Ray Myers, Salem Public Schools, reported his first area of interest in the bill is in the relationship with juvenile court. His staff feels their effectiveness is cut back in working with others, when they must appear in court to testify or produce records with regard to behavior of children. The second area of concern is that the present situation reduces their effectiveness in working properly with the existing social agencies, both public and private.

Concern was expressed by the committee that the records contain the notation of a child's conduct but that there is no way of changing these notations if they are incorrect. Yet, they do follow the child through the school system.

Dr. Petrie, Willamette University asked that the legislation be restricted to elementary and secondary schools. They feel that it is not needed at the university level, as these problems are practically unknown at that level.

Dave Duniway, State Archivist suggested that higher education needs a separate pi ece of legislation or this bill needs to be redefined in terms of the type of records here on the campuses. He presented a set of guidelines to the committee which are presented to the staff of OSU.

Elma Martin, Vice principal of Wilson Public School, Portland, Ore. She appeared in support of the bill and stated that rather than have the records delivered to the court, they should be interpreted by the superintendent or his representative.

Dr. John Rademaker, Joint Council for Social Welfare Legislation. He appeared in support of this legislation. He stated that if a child might need help and be referr ed to a mental health clinic, the conferences which would ensue and should be wide-open, are not, because the school files are open to perusal.

Ray Seaborg, Oregon School Boards Assoc. He stated that the school boards are concerned with this problem and hope that something can be worked out in this bill which would help to handle the problem. Conc ern was expressed by the committee that legislation of this type would simply pass the responsibility on to the superintendent and the school boards.

_____, Professor of Counselling, U. of O. He urged the committee to promote this bill and the individual's control of information relating to him.

HB 1707

After committee discussion of the bill, Rep. Young made a motion to adopt the amendments. Unanimously accepted. Rep. Young then moved that this bill be sent to full committee with a recommendation of do-pass as amended. Unanimous.

HB 1663

Rep. Browne reported from Subcommittee I and she moved that the committee table the bill. Passed by a majority, Rep. Skelton dissenting.

HB 1664

Rep. Young reported regarding the process of bookmaking in Oregon. There was committee discussion. Rep. Anunsen moved that we table HN 1664. Tie vote.

Rep. Cole moved the adoption of the proposed amendments of 4-4-69. Passed by a majority, with Rep. Anunsen dissenting. Rep. Skelton moved that 1664 be sent to the Floor with a do-pass as amended recommendation. Passed with Anunsen and Macpherson dissenting.

HB 1665

Rep. Skelton moved to table this bill after committee discussion. Affirmative: Frost, Haas, Macpherson, Pynn, Skelton, Young, Wilson. Negative: Anunsen, Browne, Cole.'

HB 1707

Rep. Pynn reported from Subcommittee I. Rep. Skelton moved that we table 1707. Passed with Browne, Cole, Haas and Macpherson dissenting.

HB 1516

Rep. Cole introduced Mr. Robert Stohl to present his report to the committee. This report deals only with the cost study made by the Judicial Council, and is in committee file. The cost figures are estimates as the total cost depends on how many counties participate in the program. He gave an analysis of the cost figures. Rep. Anunsen asked if we were to go to a public defender system if it would be cheaper for the counties right now, and was given a positive answer. Rep. Pynn asked if it would be possible that more people would use the public defender than do use the court appointed attorneys? They found it difficult to arrive at a positive answer. Rep. Wilson asked what the total figure would be. $1,495,000, of which the state would pay half.

The investigator, assigned the public defender's office, checks cases from time to time when they think there is question about whether a person has money or not. Secondly, -they would have an ongoing file on the defendant. People tend to use the service more than once, which would give the defender more knowledge than a private attorney serving the client once.

The committee questioned the advisability of no charge made of the public defender to further inquire as to the finances and ability of the defendant to report to the court if he is financially able.

HB 1665

It was decided that it would be requested that the full committee take this bill off table and that the Subcommittee would recommend a do-pass.

HB 1707

This bill is also to be requested taken off table and a do-pass as amended vote recommended.

HB 1712

This bill was in Subcommittee II, but Rep. Carson planned to ask that it be taken off table and he asked committee support to pass it out of full committee.

HB 1637

Rep. Cole suggested requesting the full committee to take this off table also.

There being no further business, the meeting adjourned at 9:52 a.m.

Respectfully submitted,

Betty Sheldon

Committee Clerk

It was agreed unanimously by the committee to delay further action on the bill until Representative Haas and the committee counsel could draft a final proposed amendment to the bill, to be presented next work session.

