NOTE

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COURTS—APPELLATE PROCEDURE—DUE PROCESS—COURT RULE COMPELLING ADVANCE PAYMENT OF TRANSCRIPT FEE INEFFECTUAL TO DEPRIVE INDIGENT APPELLANT OF HIS CONSTITUTIONAL RIGHTS.—The doctrine, deeply rooted in American jurisprudence, that a defendant's right to be heard cannot be abrogated for reason of poverty, was recently reaffirmed by the New York Court of Appeals in its decision in *People* v. *Pride*.[1]

The court unanimously reversed an order of the Supreme Court, Erie County, that had denied a penniless, convicted defendant's request for a free copy of the trial minutes for appeal purposes.

Pride, an indigent defendant, was convicted of assault in the third degree in the City Court of Buffalo. He commenced an appeal from his conviction to the Supreme Court, Erie County, by filing the required notice and affidavit of appeal and serving copies thereof upon the district attorney. According to section 761 of the New York Code of Criminal Procedure, Pride was also required to supply the district attorney with a copy of the return to be prepared by the trial court in accordance with section 756 of the Code. As Pride's affidavit of appeal alleged that his conviction was contrary to the weight of the evidence adduced on the trial, it is settled law that the return would have to comprise a transcript of the trial minutes including the evidence.[2] According to section 49 of the Buffalo City Court Act an appellant has to pay in advance for a transcript of trial minutes. The trial minutes were rather voluminous and the estimated costs were $450, a sum prohibitive for the destitute defendant. Consequently, Pride moved in the Supreme Court, Erie County, for an order requiring that the transcript be made available to him without charge. The Supreme Court dismissed the motion, thus rendering it impossible for Pride to serve the required return upon the district attorney. The incomplete appeal was, consequently, dismissed by the Supreme Court. Pride thereafter took an appeal from the dismissal order to the Court of Appeals who unanimously held ". . . that insofar as section 49 is construed to compel payment of a fee, which because of defendant's poverty is prohibitive, as a requirement precedent to the making of a return under section 756, that statute must be deemed ineffectual as vitiative of constitutional rights."[3]

It might seem inconceivable, if not disturbing, that in the year 1957 in the State of New York a convicted defendant could be refused access to an appeal court merely because of his inability to pay the statutory fee for a transcript of the necessary trial minutes. A survey of the law on this point, however, shows that the result reached in the *Pride* decision is not obvious at all and that appeal courts throughout the United States are frequently confronted with this issue as evidenced by an abundance of recent decisions.

To provide equal justice for poor and rich alike is an age-old problem.

"Ye shalt do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty; but in righteousness shalt thou judge thy neighbor".

Thus teaches the Old Testament.[4]

The Magna Carta's provision "To no one will we sell, to no one will we refuse justice" is, for example, demonstratively embodied in the oath of office required to

[1] 3 N. Y. 2d 882, 145 N. E. 2d 184 (1958).
[2] People v. Giles, 152 N. Y. 136, 46 N. E. 326 (1897).
[3] See note 1, *supra*.
[4] LEVITICUS, c. 19, v. 15.

be taken by federal judges, which states "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; . . . ."[5]

The due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, although not expressly mentioning poverty, have been repeatedly interpreted by the Supreme Court of the United States to mean that "the central aim of the American judicial system is that all people charged with crime must stand on an equality before the bar of justice."[6] The New York Constitution also provides for the due process and equal protection clauses.[7]

While it is thus well settled that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has,"[8] courts have nevertheless been very reluctant to assist indigent defendants in obtaining trial records without payment. Various reasons may be advanced for this fact. It may be argued that courts are not provided with sufficient funds or have no authority to spend public funds unless authorized by statutory provisions. Further, most defendants, eager to appeal their conviction, will ordinarily be able to pay the generally modest fees charged by the courts for trial transcripts.

Many states and also the Federal Government have provided for criminal proceedings *in forma pauperis,* in which the entire costs of the proceedings are borne by the authorities. The Federal Code, for example, provides that in any criminal case the court may "direct that the expense of furnishing a stenographic transcript and printing the record on appeal . . . be paid by the United States. . . ."[9]

The New York Code of Criminal Procedure does not contain express provisions authorizing appeals *in forma pauperis,* except in capital cases. Section 485 of the Code directs the clerk of the court in which the conviction was had to supply for appeal purposes transcripts of the trial minutes without costs to the defendant's attorney.[10] This section, however, is expressly limited to *capital* cases as evidenced by numerous decisions. Thus, in *People* v. *Brown*[11] the court held that "neither a reviewing court nor a court of original jurisdiction has power to furnish to the defendant, gratis, a transcript of minutes of the trial, after trial, except in cases where the judgment is of death or of life imprisonment following a recommendation of the jury."

