon, 170 Mo. 161, 70 S. W. 473 (1902).

Doctor Harriet H. Hyman,[1] authority on blood tests relates that there are two cellular properties in the blood, known as *aggultinogens* and *agglutinins*. When this fact was first discovered in 1900 by Karl Landsteiner, the human blood was classified into four groups, known as O, A, B, and AB. In 1928 it was discovered that other agglutinins existed and these were designated as M and N. This made possible the classification of blood into twelve distinct groups:

AM	OM	BMN
AN	ON	ABM
AMN	OMN	ABN
BM	BN	ABMN

The blood group of a particular individual depends upon the blood group of the parents. The laws governing the inheritance of these blood groups are so exact that it can be determined by examination of two parents of what blood group their children will be. If the blood group of the mother be known and the blood group of her offspring, the blood group of the father can be predicted by that of the offspring. All factors come in pairs. If the blood of the child belongs to group MN, it is known that one of the parents must belong to group M and the other parent belong to group N. If the child belongs to group M, the substance must come from both parents. The tests in reference to blood examination have been extensive and accurate, according to authorities, and if the parents belong to the M group, the child cannot inherit the N group.

In a bastardy case,[2] Doctor Hyman recently testified as an expert, relating that blood tests were made of the mother, the child, and the alleged father. The accused male was found to belong to group AN, and the mother AM, and the child to group AM. On the basis of such examination, the defendant could not possibly have been the father of the child. Any father of the baby must have substances M in his blood because the child gets its M substance from both parents. The accused in this case belonged to group N and lacked substance M. Were he the father of the child, the blood of the latter would be of the group MN.

In this case, the Ohio court for the first time recognized the value of blood tests in evidence as applying in a negative manner, ruling that where a man is accused by an unmarried female of being the father of her unborn child and after the birth of the child an expert whose qualifications are not questioned, makes a blood test of the blood of the mother of the child, of the alleged father, and of the child itself, the result of such test is competent evidence and may be introduced for whatever weight it may have to prove the non-paternity of the accused.

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1 2 Ohio Law J. 203 (1936).

2 59 Ohio App. 191, 17 N. E. (2nd) 428 (1938).

Professor Wigmore in his exhaustive work on Evidence, brings out the logic upon which the blood tests are based by using the following analogy from ordinary commercial life: "A customer of the Belleville Bank comes to the bank president on Tuesday with a $10 bill, handed to him on Monday before, by one of the tellers. This bill has turned out to be a counterfeit. The president would like to know which one of the tellers gave this bill to the customer; but the customer does not remember which teller he dealt with. The banker, referring to the records of the bank, finds that on Monday each teller was supposed to receive for distribution packages of bills of $1, $5, $10, $20, and $50 denominations; but the records show that on this Monday Tellers Numbers 1, 2, 3, and 4 did receive the usual packages, but by inadventure Teller Number 5 was given no $10 package. It follows that Teller Number 5 is exonerated from having been the one to pass out the counterfeit $10 bill. It does not, however, follow that the passing of that bill can be fixed upon either Tellers Number 1, 2, 3, or 4; it might have been any one of them but no particular one can be fixed upon by that evidence." [3]

Wigmore shows by this example, in one specific biological trait, blood groups, scientific opinion is now in accord in accepting the fact that there is a causative relation between the trait of the progenitor and the trait of the progeny. That is, the blood composition of a child may be some evidence as to the child's parents. But, as all authorities agree, thus far, this trait in its present state of scientific discovery, can be used only *negatively* — to evidence that a particular man is *not* the father of a particular child.

From the illustration given by Wigmore it can be seen that in a bastardy case, if the child had blood of the AB group, and the alleged father blood of the O group, he could not possibly be the father any more than Teller Number 5, *supra,* could have handed out the counterfeit money. At the same time, four other men subjected to the blood test and each of them having either type A, B, or AB, could not be proven to be the actual father of the child.

For this test only one or a few drops of blood are needed in order that the laboratory technician be able to determine the group within which it falls. The test itself is convenient, painless, and in no way prejudicial to the health of the donor, yet many courts seem to disprove of it for this very reason; or at least the courts take the position that they have no right to order parties concerned to submit to such tests.