HB 1707

Representative Carson moved that the bill be taken from the table. Motion passed by a majority vote, with Frost dissenting. Representative Davis testified briefly on the bill, and after discussion with the committee Representative Carson moved that the proposed amendments be adopted. (dated 4/8/69) Motion passed by a majority, with Frost and Macpherson dissenting. Anunsen and Skelton excused. Representative Carson then moved that the bill receive a do pass with amendments recommendation of the committee. Motion passed by a majority, with Frost and Macpherson dissenting. Anunsen and Skelton excused. Representative Pynn is to carry the bill to the House.

SB 188

Representative Macpherson reported on the bill, suggesting verbally extensive amendments to the bill to amend ORS 57.030 (15) and to conform to the Model Business Corporation Act. There was discussion by the committee, and Representative Macpherson moved that the proposed amendments be adopted. Motion passed by a majority, with Haas and Cole dissenting. Representative Carson temporarily absent from the meeting, Anunsen and Skelton excused. Representative Macpherson then moved that the bill receive a do pass with amendment recommendation of the committee ; motion passed by a majority vote, with Carson, Cole and Haas dissenting. Anunsen, Skelton excused. Representative Macpherson will carry the bill to the House.

HB 1802

Representative Browne reported on the bill from subcommittee, and suggested to the committee that no action be taken. After discussion with the committee she so moved; motion passed by a majority, with Carson and Macpherson temporarily absent, Anunsen and Skelton excused.

There being no further business before the committee, the Chairman adjourned at 5:00 p.m.

Respectfully submitted,

Carol Doerksen

Carol Doerksen, Clerk

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ever, an altogether different concept, *autrefois acquit*, barred new proceedings after an acquittal. The nature of this common law bar, as stated by Blackstone, was:

> "The plea of autrefois acquit, or a former acquittal, is *grounded on* this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense, and hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime."[17] (Emphasis added.)

It is apparent, therefore, that only a *"fairly found"* jury verdict barred a new trial at common law,[18] and that double jeopardy reflected only a *policy* against trying a man more than once for the same crime, and that policy found its *legal* expression in the separate and different concept of *autrefois acquit*.

In the United States today there is nearly total judicial agreement that *double jeopardy itself* constitutes the *legal* bar to retrial for the same crime. Moreover, the time at which jeopardy attaches in a criminal case is neither when the defendant pleads nor when the jury renders its acquittal (as its common law antecedents of jeopardy or autrefois acquit would seem to require), but rather when the jury is impaneled, sworn, and charged with the prisoner; that if the jury is discharged at any time thereafter (except for certain specific and compelling reasons such as the illness of the judge or juror or in the case of a "hung jury") there has been the equivalent of an acquittal and the defendant must go free.[19] Thus the American practice which is so lenient to defendants is not consonant with the earlier common law procedures. It makes no difference, so far as adherence to common law is concerned, that American courts may mean *autrefois acquit* when they speak of jeopardy, since not even *autrefois acquit* could prevent Crown appeals or second trials, as the previous discussion of appeals by felony and attaint has demonstrated. Moreover, from Blackstone's statement that one must be *"fairly* found not guilty," it is at least arguable that at the common law not even a jury acquittal would preclude subsequent action when the acquittal was the result of error in the trial court.[20]

The purpose of this section is not to establish conclusively that the right of appeal existed for the prosecution at common law. The purpose is, instead, to suggest that there is sufficient evidence of the existence of that right that American courts, absent specific constitutional[21] or statutory provisions, should not deny it to the State solely on the ground that it did not exist at common law. It is also suggested that double jeopardy considerations did not bar retrials at common law and that courts which now bar state appeals on double jeopardy grounds do so on the basis of policy considerations and not by reason of a legal construction of the double jeopardy clause. (This policy factor will be explored in detail in the last section of the paper.)

The Statutes

The American Law Institute has proposed a section in its Code of Criminal Procedure which reads as follows:

> "An appeal may be taken by the State (Commonwealth or People) from: (a) an order quashing an indictment or information or any count thereof. (b) an order granting a new trial (c) an order arresting judgment. (d) a ruling on a question of law adverse to the State where the defendant was convicted and appeals from the judgment. (e) the sentence, on the grounds that it is illegal."[22]

appears to be the common law forerunner of the modern practice of abandoning jeopardy after it has attached in cases of necessity, thus allowing the state to retry the defendant.

[17] 4 BLACKSTONE, COMMENTARIES *335.

