

CRIMINAL
LAW

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ASSOCIATION

presents

Annual Trial Skills Update Seminar

Criminal Appeals: Disaster Preparedness: Making a Record and Protecting Your Client While Thinking About Appeals

Saturday, April 6, 2024
2:10pm - 3:10pm

Speakers: Gary Rowe

Conference Reference Materials

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A. Some History: The Appeal of Felony

On the following three pages, you will find three old English cases. Each is an “appeal of felony.” Consider the following questions as you read them:

1. What do you think an “appeal of felony” was in medieval England? What purpose might it have served?
2. How was an appeal of felony prosecuted and tried?
3. What could go wrong when a litigant brought an appeal of felony? Why?
4. Why might this material matter to us today?

Case One

This English case comes from the Lincolnshire Eyre of 1202, and is recorded in the English Eyre Rolls. It has been translated from the original Latin.

Hereward, William's son, **appeals** Walter, Hugh's son, for that he **in the king's peace assaulted him and wounded him** in the arm with an iron fork and gave him another wound in the head; and this he **offers to prove by his body** as the court shall consider. And **Walter defends all of it by his body**. And it is testified by the coroners and by the whole county that Hereward showed his wounds at the proper time and has made sufficient suit. **Therefore it is considered that there be battle**. Walter's pledges, Peter of Gosberton church, and Richard Hereward's son. Hereward's pledges, William his father and the Prior of Pinchbeck. Let them come armed in the quindene of St. Swithin at Leicester.

Case Two

This English case comes from the Hundred of Offlow and is also from (circa) 1202.

Richard, brother of John of Sowe, **appeals Herbert**, the serjeant of Mathew of Gamages, for that he **in the king's peace slew John his brother**; and this he offers to prove against him as the court shall consider. And **Herbert defends** the whole word by word as the court shall consider. It is considered that the **appeal is null, for in his appeal he made no mention of sight and hearing, nor even of felony**. So let the appellor be in **mercy** [i.e., fined].

Case Three

This English case comes from the Lincolnshire Eyre of 1202 and is recorded in the English Eyre Rolls. It has been translated from the original Latin.

Gilbert of Willingham **appeals Gilbert**, Geoffrey's son, for that he **in the king's peace and wickedly set fire to his house and burned it**, so that after the setting fire [the appellor] went forth and raised hue and cry so that his neighbours and the township of Willingham came thither, and he showed them [the appellee] in flight and therefore they pursued him with the cry; and this he offers etc. And the appellee defends all of it word by word etc. And the neighbours and the township of Willingham being questioned, say that they never saw him in flight, and that [the appellor] never showed him to them. Likewise the **jurors say that in their belief he appeals him out of spite rather than for just cause**. Therefore it is considered that the appeal is null, and the **appellee is in mercy** for a half-mark. Pledge for the amercement, Robert Walo.

Shakespeare and the Appeal
Richard II, Act I, Scene 1

**ACT I, SCENE I. London. KING
RICHARD II's palace.**

*Enter KING RICHARD II, JOHN OF
GAUNT, with other Nobles and Attendants*

KING RICHARD II
Old John of Gaunt, time-honour'd
Lancaster,
Hast thou, according to thy oath and
band,
Brought hither Henry Hereford thy bold
son,

**Here to make good the boisterous late
appeal,**
Which then our leisure would not let us
hear,

Against the Duke of Norfolk, Thomas
Mowbray?

JOHN OF GAUNT

I have, my liege.

KING RICHARD II

Tell me, moreover, hast thou sounded
him,

**If he appeal the duke on ancient
malice;**

Or worthily, as a good subject should,
On some known ground of treachery in
him?

JOHN OF GAUNT

As near as I could sift him on that
argument,

On some apparent danger seen in him
Aim'd at your highness, no inveterate
malice.

KING RICHARD II

Then call them to our presence; face to
face,

And frowning brow to brow, ourselves
will hear

The accuser and the accused freely
speak:

High-stomach'd are they both, and full
of ire,

In rage deaf as the sea, hasty as fire.

**. . . [Arguments from Bolingbroke and
Mowbray omitted]**

KING RICHARD II

We were not born to sue, but to
command;

Which since we cannot do to make you
friends,

Be ready, as your lives shall answer it,
At Coventry, upon Saint Lambert's day:

**There shall your swords and lances
arbitrate**

**The swelling difference of your settled
hate:**

Since we can not atone you, we shall see
Justice design the victor's chivalry.

Lord marshal, command our officers at
arms

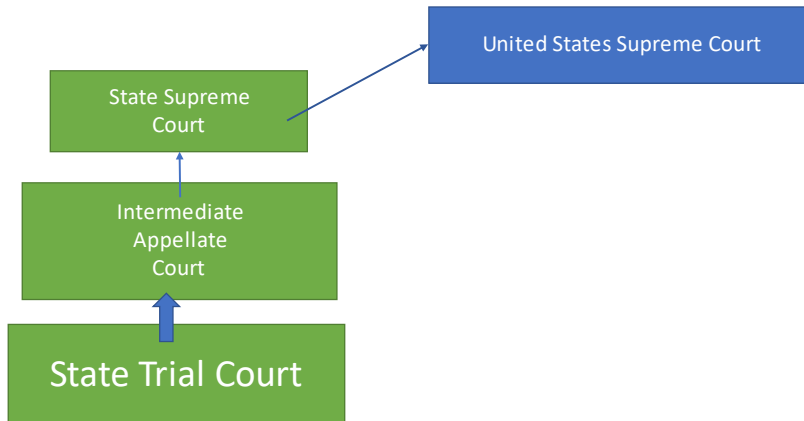
Be ready to direct these home alarms.

Exeunt

B. The Uses(?) of Jurisdictional Redundancy

1. State appeals

The Geography of State Appeals



2. A Hypothetical:

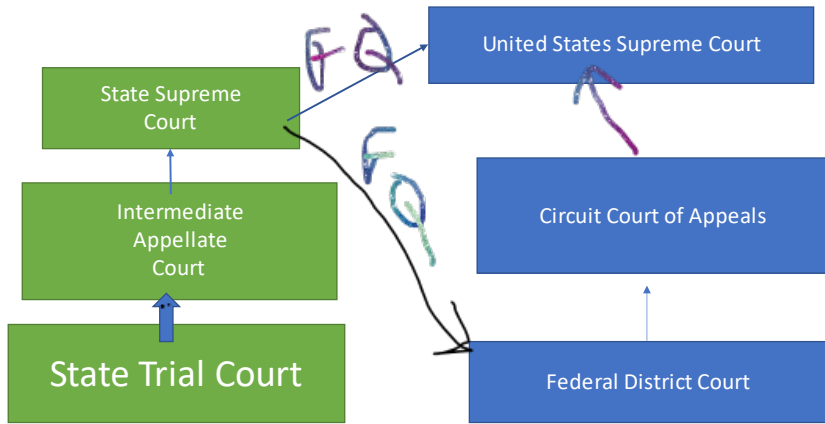
Would you support the following federal statute governing civil cases? Why or why not?

“A losing party in the highest state court may, if the Supreme Court does not grant certiorari, seek review in federal district court of a state court judgment on the ground that it violates the Constitution, laws, or treaties of the United States.”

Would you support such the equivalent statute governing criminal cases?

3. Federal Habeas Corpus

The Geography of Federal Habeas



C. Standards of Review

- De novo
- Abuse of Discretion
- Clear Error
- Substantial Evidence

Questions:

1. What is the difference between these standards?
2. Which standard do you want?
3. How can you, as a trial lawyer, help your appellate lawyer get the best standard of review?