In *Commonwealth v. English,*[4] the court held that in criminal cases such as prosecution for fornication and bastardy, courts have no power

[3] WIGMORE ON EVIDENCE, Supp. to 2nd Ed., § 165a (1934).

[4] 123 Pa. Super. 161, 186 Atl. 278 (1936).

to compel the prosecutrix or other witnesses to submit their bodies for blood tests. The court went so far as to say that refusal to take such a test could not be emphasized against any party to the case.

The case of *Taylor v. Diamond*,[5] held that the court had no right whatsoever to order any witness to submit to the taking of blood tests.

We find an interesting conflict upon this point even in courts higher than trial courts within the same state. In *Arais v. Kalensnikoff*,[6] a California District Court of Appeal held that whenever it should be relevant to the prosecution of the defense in an illegitimacy action, the trial court, by order, might direct the mother, her child and the defendant to submit to one or more blood tests to determine whether or not the defendant could be excluded as being the father of the child. This court took the view that such tests should be admissible in evidence in cases where definite exclusion is established, and decided that the courts should take judicial notice of recognized blood groupings, plus the results derived therefrom.

One year later, upon appeal, the Supreme Court of California, in the same case,[7] decided that blood groupings such as were used as evidence in this case could not be accepted as conclusive evidence that an alleged father is not in fact the father of the child whose paternity was in dispute. This court took the view that such tests were not scientifically proven to be reliable and hence could not be used in the way of evidence.

In the *Appeal of Ketcham*,[8] a like attitude was taken by the court when it held that in a proceeding to establish paternity of a child born out of wedlock, admission of results of blood grouping tests over the objection of the alleged father, was error because such tests could not be proven to be accurate in result.

Other courts are less prejudiced against the taking of blood tests. In this class may be put the courts of South Dakota, for in *State v. Damm*,[9] the court decided that the result of blood tests made by competent persons for the ascertainment of blood types or groupings was admissible in evidence upon the issue of paternity of a child, but it was purely a discretional matter. The court held that modern medical science is agreed upon transmissibility of blood characteristics to such extent that it can be accepted as an unquestioned scientific fact that, if blood groupings of parents are known, the blood group of the offspring can be necessarily determined, or that, if blood groupings of the mother and child are known, it can be accepted as a positively

5 241 App. Div. 888, 269 N. Y. S. 165 (1934).

6 67 P. (2nd) 1059 (Cal. Dist. Ct. of App., 1937).

7 74 P. (2nd) 1043 (Cal. Super. Ct., 1938).

8 4 N. Y. S. (2nd) 786, 254 N. Y. App. Div. 776 (1938).

9 104 A. L. R. 430, 266 N. W. 667 (1938).

established fact that the blood group of the father could not have been a certain specific characteristic group, and the court at his discretion might order such a test made for what it is worth.

The New York court, as it decided the case of *Beuschel v. Manority*,[10] could be put in this same class when it held that the prosecutrix might or might not submit to the taking of her blood and that of her child's for the purpose of blood grouping tests to prove paternity, but that no matter what the result of such tests might be, the test would plainly determine nothing.

Following the decision of *Beuschel Case*, the State of New York enacted a statute as follows: "Whenever it shall be relevant to the prosecution of defense of an action, the court, by order, shall direct any party to the action and the child of any such party to submit to one or more blood grouping tests, the specimens for the purpose to be collected by duly qualified physicians and under such restrictions and directions as to the court or judge shall seem proper. The order for such blood grouping tests may also direct that the testimony of the persons so examined may be taken by deposition pursuant to this article." [11] It is contended that this statute indicated a legislative intent that this new species of evidence should be available in any litigation in any court of the State when its employment might conceivably throw light on the justice of either of the opposing contentions.

Apparently disregarding the statute, the court in *Flippen v. Meinhold* [12] held that it was not entitled to order the defendant to submit to blood grouping tests since positive results of the test would furnish no satisfactory proof of the defendant's paternity, for which purpose the test was sought.

In another New York case, *Thomson v. Elliott*,[13] the court held he was constrained to deny the respondent's motion for an order directing the mother, and child, when born, to submit to blood tests for the purpose of determining paternity, because of the decision found in *Beuschel v. Manority*.[14]

In spite of the fact that a large group of courts still apparently disregard entirely, or do not put any weight in the results of blood tests, we find some that are advanced enough to accept the results as valuable parts of evidence. Like the Ohio Court in *State v. Wright*,[15] they consider these scientific findings to have merit, and as such to be admissible in disputed paternity cases.