[18] A number of cases direct themselves to the proposition that only a jury verdict precludes appeal (to the extent that it is precluded at all): Windsor v. Queen, [1866] 1 Q.B. 289, 303, 309; Regina v. Charlesworth, 1 B & S 460, 507, 121 Eng. Rep. 786, 804 (Q.B. 1861); United States v. Bigelow, 3 Mack 393, 421 (D.C. 1884).

[19] A brief historical introduction and explanation of the American practice appears in the introductory note to the Double Jeopardy volume of ALI, ADMINISTRATION OF THE CRIMINAL LAW (1935). A summary and survey of the practice in individual states can be found in 22 C.J.S., *Criminal Law* §241 (1940), and 15 AM. JUR., *Criminal Law* §369 (1938, Supp. 1958). See, for example, Hunter v. Wade, 169 F.2d 973, *aff'd* 336 U.S. 684 (1948), and People v. Watson, 394 Ill. 177, 68 N.E.2d 265 (1946).

[20] This is the position taken by the Connecticut courts. State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894) and State v. Palko, 122 Conn. 529, 191 Atl. 320 (1937) *aff'd* 302 U.S. 319 (1937).

[21] The Texas constitution prohibits state appeals. TEX. CONST. art. 5, §26.

[22] ALI CODE OF CRIMINAL PROCEDURE §428 (1931). However, the ALI ADMINISTRATION OF THE CRIMINAL LAW §13 (1935), would, in addition, allow the state the right to a new trial when there was a material error prejudicial to the state, despite a prior acquittal.

Many states have enacted quite similar statutes, although no state has adopted the precise form of the proposed statute.[23] In general, the great majority of states allow, with only insignificant deviations from the model code, appeals from orders of the court but not from a judgment of acquittal, although the latter limitation is imposed more by the cases interpreting the statutes than by any explicit statements in the statutes themselves. In two of these states, Colorado and North Carolina, an appeal may be taken by the Attorney General not merely from orders but from a declaration that the statute is unconstitutional.[24] In Michigan the state may appeal from an order to quash or to arrest judgment *only* when these orders are based on the unconstitutionality of a statute.[25] The Alabama statute provides that the state may appeal when the act of the legislature under which the indictment or information is brought is held to be unconstitutional. The state's *case law* has made this the only occasion for appeal.[26]

In some states it has been provided that the attorney general may, with the court's permission, bring an appeal to the supreme court to determine a disputed point of law, although this determination would not affect any defendant who may already have been acquitted. In at least eight states,[27] this right accompanies the right to appeal from preliminary orders, or as in North Carolina, from the labelling of a statute as unconstitutional. In five states[28] this form of moot appeal not affecting the defendant is the only appeal which the statutes permit.

In at least three states there is no right of appeal by the State at all. Texas is most explicit: it has enacted a constitutional provision which declares that "the state shall have no right of appeal in criminal cases."[29] In Georgia[30] and Minnesota[31] the right is denied by omitting mention of the state in the statutory provisions authorizing whatever appeal is allowed in criminal cases. Not far removed from such statutes is that of Illinois where the state's sole right to appeal extends only to orders to quash or set aside the indictment.[32]

The law of Virginia and West Virginia is unique, due to the rather unusual constitutional provisions in these two states. Virginia's constitution[33] gives the state the right to appeal only in those criminal cases involving the violation of a law relating to the state revenue, while in West Virginia[34] the state can appeal in cases relating to the public revenue and "such other...as may be prescribed by law."[35] The courts of West Virginia have taken this to mean that an appeal is proper from preliminary orders but not from an acquittal, so as not to place the defendant in jeopardy twice.[36]

The double jeopardy rationale of the West

[23] In Washington, for example, the state may appeal orders to quash, in arrest of judgment, or for a new trial, but in addition has the right to appeal from "...any order which abates the action otherwise than by an acquittal of the defendant by the jury." WASH. REV. CODE §10-73.020 (Supp. 1954). Under this provision a directed verdict can be appealed from, State v. Brufin, 22 Wash.2d 120, 154 P.2d 826 (1945), although this is not allowed in the model statute. Similarly, Florida has adopted a statute exactly like the model statute except that in addition it allows an appeal from a judgment discharging the defendant on habeas corpus. FLA. STAT. §924.02 (1941).