The same result was reached in *People ex rel. Ludwig* v. *McDonnell.*[12] If the reason for denying defendants free transcripts (except in capital cases) is based on financial considerations, it is submitted that such line of reasoning is fallacious, because section 456 of the Code provides as follows:

"Where the defendant is convicted of a crime the clerk of the court in which the conviction was had shall within two days after a notice of appeal shall be served upon him notify the stenographer that an appeal has been taken whereupon the stenographer shall within ten days after receiving such notice deliver to the clerk of the court a copy of the stenographic minutes of the entire proceedings of the trial certified by the stenographer as an accurate transcript of such proceedings. Such copy shall be filed by the clerk in his office. The expense of such copy shall be a county

[5] 28 U. S. C. § 453 (1948).

[6] Griffin v. Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). See Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940); Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

[7] N. Y. CONST., art. I, §§ 6, 11.

[8] See *supra,* note 6, Griffin v. Illinois.

[9] 28 U. S. C. § 1915 (1948).

[10] N. Y. CODE OF CRIM. PROC. § 485.

[11] 3 A. D. 2d 696, 158 N. Y. S. 2d 1002 (4th Dep't 1957).

[12] 2 Misc. 2d 111, 149 N. Y. S. 2d 786 (Sup. Ct. Bronx Co. 1956).

charge, payable to the stenographer out of the court fund upon the certificate of the judge presiding at the trial."[13]

Since according to this section a transcript of the minutes is prepared at the expense of the county in any event, no valid reason would appear to exist why an indigent appellant should not be supplied with a free copy thereof.

Already prior to the decision under consideration some New York courts have pointed the way to the legislature to broaden the scope of section 485 by relaxing or even disregarding the provisions of this section. In a 1957 decision[14] reported in this publication,[15] the Court of Appeals established a broader rule with regard to a destitute appellant's right to free trial records.

It is also interesting to note that the lower courts of this State apparently do not feel bound by section 485 and intentionally disregard the spirit of this section. In a 1956 Kings County decision[16] the court thus held that a defendant in a criminal case must be allowed a transcript without costs. The same result was obtained in a 1956 Herkimer county court decision.[17] The court stated: "where convicted defendants allege that they are poor persons with no means of paying the necessary fees to acquire transcripts, and court records are needed to prosecute an appeal, the denial of a motion that a copy of records including the stenographer transcripts be furnished them without cost is a denial of equal protection and due process".

The leading case on the issue under consideration is *Griffin* v. *Illinois*[18] which reached the Supreme Court of the United States by writ of certiorari. In this case the petitioner had been convicted of armed robbery and his motion to have a copy of the trial records furnished to him without costs because of his poverty was denied by the Illinois courts.

The Supreme Court reversed the decision of the Illinois courts by holding that "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." The Court stated that "in criminal trials a state may no more discriminate on account of poverty than on account of religion, race or color." The Court reasoned that the "ability to pay costs in advance bears no rational relationship to guilt or innocence and cannot be used as an excuse to deprive the defendant of a fair trial".

The present general trend which entitles a destitute appellant to free transcripts as a matter of right is followed by courts in many states. In a 1957 Washington decision[19] the court stated as a dictum: "If a complete record is required on appeal, a convicted defendant has only to show a reason therefor, whereupon the trial court is authorized to order it at public expense."

Both North Dakota and West Virginia have enacted statutes for the purpose in issue.[20] With regard to the former state the court said in *State* v. *Moore:*[21] "If the defendant makes a reasonable showing that he has to have a complete

[13] N. Y. CODE OF CRIM. PROC. § 456.

[14] People v. Kalan, 2 N. Y. 2d 278, 140 N. E. 2d 357 (1957).

[15] 3 N. Y. LAW FORUM 317 (1957).

[16] People v. Strong, 159 N. Y. S. 2d 351 (Kings Co. Ct. 1956).

[17] People v. Jackson, 2 Misc. 2d 521, 152 N. Y. S. 2d 893 (Herkimer Co. Ct., 1956).

[18] See note 6, *supra.*

[19] Grady v. Schneckloth, 314 P. 2d 930 (Wash. 1957).

[20] W. VA. CODE ANN. § 5251 (1) (1955).
(1947).

[21] State v. Moore, 82 N. W. 2d 217 (N. D. 1957).

transcript to prepare his appeal, Sec. 27-0606 NDRC 1943 authorizes the court to order a transcript at the expense of the county".

"Due process of law signifies a right to be heard"[22] and "under the equal protection clause, a destitute defendant must be afforded as adequate appellate review as defendants who have money enough to buy transcript."[23]

In the light of these basic tenets it is submitted that the refusal to supply indigent persons with free trial transcripts for appeal purposes is repugnant to American public policy and contrary to constitutional guaranties. It is gratifying to see that the Court of Appeals and some lower New York courts theretofore have realized this point. It is hoped that the New York legislature will soon act in this spirit.

[22] Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897).
[23] See *supra,* note 6, Griffin v. Illinois.