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10 272 N. Y. S. 165, 241 App. Div. 888 (1934).

11 104 A. L. R. 448 (1938).

12 156 Misc. Rep. 451, 282 N. Y. S. 444 (1935).

13 152 Misc. Rep. 188, 272 N. Y. S. 898 (1934).

14 241 App. Div. 888, 272 N. Y. S. 165 (1934).

15 59 Ohio App. 191, 17 N. E. (2nd) 428 (1938).

The court in the case of *In re Swahn's Will* [16] determined that the courts will judicially notice that the principle underlying blood grouping examinations is that certain characteristics of blood of a parent perpetuate themselves in blood of the offspring, and that results of such tests are therefore potentially relevant in the determination of paternity or maternity, and therefore admissible in evidence.

Likewise in *Commonwealth v. Sammarellie,*[17] the court said with reference to blood grouping tests, that: "Proof of non-paternity by this means depends on showing that according to the laws of inheritance of determining factors, the child could not be the descendant of both the woman and the man in question; and hence since it is assumed to be the child of the woman, it is consequently proved to be the child of a man other that the accused. The chances for a man wrongfully implicated of proving his innocence are about one to seven, or there are six chances to one that he will be unable to do so. If, however, the blood group of a man is known, it is possible to tell with greater accuracy what his chances may be of proving non-paternity, since the various percentages in each blood group are approximately known." This court then held that on the theory that the verdict found in the lower court was against the weight of evidence, a new trial should be granted to a defendant found guilty of bastardy where uncontradicted testimony of the defendant's expert witness revealed that the Landsteiner Blood Test indicated that the defendant could not possibly have been the father of the child.

We find that judicial bodies are not the only ones concerned with the matter of blood tests as matter of evidence, because legislative bodies in a few states have, of late, taken the matter into consideration. Bills on the subject have been considered in Illinois, Montana, New Jersey, and Ohio, but all were apparently tabled for the time being. However, subsequent to the enactment of the New York Statute on blood tests, the Wisconsin legislature went a step farther in passing a law which is now in effect and reads as follows: "Whenever it shall be relevant to the prosecution of defense in an illegitimacy action, the trial court, by order, may direct that the complainant, her child, and the defendant submit to one or more blood tests to determine whether or not the defendant can be excluded as being the father of the child. The result of the test shall be receivable in evidence but only in cases where definite exclusion is established. The test shall be made by duly qualified physicians, or duly qualified persons, not to exceed three, to be appointed by the court and to be paid by the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court, or to the court and jury. Whenever the court orders such blood tests to be taken and

16 158 Misc. Rep. 17, 285 N. Y. S. 234 (1936).
17 17 Pa. Dist. & C. 229 (1931).

one of the parties shall refuse to submit to such test, such fact shall be disclosed upon the trial unless good cause is shown to the contrary." [18]

It seems from this research that the courts are in conflict as to whether or not blood grouping tests shall be admissible in evidence even in modern law. The legislative groups, however, are indicating a decided trend to favor the admissibility of such evidence as long as it is used to prove that an alleged father cannot be the parent of the child in question. Then since the courts are apparently not advanced enough to accept this type of scientific proof of non-paternity, we may find legislative groups taking the decision of this matter from the hands of the courts in the future, and enacting statutes which will determine blood grouping tests to be reliable and acceptable as matters of evidence in paternity cases.

Richard F. Sullivan.

LIE DETECTOR — ADMISSIBILITY AS EVIDENCE.—In the past decade science has made many advances — many of which have been used in the detection of criminals. Great difficulty was experienced by the proponents of the various implements and methods of detection in having their apparatus and findings accepted by the courts as evidence. The courts rightfully have refused to accept any scientific evidence until the theory on which it is based has been universally accepted by the scientific world as being perfected. Today there are many crime laboratories throughout the country endeavoring by experiment, to perfect some such theory.