[24] ARIZ. REV. STAT. ANN. §§13-1711-12 (1956); CAL. PEN. CODE §1466; COLO. REV STAT. ANN. §§39-7-24, 27 (1953); FLA. STAT. §924.02 (1941); IDAHO CODE ANN. §19-2801 (1948); IND. ANN. STAT. §9-2304 (1956). Section 9-2305 gives the state the right to appeal any question not one of fact in misdemeanor cases; KAN. GEN. STAT. ANN. §62-1703 (1949); LA. REV. STAT. tit. 15, §540 (1950); MD. ANN. CODE art. 5, §14 (1957); MISS. CODE ANN. §1153 (1942); MO. REV. STAT. §§547.200, 210, 230 (1953); MONT. REV. CODES ANN. §94-8104 (1947); NEV. REV. STAT. §177.060 (1955); N.M. STAT. ANN. §§41-15-3, 6 (1953); N.Y. CODE CRIM. PROC. §518; N.C. GEN. STAT. §15-179 (1953); N.D. REV. CODE §29-2807 (1943); OKLA. STAT. tit. 22, §1053 (1951); ORE. REV. STAT. §§138.020, 40 (1953); S.D. CODE §34-4101 (1939); WASH. REV. CODE §10-73.020 (Supp. 1954). Tennessee's statute is much simpler; it provides that the state may appeal to the Supreme Court just as it may in civil cases, *except* where the defendant has been acquitted in the trial court; TENN. CODE ANN. §40-3401 (1956), and State v. Malouf, 199 Tenn. 496, 287 S.W.2d 79 (1956).

[25] MICH. STAT. ANN. §28.1109 (1954).

[26] ALA. CODE tit. 15, §370 (1940); State v. Gray, 256 Ala. 31, 55 So.2d 354, 8 (1951).

[27] Idaho, Indiana, Kansas, Mississippi, Montana, North Carolina, North Dakota, and Oklahoma; probably also in Michigan, Kentucky. KY. CRIM. CODE §§335, 169, 177, 178 (Baldwin 1948).

[28] ARK. STAT. §§43-2720, 22 (1947); OHIO REV. CODE §§2945.67-70 (1953). The statutes have been construed to allow an appeal only to fix the law for the future, not to get a reversal. State v. Lynch, 81 Ohio 336, 340, 90 N.E. 935 (1910); NEB. REV. STAT. §§29-2314, 16 (1943); WYO. COMP. STAT. ANN. §10-1308, 11 (1945).

[29] TEX. CONST. art. 5, §26. It is interesting to note that this section is found in the article devoted to the judiciary and does not seem to be associated with the prohibition against double jeopardy which is found in art. 1, §14. Moreover, the introductory commentary to the section lists the reasons usually cited in defense of a denial to the state of the right to appeal, and double jeopardy is not one of them.

[30] GA. CODE §6-901 (1935).

[31] MINN. STAT. ANN. §§632.01, 05 (1949).

[32] ILL. REV. STAT. c. 38, §747 (1955).

[33] VA. CONST. art. 6, §88.

[34] W. VA. CONST. art. 8, §3.

[35] W. VA. CODE ANN. §5182 (1955).

[36] Ex parte Bornee, 76 W.Va. 360, 85 S.E. 529 (1915).

Virginia court points up the principal *legal* basis given for statutes which limit the state's right of appeal to preliminary orders of the court. In the great majority of states jeopardy attaches at the swearing and impaneling of the jury;[37] thereafter no appeal or new trial is allowed unless the defendant waives the jeopardy, as by moving to arrest judgment, or because of dire necessity, as when the judge dies. Consequently, when the jury renders a verdict for acquittal, clearly, under this rationale, no appeal or new trial can be available. This accounts for the decision of the courts of West Virginia to limit state appeal to preliminary orders. But this seems merely a policy decision; surely the courts could have allowed an appeal even from an acquittal on the basis of the broad authorization in the West Virginia constitution. The constitution of Virginia does not mold its state appeals practice to conform to the jeopardy theory, since in revenue cases the state can appeal even where the liberty of the defendant is involved, irrespective apparently of jeopardy, and in non-revenue cases the state cannot appeal even when there has been no jeopardy.[38]

While the West Virginia courts, having broad constitutional authorization, construed it to preclude appeal of an acquittal, Wisconsin, on the other hand, with an express constitutional prohibition against placing an accused twice in jeopardy,[39] nonetheless allows the state to appeal even from an acquittal. A Wisconsin statute specifically permits the appeal.[40] Wisconsin has been able to do this since it holds jeopardy to attach only after a final judgment is rendered and the accused is discharged. Thus if an appeal is requested immediately upon the verdict of acquittal, jeopardy has not attached and cannot bar subsequent proceedings.[41] As a result, in Wisconsin the state has in effect an unlimited right to appeal, provided it is promptly applied for by the prosecution.