In recent years there has been much progress made by men like Marston, Larson, Keeler, and Summers in the use of the "lie detector." Keeler is the proponent of the polygraph or blood pressure method. The polygraph is an apparatus that records the changes in the subject's heart action and in some instances registers the changes of respiration. The galvanometer method was fostered by the late Rev. Walter G. Summers, S. J. and differs from the other methods in that it records changes produced by the emotional disturbances on the activity of the sweat glands.

The first case to come up on appeal in which the admissibility of the "lie detector" was contested was *Frye v. United States.*[1] In 1923 Frye was convicted of murder in the second degree. The only error assigned was the refusal of the court to accept the offer of the defense

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18 Wisconsin Code § 166.105 (1937).

1 Frye v. United States, 54 App. D. C. 46, 293 Fed. 1013, 24 A. L. R. 145 (1923).

counsel to have an expert witness testify as to the result of a "lie detector" test made upon the defendant. At that time there were ample grounds for the court to rule out this evidence as being incompetent since both the scientific and legal articles written at the time were to the effect that the apparatus was still in the experimental stage. John A. Larson in his address to the American Bar Association stated: ". . . there is no test in its present state which is suitable for the positive identification of deception and suitable for court procedure." [2]

Ten years later a defendant in a robbery case attempted to prove by the testimony of Professor Leonard Keeler of the Northwestern University Crime Detection Laboratory the result of a deception test upon the defendant with the Keeler Polygraph. The purpose was to show that the defendant was not in the city of the scene of the crime at the time it was committed and was therefore not guilty.[3] The Wisconsin Court refused to permit this testimony to be admitted as evidence basing its decision on the Frye case on the ground that this method of detecting deception was still in its infancy.

In March, 1938, Raymond Kenny was prosecuted for robbery in the second degree as a second offender in the Queens County Court of New York.[4] County Court Judge Colden overruled the objection of the people to the admission of testimony showing the accused's reaction when subject to interrogation under the "lie detector."

The Judge says after stating the difficulty experienced in having admitted into evidence the testimony of handwriting experts, psychiatrists, etc., ". . . today their right to admission is firmly entrenched in our law. . . . Despite the fact that such experts frequently differ in their conclusions, their testimony is received in evidence and it is left to a jury to determine, which of either expert or experts, they are going to believe or accept." [5]

County Court Judge Colden seems to have been impressed by the statements of the Rev. Walter G. Summers, S. J. as to the merits of his apparatus, the psychogalvanometer. In one laboratory test 271 persons were examined and 49 of the 50 guilty persons were detected by this procedure. In the accomplice group of 102 persons 100 were detected. In the innocent group of 119 persons all were detected. In actual examination of persons involved in 49 criminal cases the results indicated one hundred per cent. accuracy.[6]

When one looks at these figures it is easy to see why Judge Colden was impressed and permitted the testimony to be used as evidence;

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2 47 A. B. A. Rep. 619. (1922).

3 State v. Bohner, 210 Wis. 351; 246 N. W. 314, 86 A. L. R. 611 (1933).

4 People v. Kenny, 167 Misc. 51, 3 N. Y. S. (2d) 348 (1938).

5 *Id.* at 351.

6 *Id.* at 350.

but the following November another County Judge refused to be so impressed and would not permit a defendant in a murder trial to be removed from Kings County to Bronx County in order to undergo an examination by Father Summers. Upon appeal the New York Court of Appeals upheld the County Court saying that the denial of the motion could not be regarded as error where there is no proof of general scientific recognition of the efficiency of such a test.[7]

Thus we have the story of the courts in refusing to admit the testimony of experts on the use of the "lie detector" and its results as evidence. It it well to note that in each one of these cases the courts have cited the Frye case as the authority on which they base their finding. These courts then refer us to the various law review articles that were written at the time of the *Frye* decision; and after more than ten years, the courts are using the same authority regardless of the fact that science may have progressed during that time.

In *State v. Bohner,* Leonarde. Keeler had sufficient faith in his Polygraph to desire to use it and testify according to the results that he obtained. But the court preferred to follow the earlier case and cites us to articles that were written in 1923 and 1924.[8] In one of these articles Professor Poffenberger of Columbia University stated that the blood pressure and other deceptive tests had not as yet advanced out of the experimental stages.[9] This was written in 1924 and the Wisconsin case was decided in 1933.