Connecticut follows a similar practice. There appeals "may be taken by the state, with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."[42] Despite the fact that the Connecticut constitution contains no prohibition against double jeopardy, the courts have felt compelled to reconcile the result reached under the statute with the jeopardy concept. Accordingly, it is said that a single jeopardy is exhausted only when there has been a final judgment free from error. The basis for the Connecticut view is well stated in *State v. Lee*.[43] "The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established, and fully recognized. The question, however, as to what constitutes a trial, depends upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it."

Connecticut thus suggests one means available for allowing a departure from traditional procedure. Pennsylvania suggests another. Its statute says only that the state may except to any decision or ruling in cases charging the offense of nuisance or forcible entry and detainer, or forcible detainer.[44] Through court interpretation, this statute has not prevented the state from appealing from an acquittal in cases not explicitly mentioned in the statute.[45] The state may also appeal from orders presenting questions of law generally,[46] and in cases where there is a question raised about the constitutionality of an act upon which the indictment is based.[47] By treating the statute as non-inclusive of all state remedies, the Pennsylvania courts have been able to expand the concept of state appeal.

This survey of the statutes bearing on the state's right to appeal indicates the wide variety of positions which are taken. It would seem that the significant factors in the statutory scheme are, first, that there is a considerable diversity of practice among the states; and second, that the relevant constitutional and statutory provisions allow some degree of latitude for the courts to explain, to interpret, and thus to make the law. In only nine states do the statutes themselves specify that the *listed* opportunities for state appeal are exhaustive.[48]

[37] See note 19, *supra*.
[38] Commissioner v. Perrow, 124 Va. 805, 97 S.E. 820 (1919).
[39] WIS. CONST. art. 1, §8.
[40] WIS. STAT. §958.12 (1955).
[41] State v. King, 262 Wis. 193, 54 N.W.2d 181 (1952).
[42] CONN. GEN. STAT. §8812 (1949).
[43] 65 Conn. 265, 30 Atl. 1110 (1894).
[44] PA. STAT. (Purdom) §1188 (1930).
[45] Milk Control Comm. v. Hollinger, 170 Pa. Super. 180, 84 A.2d 794 (1952).
[46] Commonwealth v. Dolon, 155 Pa. Super. 453, 38 A.2d 497 (1944).
[47] Commonwealth v. Frank, 159 Pa. Super. 271, 48 A.2d 10 (1946).
[48] This express statement seems to be present in only the statutes of Arizona, Illinois, Kansas, Louisiana, Missouri, New Mexico, North Carolina, Oklahoma, and Oregon. It is not so much the statutes as it is the cases which make the stated remedies exclusive; for example: State v. Huebner, 233 Ind. 566, 122 N.E. 2d 88 (1954), People v. Ballots, 252 Mich. 282, 233 N.W. 229 (1930), State v. Peck, 83 Mont. 327, 271 Pac. 707 (1928).

Therefore, since most courts are free to define when jeopardy attaches, they can, if they wish, adopt the Connecticut-Wisconsin view.[49] Therefore, if a court is inclined to adopt the Connecticut-Wisconsin position it should not be deterred by reason of any double jeopardy concern.

To the extent that the courts have this freedom and the jeopardy problem is thus eliminated, resort to the common law will not suffice as an excuse to deny the state the right to appeal.[50]

The Policy Factors

To the extent that the state is allowed no appeal, the refusal is an historical reaction from a procedure which gave to the Crown inordinate advantages in the prosecution of an accused.[51] Because of this factor, modern society has developed a practice which inhibits the state to such an extent that today the accused has the decided advantages in criminal prosecution, e.g., in the presumption of innocence, the doctrine of privileged communications, the guarantee against self-incrimination and the right of practically unlimited appeal. Although it might have been wise to limit the state's rights to an appeal in the days when the accused did not have the many rights he now has, it is highly questionable whether the "no appeal" policy of today is a wise one in view of the many other protections accorded accused persons.[52]

Those who oppose state appeal cite two principal policy arguments in their support: the hardships caused defendants who have been acquitted, and the benefits of a jury trial.[53] They argue that defendants in criminal cases are rarely wealthy and that once they have borne the costs of the initial trial it is undue harassment to require the added expenditure on appeal for counsel, transcripts, and the other necesssary costs. Particularly is this true when the state may thereafter appeal from the intermediate to the ultimate appellate tribunal. Moreover, the hardships are not only of a financial nature, but there is also the factor of time consumed on appeal, of the probability of frivolous appeals by the prosecutor, and the further damage to the accused's reputation. An additional argument is the proposition that a jury verdict represents a societal judgment, an opportunity for public opinion to make itself felt in the administration of criminal law. State appeal, presumably, would eliminate these advantages.

While it is true that some hardship will fall to the accused on an appeal by the state, there are compensating values which make the right of a state appeal desirable. Means can be found to minimize the hardships. The expenses on appeal can be borne by the state. Expenses involved in providing such items as the transcripts need present no problems. Counsel can be selected by the accused or provided by the court from a group recommended or at least approved by the various bar associations, with payment of more or less standard fees by the court. The concrete form of the plan is less a problem than the decision to adopt some such procedure. Some states have already done so.[54] The effect of its adoption would be not merely to relieve the accused of financial burdens on appeal but it would also discourage the prosecution of frivolous appeals since the state would have to pay for them and justify the expense to the public each election year. In addition, preference can be given to state appeals on the courts' calendars so that an early, final determination would result without impairing even the spirit of the guarantee of a speedy trial. While it is true that an acquitted defendant's reputation may not be enhanced by forcing him to defend an appeal, at the same time it is not likely to be injured either. The fact of appeal is ordinarily not publicized as is the trial and the jury verdict. If the appellate court sustains the lower court judg-

[49] This statement must be qualified to the extent that eight states have constitutional provisions providing that no person shall, after acquittal, be tried for the same offense: Iowa, Michigan, Mississippi, New Hampshire, New Jersey, Oklahoma and Rhode Island.

[50] See the first section of this article for the detailed reasons in support of this conclusion.

[51] ORFIELD, CRIMINAL APPEALS IN AMERICA 56-7 (1939).

[52] "Under the criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole audience against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." United States v. Garsson, 291 Fed. 646, 649 (1923).

[53] For a typical exposition of these views see ORFIELD, *supra*, note 51 at 62, 71.

[54] In Nebraska, for example, the court appoints counsel to anyone opposing the state and pays a fee not to exceed $100.00.

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second time for the same offense,"[43] has been often held, but by no means correctly, to require the unconstitutionality of any state which allows appeals after an acquittal. The great majority of American jurisdictions provide for some type of appeal restricted by the double jeopardy doctrine.[44]

The instances in which an appeal may be taken by the state under such statutes have varied greatly in the different states, although the more common types are:

a. Appeals from an order granting a new trial;[45]
b. Appeals from an order arresting judgment of conviction;[46]
c. Appeals from orders made after judgments which affect the substantial rights of the state;[47]
d. Appeals from orders dismissing an indictment or information, or a decision sustaining a demurrer thereto:[48]
e. Appeals to review decisions upon pleas in abatement or pleas in bar;[49]
f. Appeals in all cases where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered;[50]
g. Appeals from judgments of acquittal in cases involving only a fine and not life or limb;[51]
h. Appeals from an intermediate court of appeal to a court of last resort.[52]

The Tennessee statute is perhaps one of the better illustrations of such statutes, being as broad as the traditional concept of double jeopardy will allow. *Tennessee Code Annotated* §40-3401 provides:

> Either party to a criminal proceeding may, with the exception stated in §40-3403, pray an appeal in the nature of a writ of error to the Supreme Court as in civil cases.[53]

Section 40-3403 provides:

> The state has no right of appeal or other remedy for the correction of errors, upon a judgment of acquittal in a criminal case of any grade.[54]

This Tennessee statute has been held to allow appeals by the state

43. 22 C. J. S., *Criminal Law* §238, p. 615 (1961).
44. A. L. I. CODE OF CRIMINAL PROCEDURE, supra note 18, at 499.
45. Commonwealth v. Metcalfe, 184 Ky. 540, 212 S.W. 434 (1919).
46. State v. Dixon. 215 N.C. 161, 1 S.E.2d 521 (1939).
47. People v. Maggio, 96 Cal. App. 409, 274 P. 611 (1929).
48. State v. Blair, 24 Ohio App. 413, 157 N.E. 801 (1927).
49. People v. Ellis, 204 Calif. 39, 266 P. 518 (1928).
50. TENN. CODE ANN. §§40-3401, 40-3403 (1955).
51. Commonwealth v. Gritten, 180 Ky. 446, 202 S.W. 884. (1918).
52. People v. Finkelstein, 372 Ill. 186, 23 N.E.2d 84 (1939).
53. TENN. CODE ANN. §40-3401 (1955).
54. TENN. CODE ANN. §40-3403 (1955).

from an arrest of judgment;[55] from an order quashing an indictment;[56] and from a dismissal of the prosecution on a plea of double jeopardy,[57] but not from a directed verdict of acquittal.[58]

There would seem to be little objection to such statutes; indeed, it would be desirable to go farther and allow state appeals even after the defendant has been placed in jeopardy. Some have objected to statutes allowing appeal before jeopardy has attached on the basis of hardship,[59] but such argument is invalid even as to appeals after jeopardy has attached, as will be shown presently. The weight of authority supports such statutes; they have consistently been held constitutional; and are employed by most of the states and the federal government.[60] Any objection would be in the realm of speculation; the real question is whether or not the double jeopardy restriction should be retained.