In an excerpt by Professor Keeler appearing in *The Science of Judicial Proof* [10] he states that the exact statistics cannot be derived in actual cases because of the difficulty of verifying all test results. Then, ". . . in criminal cases approximately 62 per cent. of those giving test results indicating guilt have made verified confessions or otherwise have been proven guilty. In three cases brought to the writer's attention, individuals diagnosed as innocent were later proven guilty, but in no case has an individual been diagnosed guilty who was later definitely proved innocent. In approximately 10 per cent. of the cases the results are of such nature that no definite diagnosis can be made." [11] Again he says, "The practical uses of the polygraph (blood pressure method) have been fully established by the experience at the Scientific Crime Detection Laboratory of Northwestern University — not only in police inquiries, but in personnel administration: . . ." [12]

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7 People v. Forte, 279 N. Y. 204, 18 N. E. (2d) 31, 119 A. L. R. 1198 (1938).

8 (1924) 33 YALE L. J. 771; (1922) 35 HARV. L. REV. 302; (1924) HARV. L. REV. 1138; (1924) 24 COL. L. REV. 428.

9 (1924) 24 COL. L. REV. 428.

10 WIGMORE, THE SCIENCE OF JUDICIAL PROOF 770 (1937).

11 *Id.* at 774

12 *Id.* at 776.

By the practical uses of the polygraph it is meant the use it is put to in preliminary examinations and investigation of the criminal. Dr. Larson is still of the belief that there are too many obstacles for its admission as evidence in the court room and that its real value is more for the sake of preliminary investigation in aiding the police to obtain a confession from the criminal.[13]

Wigmore points out the main obstacles to the use of such testimony. First, the same conditions do not exist in the laboratory that exist in the court room; secondly, the number of instances that would have to be compiled in order to make a generalization; thirdly, these generalizations would be true in the general only and would not be usable to diagnose the individual; fourthly, the testimonial scientist in the court room can rarely possess the necessary objective basis which the physical scientist almost always has, *viz.* the test of the observed fact.[14]

This observation may be applied to all forms of scientific testimony. We have experts appearing in court rooms daily and giving conflicting testimony. This is especially true in the case of handwriting experts. Nevertheless such testimony is submitted to the jury and they are permitted to decide which of the data submitted is the most competent.

County Court Judge Fitzgerald in the *Forte* case followed the technique of the previous Wisconsin case and based his decision on earlier writings on the topic. Of course from the facts its would not have been difficult for the jury to find the defendant guilty of the crime but it would have been an excellent opportunity to test the veracity, as it were, of the "lie detector." The jury would be permitted to compare the results of the test with the actual circumstances as they are placed in evidence by the State.

Although Judge Colden did not base his decision on the precedent followed by the other courts, we prefer in this instance, to follow the logic of Judge Colden which has its foundation on data at his disposal rather than materials written ten years ago. We do not say that the results of the "lie detector" are faultless but rather that there may be a possibility that it is more trustworthy than it was when Frye was convicted of murder in the second degree.

Edward F. Grogan, Jr.

PROCEDURAL STEPS IN OHIO APPELLATE PRACTICE.—The prosecution of an appeal from a lower court, generally the Court of Common Pleas, to the Court of Appeals in Ohio, presents a somewhat weighty problem to many seasoned lawyers, as well as to the novitiate. It is the

13 LARSON, LYING AND ITS DETECTION 405 (1932).
14 WIGMORE, THE SCIENCE OF JUDICIAL PROOF 692 (1937).

object of this note to set forth the fundamental and yet practical aspects of appellate practice as far as the introduction of the particular litigation into the Court of Appeals.

In 1931, the Judicial Council of Ohio appointed a committee to draft a proposal for the simplification of appellate procedure, such committee working in conjunction with the Ohio State Bar Association.[1] The final draft of the proposal was introduced into the legislature in 1933, passed in April, 1935, and became effective January 1, 1936.

Under the old practice, as was the rule at common law, it was necessary to take exceptions to all rulings in the lower court in order to save such rulings, in case of error, for review in the appellate court. Today, under the GENERAL CODE,[2] the old common law technical practice of stopping the trial while exceptions were taken and noted, has been abolished. It is now only necessary for the complaining attorney to make his objection, or motion, as the case may be, thus calling the court's attention to the specific point in issue. The theory of this modern practice is that since the trial proceedings are a matter of record, the mere calling of the court's attention to a point by motion or objection is sufficient to save the question for appeal on the alleged error.