4. Appeal from an Acquittal

The final and most controversial type of appeal which may be allowed the state is an appeal after jeopardy has attached. It should first be noted that such appeals are not popular in actual practice, although most authorities favor them.[61] As stated by Moreland:

> The overwhelming weight of authority is that no appeal lies to the state for alleged error committed after jeopardy attaches. To allow an appeal in such situation would result in double jeopardy of the accused in the view of most courts.[62]

At the present time, three states have adopted statutes which permit such appeals after jeopardy has attached; Vermont,[63] Wisconsin,[64] and Connecticut.[65] The Connecticut statute is the best of the three and reads as follows:

> Appeals from the rulings and decisions of the Superior Court or of the Court of Common Pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court

55. Wilson v. State, 200 Tenn. 487, 292 S.W.2d 738 (1956).
56. *Ibid.*
57. Tennessee v. Malouf, 199 Tenn. 496, 287 S.W.2d 79 (1955).
58. Tennessee v. Vincent, 147 Tenn. 458, 249 S.W. 376 (1922).
59. Orfield, *supra* note 9, at 62.
60. *Supra*, note 35.
61. Orfield, *supra* note 2, at 55.
62. MORELAND, MODERN CRIMINAL PROCEDURE 277 (1959).
63. 13 VT. STAT. ANN. §7403 (1958); upheld in State v. Felch, 92 Vt. 477, 105 A. 23 (1918).
64. 46 WIS. STAT. ANN. ch. 958, §12 (1958); upheld in State v. Witte, 243 Wis.2d 117, 10 N.W.2d 117 (1943).
65. CONN. GEN. STAT. §54-96, ch. 961 (Rev. 1958); upheld in State v. Lee, 65 Conn. 265, 30 A. 1110 (1894).

ROBERT Y. THORNTON
ATTORNEY GENERAL

E. G. FOXLEY
DEPUTY ATTORNEY GENERAL

STATE OF OREGON
DEPARTMENT OF JUSTICE
SALEM 97310

March 31, 1969

Honorable Wallace Carson, Jr.
State Representative
State Capitol

Dear Wally:

There are transmitted herewith excerpts from two law review articles dealing with provisions of state law re appeal in criminal cases. Three states do not allow any appeal whatsoever by the state: Illinois, Massachusetts and Texas. Three states allow an appeal even after jeopardy has attached: Vermont, Wisconsin and Connecticut.

Very sincerely yours,

Robert Y. Thornton
Attorney General

RYT r
Enclosures

PROPOSED AMENDMENTS TO HOUSE BILL 1707

On page 2 of the printed bill, line 9, delete "An" and insert "A preliminary", and in the same line after "order" delete "made prior to trial.", and in the same line delete the semicolon and insert a comma, and in the same line after the comma, delete "or" and insert "including a confession or admission if the district attorney certifies that in his opinion the appeal is well-founded in law and that such evidence is necessary to the prosecution of the case."

On page 2, line 10, delete "based on any ground other" and insert "at any time before the jury is empaneled."

On page 2, line 11, delete "than a finding or verdict of not guilty."

On page 2, after line 11, insert:

"(6) A judgment of acquittal based upon a ground other than a verdict of not guilty; or

"(7) A judgment of acquittal based on a directed verdict of not guilty."

ROBERT Y. THORNTON
ATTORNEY GENERAL

3-28-69

E. G. FOXLEY
DEPUTY ATTORNEY GENERAL

STATE OF OREGON
DEPARTMENT OF JUSTICE
SALEM 97310

March 18, 1969

Honorable Jesse R. Himmelsbach, Jr.
Baker County District Attorney
Baker County Courthouse
Baker, Oregon 97814

Re: House Bill 1707

Dear Jess:

In accordance with our conversation of Tuesday, I enclose a copy of new proposed amendments to House Bill 1707. In order to distinguish these proposed amendments from the previous proposed amendments they are dated March 18, 1969.

The only change in substance in these new proposed amendments is the substitution of a new subsection (6) for previous subsections (6) and (7). The new subsection (6) is substituted for previous subsections (6) and (7) so as to eliminate any problem concerning violation of the defendant's constitutional right not to be put in double jeopardy.

I am forwarding a copy of this letter with the requisite number of copies of the proposed amendments to Representative Wallace Carson, Jr. Your letter to him requesting adoption of the new proposed amendments is all that is needed.

Yours very truly,

Robert Y. Thornton
Attorney General

By
Peter S. Herman
Assistant

PSH:ms
Enclosure
cc:Wallace Carson, Jr.
State Representative

House Bill 1707

Sponsored by Representative DAVIS (at the request of Robert Y. Thornton, Attorney General)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Authorizes state to appeal from order dismissing indictment based on any ground other than finding or verdict of not guilty, or from pretrial order suppressing evidence.

NOTE: Matter in *italics* in an amended section is new; matter [~~lined out and bracketed~~] is existing law to be omitted; complete new sections begin with **Section .**

A BILL FOR AN ACT

Relating to criminal appeals; amending ORS 138.060.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 138.060 is amended to read:

138.060. The state may take an appeal to the Supreme Court from:

(1) A judgment for the defendant on a demurrer to the indictment;

(2) An order sustaining a plea of former conviction or acquittal; ~~[or]~~

(3) An order arresting the judgment~~[.]~~ *;*

(4) An order made prior to trial supressing evidence; or

(5) An order dismissing the indictment based on any ground other than a finding or verdict of not guilty.

4/8/69 JS

PROPOSED AMENDMENTS TO HB 1707 (Subcommittee I)

On page 2 of the printed bill, line 8, after the semicolon insert "or".

In line 9, delete "made prior to trial" and in the same line after "evidence" insert "before or during trial." and delete the rest of the line.

Delete lines 10 and 11.

PROPOSED AMENDMENTS TO HOUSE BILL 1707

OF MARCH 18, 1969

On page 2 of the printed bill, line 9, delete "An" and insert "A preliminary", and in the same line after "order" delete "made prior to trial", and in the same line delete the semicolon and insert a comma, and in the same line after the comma, delete "or" and insert "including a confession or admission if the district attorney certifies that in his opinion the appeal is well-founded in law and that such evidence is necessary to the prosecution of the case."

On page 2, line 10, delete "based on any ground other" and insert "at any time before the jury is empaneled; or".

On page 2, line 11, delete "than a finding or verdict of not guilty."

On page 2, after line 11, insert:

"(6) Any order which in effect abates or determines the action, or discontinues the same, otherwise than by an acquittal of the defendant by a jury or by the court, where a jury trial has been waived. In no case shall the state have a right to an appeal where the defendant has been acquitted by a jury or by the court, where a jury trial has been waived."

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OF MARCH 18, 1969

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House Bill 1412

Mr. John Osborn explained that the purpose of House Bill 1412 was to change the structure of ORS chapter 352 providing for enforcement of parking regulations on certain of the state college campuses.

The Lane County district courts, Mr. Osborn said, had been reluctant to accept the filing of complaints where people were charged with violating University of Oregon parking regulations. The Multnomah County district court felt the same way about Portland State parking violations. On behalf of the courts, he said there were simply too many cases and they were too minor and the court just didn't have the time to hear them.

At the same time, he said, the Lane County circuit court had ruled that because existing legislation prescribed that all proceedings to enforce violations must be brought in the district court, the state schools did not have the authority to deduct fines from student fees. For these reasons criminal and civil enforcement of existing statutes had failed on the campuses. HB 1412 would permit parking violations to be handled on the campus by administrative procedures. The House amendments provided that if the violator were a student or faculty member, deduction could be made from student fees or faculty salaries for parking violations. If the violator were a private individual, there would be no effort made to take him in on a criminal charge to district court but the school would retain the power to tow the car away. The criminal penalty was retained only at the medical and dental schools where, because of parking facilities, a unique type of problem was involved.

House Bill 1707

Senator Lent expressed disapproval of House Bill 1707.

Senator Burns explained that if a defense counsel filed a motion to suppress evidence and the judge sustained that motion, the state could not proceed under existing law. He expressed support of the measure.

After a brief discussion, Senator Jernstedt moved that HB 1707 be reported out with a do pass recommendation and the motion carried. Voting for the motion: Senators Burns, Eivers, Husband, Jernstedt, McKay and Mr. Chairman. Voting no: Senators Fadeley and Lent. Senator Burns was assigned to lead the floor discussion.

House Bill 1412

Senator Fadeley moved that House Bill 1412 be given a do pass recommendation and the motion carried unanimously with all members present except Senator Willner. Senator Fadeley was assigned to lead the floor discussion.