Now, a fundamental basic condition, preceding a prosecution of appeal, is that the order of the court from which the appeal is being taken must be *final.* This is a question of interpretation and it is necessary to refer to formerly adjudicated cases to determine just what is and what is not a final order. According to the G. C. 12223-2, "An order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment, or an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be reviewed, affirmed, modified, or reversed . . ." The foregoing section supersedes G. C. 12258 which says, "An order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment is a final order." . . . In the recent case of *Fulton v. Madlener,*[3] decided in November, 1937, the court said, "A final order is comprehended by the term 'judgment' as expressed in article IV, Section 6, of the Ohio Constitution,[4] providing that the Court of Appeals has

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1 FIRST REPORT OF THE JUDICIAL COUNCIL OF OHIO, (1931) p. 15.

2 OHIO GENERAL CODE, § 11560. (General Code hereinafter referred to as G. C.) ". . . An exception shall not be necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge."

3 57 Ohio App. 345, 14 N. E. (2d) 27 (1937).

4 ". . . The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction

appellate jurisdiction, but the final order must have the same degree of finality as a judgment." In that case, the Supreme Court of Ohio held the statute, G. C. 12223-2, *supra,* unconstitutional insofar as the order for a new trial, setting aside a general verdict, was considered a "final order," since a final order to be reviewable by the Court of Appeals, must have the same finality as a judgment.[5] The Court further said, that ". . . the granting of a motion for a new trial is not a final order or judgment so as to be reviewable by the Court of Appeals since it does not result in the final determination of the rights of the parties, or determine the action notwithstanding a substantial right is affected in that a judgment predicated on the verdict is prevented. . ." Thus the importance of establishing a "final order" in predicating an appeal is an obvious fundamental condition precedent.[5a]

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in the trial of chancery cases, and, to review, affirm, modify, or reverse the *judgments* of the courts of common pleas, superior courts, and other courts of record within the district as may be provided by law, and judgments of the courts of appeals shall be final in all cases, except . . ."

5 See *"Granting Motion for New Trial as Final Order Where Court Abused Discretion."* John R. Baskin; 15 Ohio Opinions 596 (1939).

5a Statute declaring ". . . an order vacating or setting aside a general verdict of a jury and ordering a new trial is a final order.", held unconstitutional as not within the meaning of the word "Judgment" as required by Art. IV, Sec. 6, Ohio Constitution. Thus, as order vacating or setting aside a general verdict of a jury and ordering a new trial is *not* a final order. Hoffman v. Knollman, 135 Ohio St. 170, 20 N. E. (2d) 221 (1939).

An order of the trial court overruling defendant's motion, filed after defendant's motion for a new trial had been granted and verdict vacated, for judgment on the pleadings, exclusive of cross petition, was *not* a final order. J. F. Harig Co. v. City of Cincinnati, (Ohio App. 1939) 22 N. E. (2d) 540.

In an action where the ultimate relief sought is an injunction, an order of the trial court granting a temporary injunction is *not* a final order; . . . An order overruling a motion to vacate such temporary injunction is *not* a final order; . . . Order sustaining motion to dissolve temporary injuction is *not* a final order; . . . But, an order dissolving a temporary restraining order *is* a final order. Hersch v. Home Savings & Loan Co., 59 Ohio App. 145, 17 N. E. (2d) 377 (1939).

An order sustaining a motion for a new trial is *not* a final order. Andrews v. Ackerman Coal Co., 59 Ohio App. 65, 17 N. E. (2d) 274 (1939).

An order overruling a motion to quash summons and set aside service is *not* a final order. Wolf v. Western & Southern Life Insurance Co., 59 Ohio App. 238, 17 N. E. (2d) 438 (1939).

An order overruling a motion to dismiss an appeal from a municipal court to the Court of Common Pleas is *not* a final order. Federal Pipe & Supply Co. v. Dolby, 59 Ohio App. 143, 17 N. E. (2d) 397 (1939).

An order granting a new trial because of alleged misconduct of a jury is *not* a final order. Ramsey v. Oyler, 133 Ohio St. 321, 13 N. E. (2d) 577 (1938).

FINAL ORDERS:

An order, setting aside an order appointing a receiver and granting an injunction in a proceeding after judgment in aid of execution, is an order affecting a substantial right and reviewable by the Court of Appeals as a judgment. G. C.—12258 (1930), now G. C.—12223-2; Ohio Const., Art. IV, Sec. 6; Sam Savin, Inc. v. Burdsall, (Ohio. App. 1939) 22 N. E. (2d) 914.

Immediately following judgment rendered by the lower court, there is an allowance of three days for the filing of a motion for a new trial. When this motion is overruled, the appealing counsel submits an entry which, when signed by the presiding judge, becomes a final order from which an appeal may be prosecuted. Then, under G. C. 12223-7,[6] the appealing counsel is allowed twenty days from the signing of the final order entry, to file the Notice of Appeal. This Notice of Appeal is filed with the clerk of the court from which the appeal is being taken, stating merely the judgment from which the appeal is sought, and further whether the subject of the appeal is on "questions of law" or on "questions of law and fact." It is interesting to note, at this point, that all review is now considered a continuation of the case, and hence no service of Notice of Appeal on the parties to the action is required; however, as a matter of comity, it is generally considered good practice to send a copy of the Notice of Appeal to the opposing counsel. . . . And

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A trial court's action in overruling a motion to intervene as defendant in a foreclosure action is a "final order" from which an appeal will lie. Central National Bank of Cleveland v. Newton Steel Co., (Ohio App. 1939) 22 N. E. (2d) 428.

An order of the trial court vacating a judgment on one of enumerated statutory grounds after term, although erroneous, is not a nullity, but a final order. G. C.—11631; Frankenstein v. Behrendt, 135 Ohio St. 570-572, 21 N. E. (2d) 678 (1939).

An order dismissing a garnishee is a final order. Hamilton v. Temple; 60 Ohio App. 94, 19 N. E. (2d) 650 (1939).

A declaratory judgment is a final order. Western Union Telegraph Co. v. Dixie Terminal Co., 59 Ohio App. 305, 17 N. E. (2d) 954 (1939).

Appointment of a receiver in an action to foreclose a mortgage on realty is a final order. Metropolitan Life Insurance Co. v. Begin, 59 Ohio App. 5, 16 N. E. (2d) 1015 (1938).

An order of the Common Pleas court allowing payment of attorney fees out of a fund in its custody, prior to final determination of the issues of the case is a final order. Barnes v. 53rd Union Trust Co., 58 Ohio App. 27, 15 N. E. (2d) 651 (1938).

An order sustaining plaintiff's motion for a new trial after setting aside judgment for defendant on its motion for directed verdict is a final order. Durbin v. Humphrey Co., 133 Ohio St. 367, 14 N. E. (2d) 5 (1938).

See also, Annotations following OHIO GENERAL CODE § 12258.

[6] "The period of time after the entry of the order, judgment, decree, or other matter for review within which the appeal shall be perfected, unless otherwise provided by law, is as follows:

1. In appeals to the supreme court, to courts of appeals, or from municipal courts and from probate courts to courts of common pleas, within twenty (20) days.

   Provided that, when a motion for new trial is duly filed by either party within three days after the verdict or decision then the time of perfecting the appeal shall not begin to run until the entry of the order overruling the motion for new trial.
2. In all other appeals, within ten (10) days.
3. In case of insanity or death of a party after judgment, the court shall have the power to extend the time for filing the appeal, an additional twenty (20) days."

further, the party appealing is designated as the appellant, and the adverse party appellee; and the style of the case remains the same as in the court of its origin,[7] . . . thus abolishing the difficulty of determining the status of the party-litigants.

With respect to declaration of the subject matter of the appeal, another common law technicality has been abolished; the procedural method of review in cases of law and equity are the same; equity cases being known as an "appeal on questions of law and fact," and law cases known as an "appeal on questions of law" . . . and in doubtful cases, it is not necessary to "go up both ways," since amendment and transfer are now permitted.[8] The failure to designate the type of hearing on appeal shall not be jurisdictional and the notice of appeal may be amended by the appellate court in the furtherance of justice for good cause shown.[9]

Under G. C. 12223-6, except as provided in G. C. 12223-12,[10] no appeal shall be effective as an appeal upon questions of law and fact unless and until the order, judgment or decree appealed from is superseded by a bond in the amount and with the conditions as hereinafter provided, and unless and until a supersedeas bond be executed on the part of the appellant to the adverse party with sufficient surety in such sum, not less than the amount of the judgment and interest, as is directed by the court making the order which is sought to be superseded, or by the court to which the appeal is taken, conditioned as hereinafter provided in G. C. 12223-14.[11] However, on an appeal on questions

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7 "The notice of appeal shall designate the order, judgment, or decree appealed from and whether the appeal shall be on questions of law or questions of law and fact. In said notice the party appealing shall be designated the appellant, and the adverse party, the appellee, and the style of the case shall be the same as in the court of origin. . . ."

8 DAWSON, OHIO APPELLATE REVIEW, p. 4 (1935).

9 Schreiner v. Cincinnati Altenheim, (Ohio App. 1939) 22 N. E. (2d) 587; In re Wernet's Estate, (Ohio App. 1939) 22 N. E. (2d) 490; Caryl v. Scheiderer, (Ohio App. 1939) 22 N. E. (2d) 463; Paden v. Pearce, (Ohio App. 1939) 22 N. E. (2d) 301; Dewar v. Hector, (Ohio App. 1939) 22 N. E. (2d) 535. See also OHIO GENERAL CODE, § 12223-5.

10 "Executors, guardians, receivers, trustees, trustees in bankruptcy, and county treasurers, acting in their respective trust capacities, who have given bond in this state, with surety according to law, and the state of Ohio or an officer thereof shall not be required to give the bond mentioned in General Code section 12223-9."

11 "The supersedeas bond shall be payable to the adverse party or otherwise, as may be directed by the court, when the conflicting interests of the parties require it, and subject to a condition to the effect that the party appealing shall abide and perform the order and judgment of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of said appeal and such other conditions as the court may provide, and, when such judgment is for the payment of money, the bond shall provide that if said judgment is not paid upon final affirmance that judgment may be entered against the sureties on said bond."

of law, no bond is generally required. The apparent reason for this discrepancy is that an appeal on questions of law and fact, requiring a supersedeas bond, is essentially a retrial of the case.

Having filed the Notice of Appeal within the required twenty days following the entry of the final order of the court from which the appeal is being prosecuted; and also having filed the bond as required if the appeal is on questions of law and fact, the next step is under G. C. 12223-8. ". . . Within ten (10) days after filing notice of appeal, or the order allowing the appeal or a certified copy thereof, where permission to file the appeal is required, the clerk of the court from which the appeal is taken or a judge thereof, shall, upon being paid the lawful fees and the filing of a praecipe therefor, prepare and file in the court to which the appeal is taken, a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of. The transcript of the testimony or bill of exceptions or so much thereof as may be necessary for said appeal may be filed within such time as is provided for in the rules of court. In event the transcript and papers are not filed within said time, either party may apply to the court to which the appeal is taken to have the case docketed and the court shall order them filed." . . . It is a general practice to hire a public stenographer who will make a typewritten form of all the testimony, objections, motions, etc., thus completing the entire record of the lower court proceedings, and setting forth the claims upon which the appellant may intend to rely; this being the Bill of Exceptions. It should be noted here that although the "taking of exceptions" has been abolished, it is still the practice to call the transcript of errors, etc., the "Bill of Exceptions."

When the appealing counsel submits or files his brief with the Bill of Exceptions, the attention of the appellate court is called to the assignment of alleged errors, generally set out in numerical order to enable the presiding justices to more readily determine the appealibility and merits of the litigation before them. It is also a recognized practice for the party-litigants to state in their briefs whether or not they desire an oral argument before the Court of Appeals, or, when the court convenes and the Docket number is called, the appealing attorneys may state their intention of oral argument if desired. If oral hearing is requested, the chairman of the Court of Appeals sets the case for a particular date. Many cases are submitted for determination on the briefs alone. With regard to hearing on appeal, it is necessary to refer to G. C. 12223-21, "Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued may be disregarded, but the court, in its *discretion,* may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules