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THE MODERNIZATION OF CRIMINAL PROCEDURE¹

PRELIMINARY SUGGESTIONS FOR A REPORT OF COMMITTEE D OF THE
AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY

BY ROBERT W. MILLAR²

In view of the need for eventual formulation of a comprehensive set of procedural principles upon which the Institute can take its stand, it will be proper at the outset to recall the recommendations made by predecessors in office of the present committee.

The draft report of the committee for 1910-11³ prepared by three of the six members of the committee, dealt, first, with the mode of accusation, and, secondly, with the elimination of unnecessary technicality in relation to appeals. On the first question it recommended that:

"I. It should be made permissible in all jurisdictions to prosecute any and every species of offender by information, after examination and commitment by a magistrate, permitting also prosecution by indictment with or without such examination and commitment.

"II. Amendment of indictments and informations should be allowed (1) as to all formal matters in any court at any time, (2) in order to prevent variance by the trial court, before or during trial upon such terms as will afford to the accused reasonable notice and opportunity to make his defense, (3) after trial, to conform to the proofs, either in the trial court or in a court of review, where the variance was not expressly brought to the attention of the trial court when the evidence was offered and the trial proceeded without claim by the accused that he was not properly notified of the case actually made against him.

"III. The office of an indictment or information should be (1) to give the accused notice of the crime with which he is charged and of the case on the facts which will be made against him, (2) to set out the facts constituting the alleged offense with sufficient exactness to support a plea of former conviction or former acquittal, as the case

¹The body of this paper was read before the annual meeting of the American Institute of Criminal Law and Criminology, at Indianapolis, Sept. 17, 1920.

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³Journal of Criminal Law and Criminology, Vol. 1, p. 584.

may be. The further office of providing a formal basis for the judgment of conviction, so that the indictment or information must set forth everything which is necessary to a complete case on paper, no longer serves any useful end, produces miscarriages of justice, and should be done away with."

As to the second point its recommendations were:

"I. Rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals should be distinguished carefully from rules intended to secure to the accused a fair opportunity to meet the case against him and a full opportunity to present his own case; rulings upon the former class should be reviewable only for abuse of discretion and nothing should depend on, or be obtainable through, the latter class except the securing of such opportunity.

"II. No prosecution should be thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved.

"III. Questions of law conclusive of the controversy, or of some part thereof, should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court, and in any other court to which the cause may be taken for review, to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.

"IV. Any court to which a cause is taken for review should have power to take additional evidence by affidavit, deposition, or reference, as rule of court may prescribe, for the purpose of sustaining a verdict wherever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to have been competent.

"V. No conviction should be set aside or new trial granted for error as to any matter of procedure unless it shall appear to the reviewing court that the error complained of has (a) resulted in a conviction not authorized by substantive law or (b) deprived the accused of some right given by adjective law to insure a fair opportunity to meet the case against him or a full opportunity to present his own."

The report of the committee for 1912-13⁴ was to the following effect:

⁴Journal of Criminal Law and Criminology, Vol. 3, p. 566.

I. It concurred expressly in the first and substantially in the second recommendation of the previous committee.

It followed with the further recommendations:

II. That "such legislation be had as will give to the trial judge the right to charge juries orally and to limit exceptions to such charge to the specific objections made by counsel at the time of the charge, in the presence of the jury and before it has retired from the bar," the committee, however, recording its opinion that "it would be unwise to give to the trial courts the right to comment to the jury favorably or unfavorably upon the weight of the evidence or the credibility of witnesses."

III. "That such legislation be enacted in the several states as shall limit the right of appeal to such defendants as shall secure from the trial judge a certificate reciting that the cause is one which contains some doubtful or uncertain question of law or fact, or that for some other reason it is one which should be reviewed by the court of appeal. Failing to secure such certificate such defendant could then apply to the court of review for the right to appeal, and such court shall grant such appeal only when it shall be of the opinion that the case is one where an injustice has been done."

IV. "That not only should courts of criminal appeal have the power to reduce or increase penalties without reversing causes, where in their judgment such a course is proper, but likewise have the power to set aside the judgment and sentence of the court and pass such other sentence as is warranted by the evidence, having due regard for the rights of all parties involved."

V. That such legislation be enacted "as will give to courts of review the power to examine the accused under oath and to hear the evidence of such other witnesses offered on behalf of appellant as the court may elect."

VI. That such legislation be enacted "as will give to both sides, in a habeas corpus proceeding, the right to apply to an appellate court for a review of the judgment, either by appeal, writ of error, certiorari, exceptions, or by a certification of questions of law."

A minority report also appears expressing the dissent of one member from the second and fourth recommendations.⁵

The report of the committee for 1914-15⁶ was of a different character, consisting of a complete draft of an indictments act. This draft proposed a system of criminal pleading—substantially like prevailing

⁵Journal of Law and Criminology, Vol. 3, p. 577.

⁶*Id.*, Vol. 5, p. 827.

in Massachusetts since 1899—the principle of which is thus summarized in the introductory part of the report:

“The first pleading on the part of the state, be it an indictment, information or some other formal pleading, need only state the offense which is to be proved against the person accused. If this be stated such pleading is sufficient to give the court jurisdiction, and if the accused requests no further information, it is sufficient to warrant and sustain a trial and judgment. If, however, the defendant does request information as to the transaction to be proved, *e. g.*, if he wishes to know the name of his victim or description of property taken or injured, the first pleading may be supplemented by another or other pleadings known as ‘bills of particulars.’”

The problems thus dealt with are of tremendous importance in the determination of an efficient system of criminal procedure. But there are many imperfections of general prevalence which the preceding recommendations have necessarily left untouched. As a step therefore toward the declaration of principles ultimately desirable, on the part of the Institute, it is submitted that the deliberations of the existing committee extend at least to the ten questions hereafter appearing. Some of these have been suggested by members of the committee; for others the chairman accepts the present responsibility.

I. *Where the act or omission occasioning the criminal offense also gives rise to a civil liability, should not provision be made, at the election of the person aggrieved, for determining both the criminal and civil liability in a single proceeding?*

This is a form of procedure which, apart from the English statute later to be mentioned, apparently does not exist in more than germ in any Anglo-American jurisdiction. Originating in France, it has taken root in Belgium, Italy, Spain, Holland, Norway, Hungary, and elsewhere on the Continent, and, according to the chairman's information, is embodied in the draft code of criminal procedure of the Republic of China. Of the institution in France, which may be taken as typical, Sir James Fitzjames Stephens says: “In every French criminal proceeding, from the most trifling to the most important, any person injured by the offender may make himself *partie civile*. In certain cases he may by doing so be made liable in damages to the accused. A French criminal trial may thus be also a civil proceeding for damages by the party injured by the crime, and at the same time an action by the accused for what we should call a malicious prosecution.”⁷¹ The Code d'Instruction Criminelle provides that “the civil

⁷¹ History of Criminal Law, p. 524.

action may be prosecuted at the same time and before the same judges as the public action," but may be prosecuted independently, in which case it is suspended until the termination of any criminal action begun prior to or during its prosecution.⁸ It further requires a formal declaration of damage on the part of the injured person before he can be considered *partie civile*; this may be interposed at any stage of the case down to the close of the trial arguments.⁹ We found this institution in the Philippines and Porto Rico, as a legacy of Spanish dominion, and have wisely left it undisturbed. In the case of the former it was preserved by the following provision of General Orders No. 58, 1900, of the Military Governor, issued in modification of the former system of criminal procedure: "The privileges," it was provided, "now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case, and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promotor fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right."¹⁰

The great argument in favor of such a plan is, of course, the economy of time and effort which it is calculated to effect. Where a civil action follows upon the heels of a private prosecution, we do in two actions what might easily have been done in one. When the same act is both a crime and a tort, it is from the mouths of the same witnesses that we must ascertain the facts in either kind of liability. Why not, therefore, make one hearing of the witnesses suffice?

It may be urged that the presence of the counsel for the injured person as an active auxiliary of the public prosecutor would make the odds too heavy against the accused—that the energy and skill of the private counsel which under existing conditions counts against the accused only in the civil action, would materially aid in the conviction. But assistance of the prosecution by private counsel is no novelty in current practice. And when a civil action is contemplated it is probably not unusual for the aggrieved person's counsel to co-operate with the public prosecutor in the preparation of the state's case. It is

⁸Art. 5.

⁹Arts. 66, 67.

¹⁰Penal Code of the Philippine Islands, 1911, Appendix, p. 307.

not likely that the innovation would cause any great difference from the present system in the matter of equality of legal representation.

Another objection might be placed on the ground that adoption of this procedure would make the effectuation of the civil right more or less dependent on the competence and activity of the public prosecutor. But in any legislation on the subject the control of the prosecutor over the civil action could be reduced to a minimum, and the complainant should be at liberty to introduce such relevant and competent evidence as he chooses without hindrance from the prosecutor, as well as to dismiss his action without prejudice down to the time of the jury leaving the bar. Moreover, it should always be optional with the complainant whether to join or not in the first place.

It has been suggested that the difference in the rules as to burden of proof obtaining in criminal and civil proceeding stands in the way. Undoubtedly it presents a difficulty. Under the established rule, the act or omission looked at as a crime must be proved beyond a reasonable doubt; looked at as a tort it need not only be proved by a preponderance of the evidence. It would unquestionably be too academic a practice to ask the jury to apply that double standard. The simplest way, therefore, would be to require both issues to be established beyond a reasonable doubt. That is to say, the jury would be instructed, as they are today, that the evidence must satisfy them beyond a reasonable doubt that the defendant committed the act in question. If there is any prospect that the responsibility of the defendant cannot be so proved, then the complainant, under the optional character of the procedure, may refrain from joining and have as now his action at law. But as to any fact required to be proved on the civil and not the criminal issue, such as the amount of damages suffered, it would be feasible to gauge proof of this by the ordinary civil standard. The different standards being, in this instance, applied to different themes of proof, an intelligent jury would be in no more danger of confusion than if it had heard a civil case immediately following a criminal one.

Nor can there be any objection on the ground that this institution tends to confuse the boundaries of civil and criminal justice. The two actions remain distinct. All that is done is to join them for procedural convenience. For that matter, the principle here involved is not altogether a new one in our law. When the criminal court in a case of theft, makes an order for the restitution of the stolen property, as has been competent for it since the 2nd Henry VIII, c. 11,¹¹ what else

¹¹Bishop, *New Criminal Procedure*, 2nd ed., Vol. 3, sec. 756.

is it doing but ascertaining and determining a civil liability collateral to the criminal liability which it has fixed by its sentence? In England, indeed, there has been even a further approach to the Continental idea. By the Forfeitures Act, 1870, 33 and 34 Vict. c. 23, it was provided that the criminal court, "if it shall think fit, upon the application of any person aggrieved and immediately after the conviction of any person for felony, to award any sum of money not exceeding one hundred pounds by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt," etc.

No doubt the fact that a majority of offenders are persons of no financial responsibility has had much to do with our acceptance of the present condition. But it is nevertheless true that there are many cases where the innovation suggested is urgently needed. The case, for instance, of the motorist found guilty of assault or manslaughter occasioned by culpably negligent driving is one in point. It would seem to be in accord with practical justice that the same jury which found him guilty of the criminal offense should assess the civil damages.

II. *Should not the defendant in all cases be required, by way of plea or otherwise, to give the prosecution notice of the nature of his defense?*

At common law every kind of defense was admissible under the plea of not guilty, except former acquittal or conviction or pardon. Many states have done away with these exceptions and leave the defendant free to show all defenses under not guilty. On the other hand, some jurisdictions have introduced the requirement that the prosecution be given notice of an intended defense of insanity at the time of commission of the offense. As appears from the report of Committee B of the Institute for 1911 this is true of New York, Alabama, Louisiana and Washington.¹² Why should not we go further and require reasonable notice to the state of the character of the defense in all cases? A chief need in this regard concerns the defense of alibi. That the manufactured alibi is one of the main avenues for escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertion. Such is

¹²Journal of Criminal Law and Criminology, Vol. 3, p. 890, Vol. 4, p. 67.

the practice in Scotland, where a defendant is not permitted to prove an alibi unless he pleads it as a special defense. In so doing, he must specify the place where he intends to show he was at the time in question.¹³

In the Scottish criminal procedure special notice must be given also of the defenses of insanity at the time of the offense, self-defense, that the defendant was asleep at such time or that the crime was committed by another person named.¹⁴

If it is not desirable to require notice of the nature of the defense in all cases, certainly it should be required in the cases of alibi, self-defense and insanity at the time of the act. Moreover, former acquittal or conviction should be the subject of such notice, as at common law. The statute of limitations also is a defense which should come in this class; it being presupposed that the rules relating to the indictment or information relieve the prosecution from the duty now illogically imposed upon it of negating such defense in advance. "So far as the defenses of former jeopardy and statute of limitations are concerned it would be more in accord with sound principle to make these the subject of special pleas, as were former acquittal and conviction under the common law practice. Notice of the other defenses mentioned, viz., insanity, self-defense and alibi should more appropriately come by way of a written specification under the plea of not guilty, as is now the rule in New York with reference to insanity."¹⁵

The method last indicated would be the one to follow, however broad is made the requirement of notice. If the defense is one by way of confession and avoidance, a special plea would be proper; if essentially a denial, then the vehicle of notice should be a written specification under not guilty.

III. *Should it not be open to the prosecution to comment on the failure of the defendant to testify in his own behalf?*

The right not to incriminate oneself is something that most of us would be unwilling to disturb, although there are some like Mr. Moorfield Story, who would do away with it altogether. Still it is a fair question whether we have not gone too far in seeking to avoid the natural inferences arising from the defendant's silence. A common provision of constitution or statute is that the failure of the accused to testify shall create no presumption against him. Washington and Nevada make it the duty of the court to instruct the jury that no such

¹³Wood and Renton, *Criminal Procedure*, pp. 73, 319.

¹⁴*Op. cit.*, p. 73.

¹⁵Millar, *Reform of Criminal Pleading in Illinois*, *Journal of Criminal Law and Criminology*, Vol. 8, p. 336.

presumption arises. In a large number of jurisdictions there is an express prohibition of comment to the jury on the failure. Iowa has probably the most extreme provision in this regard. It declares that the fact of failure to testify shall have no weight against the defendant "nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify on his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and the defendant shall for that cause alone be entitled to a new trial."¹⁶

If the verdict of the jury were final there would be little to be said on the present subject. For in spite of every interposition of the law, the jury, as has been frequently pointed out, will assuredly draw the forbidden inferences. It can hardly be otherwise than that as reasonable men, they should draw from the silence of accused what Mr. Moorfield Story aptly describes as all the inferences "which men inevitably draw from silence where one would naturally speak."¹⁷ But when the case is appealed, the situation assumes a different complexion. If the prohibition against comment has been contravened, the result, even in the absence of an explicit provision like that of Iowa will often be a reversal. For it will be said that a presumption of error arises from the comment, and if there is nothing before the court to rebut this, it is of no moment how guilty in point of fact the defendant actually is. It is consequently a very pertinent question as to whether the real, as distinguished from the technical benefit to the defendant proceeding from the prohibition, is such as to compensate for the frequent miscarriages of justice which it effects.

One jurisdiction has answered this question in the negative. The Constitution of Ohio, adopted in 1914, after guaranteeing to the defendant the privilege of not being compelled to testify against himself, provides that his failure to do so may be considered by the court and may be made the subject of comment by counsel.¹⁸ It is clear that reversals because a prosecuting attorney has directed the attention of the jury to a circumstance which no intelligent person could help taking into consideration of his own accord should have no place in any well ordered system of criminal procedure. It may be that to accomplish this a following of the Ohio example is necessary.

An alternative suggestion offered by one member of the committee would grant to the court alone the right to make such comment, on the

¹⁶Compiled Code of Iowa, 1919, sec. 9464.

¹⁷Some Practical Suggestions as to the Reform of Criminal Procedure, *Journal of Criminal Law and Criminology*, Vol. 4, p. 495.

¹⁸Art. 1, sec. 10.

ground that comment by counsel would tend to be partisan and unfair. But if it should be concluded that comment by counsel is advisable it would seem that abuse here could be checked and controlled by a competent court quite as well as it could be in any other part of the argument.

IV. *So far as consistent with the preservation of the accused's right of confrontation, should not the rights of the prosecution and defense be on a parity with reference to the introduction of evidence, taken on deposition, of a witness who is dead, sick, insane or absent from the jurisdiction at the time of trial?*

Independently of statute depositions taken on commission were unknown both in civil and criminal proceedings. Where at the time of trial the witness himself was unavailable resort might be had at common law under some circumstances to his testimony given on a former trial involving the same issue or to his deposition before the committing magistrate in the same case, provided that the accused had had the opportunity of cross-examining any adverse witness.¹⁹ So far as the defendant is concerned statutes have nearly everywhere given him in criminal, as in civil proceedings, the right to resort to depositions taken on commission where the witness is dead or otherwise unavailable. A few jurisdictions still withhold it. Notable among these is Illinois when it was held in 1914 that inasmuch as the statutes had made no provision for depositions in criminal cases, the court had no power to require the prosecution to consent to the introduction of a deposition on behalf of the defendant on pain of postponement of the trial.²⁰

With respect to the prosecution, however, the law-makers of the several states have been much less generous. Most of the jurisdictions which have conceded this right to the defendant make no grant of it in any form to the state. It is not unusual, however, to find a provision to the effect that either side may introduce a deposition taken by the defendant. A few states make the right of the state to take depositions contingent upon consent of the defendant. One jurisdiction, at least (Oregon), has a provision whereby, as a condition precedent to obtaining a continuance, the defendant may be required to consent to the taking of a deposition on behalf of the state. A provision occurring in Massachusetts and Michigan is to the effect that the prosecuting officer may join in a commission granted the defendant to take the testimony of material witnesses residing out of the jurisdiction and name any material witnesses to be examined on behalf of the state. In New

¹⁹Bishop, *New Criminal Procedure*, 2nd ed., Vol. 2, secs. 1194 *et seq.*

²⁰*People v. Turner*, 265 Ill. 594.

York, California, Colorado, Arizona, Utah, and perhaps elsewhere, there may be a conditional examination on behalf of the state of a witness who is unable to find security for his appearance. California limits this right to cases other than homicide, but has a further provision enabling the state as well as the defendant to take the deposition of any material witness who is about to leave the state or is so sick or infirm as to afford reasonable ground for apprehension that he will be unable to attend the trial. Both in this and the preceding case the deposition may be read at the trial upon a showing that the presence of the witness cannot be had.²¹

The great obstacle, of course, to the allowance of depositions on behalf of the prosecution has been the necessity of observing the constitutional guaranty that the defendant shall be confronted by the witnesses against him. This necessity may be met to a very large extent by providing opportunity for the defendant to be present and cross-examine the witnesses in question. California requires that examination of the witness unable to find security "must be by question and answer in the presence of the defendant or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this code to be conducted."²² Its provision in this regard, as to the other kind of conditional examination, is that "the defendant has the right to be present in person and with counsel at such examination, and if the defendant is in custody the officer, in whose custody he is, must be informed of the time and place of such examination, and must take the defendant thereto, and keep him in the presence and hearing of the witness during the examination."²³

Recent legislation on this subject in Ohio also deserves attention. The Constitution of 1912²⁴ declares that "provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition and to examine the witness face to face as fully and in the same manner as if in court." Accordingly, in 1913, the existing law on the subject of depositions in criminal cases was amended so as to provide for the granting of a commission to the prosecuting attorney as well as the defendant to take the deposition of a witness who resides

²¹Deering's Penal Code, 1915, secs. 1335, 1336, 1345.

²²*Ibid.*, sec. 882.

²³*Ibid.*, sec. 1340.

²⁴Art. 1, sec. 10.

out of the state, is sick, or infirm, or is about to leave the state or is confined in prison. Provision was made for confrontation substantially in the language of the constitution.²⁵ By a further amendment adopted in 1917, there was imposed a very proper restriction dictated by the exigencies of confrontation, namely, that no such deposition was to be taken outside of the state if the defendant was in confinement.²⁶

If the extension of the use of depositions indicated in the question be deemed a proper measure of reform, it could be effected by the general adoption of statutes based on the California and Ohio provisions. But in addition to the classes of witnesses enumerated in these enactments, there would seem also to be need of provision for the conditional examination, at the discretion of the prosecutor, even of witnesses who are able to give security for their appearance. The necessity for this, if newspaper accounts be correct, is well illustrated by the recent Enright murder case in Chicago, where, according to these accounts, the trial of those charged as principals was rendered impossible by reason of the inability of the state to find its two main witnesses who had been released on bail. If the depositions of these two witnesses had been available this unfortunate result would have been averted. No harm can possibly be done by the adoption of such a practice, for if the witness' presence can be had at the trial use of the deposition naturally would be prohibited.

V. *Should not less than a unanimous vote of the jury be sufficient for conviction, at least in other than capital cases?* ✓

The common law requirement of unanimity in the verdict is one which can probably be relaxed, even in cases of felony, without impairing the protection of the accused. As a result of the existing rule the presence of a single irrational, biased or corrupt juror may cause a disagreement and tend to prevent ultimate conviction notwithstanding overwhelming evidence of guilt. For the effect of a disagreement reaches beyond its purely legal incidence. It is but a commonplace to say that it means scattering of the witnesses and general discouragement of the forces of prosecution. It is generally agreed that a case can never be tried as well the second time as the first; the search for the truth is rendered more difficult. Often, of course, the prosecution will overcome these handicaps and finally secure conviction of a guilty offender, but disagreements, nevertheless, count most significantly among the causes of thwarted criminal justice.

There is too general a tendency to look upon the common law

²⁵Laws of Ohio, 1913, pp. 443, 444.

²⁶Laws of Ohio, 1917, pp. 451, 452.

institution of trial by jury with a blind admiration. Too generally do we penetrate the veil of tradition which surrounds it only to see its conceded virtues; of its faults we remain oblivious. Most of us look upon it as the only method of criminal trial consonant with free institutions, and to all its incidents, including the unanimous verdict, we yield the same unquestioning allegiance. Yet if we look abroad at those countries on the Continent where the jury has been adopted as part of the machinery of the criminal courts, we shall find no requirement that the verdict be unanimous. In Scotland, with its jury of fourteen, a simple majority decides,—and whatever may be said about criminal justice on the Continent, surely none can impugn its quality in Scotland. But even in our own country, some departures have already been made from the traditional forms of jury trial. Florida, since 1877, has lived under the provision that “twelve men shall constitute a jury to try all capital cases and six men shall constitute a jury to try all other criminal cases.”²⁷ Many states provide that civil cases may be decided by a three-fourths majority of the jurors. Arizona, Colorado, Connecticut, Idaho, Mississippi, Missouri, Nevada, Oklahoma, South Dakota, Utah and Washington have all taken this step. Idaho provides for a verdict by five-sixths of the jury in misdemeanor cases, as does, perhaps, one or two other Western states. Oklahoma fixes three-fourths as the necessary majority in misdemeanor cases and Montana provides that the verdict may be two-thirds in civil cases and criminal cases not amounting to felony. Utah is content with a jury of eight in courts of general jurisdiction except in capital cases. It is in Louisiana, however, that the farthest departure has been made. The Constitution of 1913 declares that the accused “in cases where punishment is not necessarily imprisonment at hard labor or death may be tried by the court without a jury or by a jury of less than twelve²⁸ and by a subsequent provision directs that where the punishment cannot be hard labor, trial may be by the judge, where it must be hard labor, by a jury of five, all of whom must concur, where it is necessarily hard labor, by a jury of twelve, nine of whom must concur, and where it may be capital, by a jury of twelve, all of whom must concur.²⁹

Such a system as that obtaining in Louisiana is probably too complicated to commend itself for general adoption. There undoubtedly is need, however, for some change in the generally existing requirement of unanimity. Just what number should be fixed upon as the necessary majority is a matter upon which individual opinions will

²⁷Compiled Stat., 1914, Vol. 2, sec. 3910.

²⁸Art. 9, Bill of Rights.

²⁹Art. 116, Bill of Rights.

differ, as is also the question whether or not the present requirement should be preserved in capital cases. Perhaps the most desirable recommendation could be one to the effect that a three-fourths majority should be sufficient for conviction in other than capital cases.

VI. *Should not the state have a right to appeal on questions of law equal to that of the defendant?*

The various jurisdictions exhibit a wide diversity as to the right of the state in reference to review of criminal proceedings. In all except Connecticut observance of the provision against double jeopardy has either denied the state any right in this regard, made it an academic one or else restricted it within narrow limits. Mr. Clark, in his *Criminal Procedure*, thus summarizes the situation: "At common law, the state cannot appeal or sue out a writ of error to review a judgment for the defendant in a criminal case, even on demurrer, much less on a verdict of acquittal. . . . By statute, in many of the states, a writ of error or appeal is allowed the state from an adverse judgment or motion to quash a demurrer, or motion in arrest of judgment, or where a statute has been held unconstitutional; and it is also allowed by statute in case of an acquittal by the jury on the facts for the purpose of determining and settling questions of law, but not for the purpose of obtaining a new trial."³⁰

It would be impracticable to attempt here a review of the multi-form provisions of the several states on this subject. We may note, however, that the case of Connecticut apart, the farthest stage reached is exemplified by such a statute as that obtaining in California, and with or without certain differences in other Western states. It provides that:

"An appeal may be taken by the people:

1. From an order setting aside the indictment or information;
2. From a judgment for the defendant on a demurrer to the indictment, accusation or information;
3. From an order granting a new trial;
4. From an order arresting judgment;
5. From an order made after judgment affecting the substantial rights of the people."³¹

The Federal Criminal Appeal Act of 1907³² should also be noted. This gives the United States the right to appeal, by means of a writ of error:

"From a decision or judgment quashing, setting aside, or sus-

³⁰*Criminal Procedure*, p. 393.

³¹*Deering's Penal Code*, sec. 1238.

³²34 Stat. 1246.

taining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

“From a decision arresting a judgment of conviction for insufficiency of the indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

“From the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.”

Statutes such as these, however, fall far short of equalizing the right of the state with that of the defendant. This cannot be accomplished with a revival of the generally obtaining notion of jeopardy. Connecticut, at least, has here pointed the way. A statute passed in 1886 provided that “appeals from the rulings and decisions of the Superior Court upon all questions of law arising on the trial of criminal causes 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. In the celebrated case of *State v. Lee*,³³ after acquittal of the defendant, the state appealed on the ground that the trial court had improperly excluded certain evidence. The appellee contended that the acquittal barred the state’s right of appeal inasmuch as the defendant had been in jeopardy. In negating this contention the court said:

“The principle *nemo bis vexare pro eadem causa* gives protection against a second judicial proceeding, and in the event of such proceeding gives to a party the right, in criminal cases, to the plea of *autrefois acquit* or *autrefois convict* and in civil cases to the plea of *res judicata*; but the principle does not control the question whether the judgment pleaded in bar is in fact a legal and final judgment, and has no legitimate relation to the question whether existing procedure provides for correction of errors occurring in the trial.”

And again:

“Judicious legislation for securing a full, fair and legal trial of each criminal cause, is not in derogation, but in protection, of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. This maxim is based on the truth that a judicial proceeding lawfully carried on to its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of

³³65 Conn. 265.

a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure; while such prosecution remains undetermined the one jeopardy has not been exhausted."

The rational view of jeopardy thus adopted finds strong support in the dissenting opinion of Mr. Justice Holmes in the case of *Kepner v. U. S.*³⁴ In that opinion, concurred in by White and McKenna, J. J., it was said:

" . . . It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man had already been tried once. But there is no rule that a man may not be tried twice in the same case. . . . If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor than he would be when retried for a mistake that did him harm. . . . If what I have said is norrect, no additional argument is necessary to show that a statute may authorize an appeal by the government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. . . . For the reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below."

If this construction of the term "double jeopardy" were to find general acceptance, the problem of appeal by the state would present no difficulty. The opposite view, however, is very firmly entrenched—so firmly as to appear almost impossible of dislodgment. But it ought to be dislodged, and the Institute can, if it chooses, do here a work of exceptional value. By insistence and iteration it can preach the true doctrine of double jeopardy and make plain to the public that the only obstacle to putting the state on an equal footing with the defendant in the present regard is one which lies in a comparatively narrow compass. The means of correction, of course, will be a special problem in each jurisdiction. In most it will probably require a constitutional amend-

³⁴195 U. S. 100.

ment to change the long settled course of decision under the jeopardy clause. But no state will be able to lay claim to a really satisfactory system of criminal procedure until that correction is accomplished. With it accomplished a simple statute like that of Connecticut will suffice to give the state the right to which it is entitled.

VII. *Should not the rule which obtains in nearly all the states to the effect that jeopardy attaches as soon as a jury is impanelled and sworn be changed so as to postpone the attaching of jeopardy until the rendition of a verdict on the merits?*

By a further construction of the double jeopardy clause the courts in most of the states hold that jeopardy is incurred by the accused the instant a jury is sworn. Some exception is variously made for the case of disagreement of the jury and certain other causes of mistrial. The case of a new trial granted on the accused's motion is also excepted on the ground that he, himself, has waived the jeopardy. But if the prosecutor should be obliged to enter a *nolle prosequi* because, *e. g.*, of inability to find a material witness, there is no help for it, the accused stands acquitted and cannot again be tried, for by the swearing of the jury he has been in jeopardy. To illustrate: A soldier in the American Expeditionary Forces in France was charged with attempt to commit rape and placed on trial before a court martial. When the complaining witness took the stand she testified that the accused had succeeded in his purpose, and that a sense of shame had prevented her from disclosing this before. The offense therefore was rape and not an attempt to commit rape. If this case had occurred in any one of most of the state jurisdictions, the offender would have gone unpunished, since under the rule mentioned and the further principle that one who is tried for a lesser included offense is in jeopardy for the whole, he would have been able, on a subsequent prosecution for the completed crime, successfully to plead that he had been once in jeopardy.

As far as may be judged without an exhaustive examination of their decisions, Maine, Vermont, New Hampshire and Maryland take the view that rendition of a verdict is necessary to constitute jeopardy.³⁵ There are indications that the Supreme Court of the United States has leaned in the same direction.³⁶ In some states the double jeopardy clause appears as a prohibition of a second trial after acquittal. This is true of New Jersey, Rhode Island, New Hampshire, Michigan, Missouri and Oklahoma. But in the first of these only does it seem to

³⁵*State v. Elden*, 41 Me. 165; *State v. Champeau*, 52 Vt. 513; *State v. Hodgkins*, 42 N. H. 474; *Anderson v. State*, 86 Md. 479.

³⁶*U. S. v. Perez*, 9 Wheat 579; *Dreyer v. Illinois*, 187 U. S. 71; *Lovato v. New Mexico*, 242 U. S. 199.

make jeopardy dependent upon acquittal or conviction.³⁷ The Mississippi Constitution of 1890, however, marks a notable advance. It couples the double jeopardy clause with the provision: "but there must be an actual acquittal or conviction on the merits to bar another prosecution."³⁸ And this qualification has been given full effect. It "changes fundamentally the old rule," says the Supreme Court of Mississippi in *Roberts v. State*,³⁹ "and wisely puts an end to the unmeritorious escape of persons charged with crime who had been only technically and not really tried."

Whether the interpretation so generally placed upon the double jeopardy maxim is in conformity with the common law admits of serious question. Certainly, it does not appear to be accepted in modern English practice.⁴⁰ "In England," says Mr. Wharton, "it is settled that the maxim that a man cannot be put in peril twice for the same offense means that man cannot be tried again for an offense upon which a verdict of acquittal or conviction has been given and not that a man cannot be tried again for the same offense where the first trial has proved abortive and no verdict given."⁴¹ And at all events it utterly fails to respond to present day needs. A rule can never be other than unsatisfactory which, under any circumstances, permits a criminal to regain his freedom simply because a jury has been sworn to try him. Nothing short of a verdict on the merits should suffice.

That a strong case can be made against the proposed change is not to be gainsaid. It finds expression in the objection voiced by Mr. Bishop:⁴² "Should the legislature direct (what the court might as well do without the direction) that whenever the evidence appeared to the judge to be insufficient to convict, he should discharge the jury without taking a verdict and hold the defendant to answer before another jury, no protection against any number of trials and any amount of harassment would be afforded to defendants." But, on the other hand, no one doubts that the case may be nolle prossed at any time before the jury is sworn without causing the accused to incur jeopardy. Why then should the mere swearing of the jury produce a difference? Why, to be concrete, should there be no jeopardy at 11 a. m. and complete jeopardy say at 11:02 a. m. just because the jury has been sworn in the interim? The harassment which Mr. Bishop

³⁷*Smith v. State*, 41 N. J. L. 498.

³⁸Art. 3, sec. 22.

³⁹72 Miss. 728.

⁴⁰See Archbold, *Criminal Pleading and Practice*, 23d ed., pp. 139-141; 169-174.

⁴¹2 *Criminal Procedure*, 10th ed., p. 1891, note 6.

⁴²*New Criminal Law*, 8th ed., Vol. 1, sec. 1019.

speaks of would be different only in degree from that which the defendant is exposed under the present rule, for theoretically that permits nolle prosequendo *ad infinitum* until a jury has been sworn. It would be no greater than that experienced by the defendant in a civil cause where under the general rule, the plaintiff may take a nonsuit at any time down to the retirement of the jury to consider its verdict. And when we set over against the possible inconvenience which might thus be occasioned an innocent defendant, the harm which is continually being inflicted on society by the chance of technical acquittal which the present rule extends to the guilty, we are forced to conclude that change is imperative. The Institute, it is submitted, should earnestly advocate the adoption, where necessary, of a constitutional provision like that of Mississippi.

VIII. *Should there not be an abrogation of the rule prevailing in certain jurisdictions which confines the scope of a new trial granted at the defendant's instance to the particular offense of which he was convicted on the first trial, notwithstanding that he stands charged with a higher degree of that offense?*

A still further aspect of the double jeopardy rule is here involved. "By the weight of authority," says Mr. Clark, "if a person is convicted, not of the highest offense charged, but of a minor offense included in the charge, as of manslaughter on an indictment for murder or simple assault on an indictment of an aggravated assault, this is an acquittal of every higher offense of which he could have been convicted, and, in obtaining a new trial, he cannot again be tried for the higher offense."⁴³ But a considerable number of jurisdictions take the opposite view.⁴⁴

Included among the dissentient courts is the Supreme Court of the United States which in *Trono v. U. S.*,⁴⁵ by a vote of five to four, upheld the action of the Supreme Court of the Philippines in reversing a conviction in a lower court and holding the accused guilty of a higher degree of the same offense. "In our opinion," said the court, "the better doctrine is that which does not limit the court or jury upon a new trial to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own motion has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do

⁴³Criminal Procedure, p. 392.

⁴⁴See the cases cited by Mr. Clark, and in 16 Corpus Juris, pp. 260-262.

⁴⁵199 U. S. 521.

not agree to the view that the accused has the right to limit his waiver as to jeopardy when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed."

This, it is submitted, expresses what ought everywhere to be the law. If the finding of the jury, by the defendant's appeal, is cancelled and obliterated for one purpose it should be for every purpose. Otherwise we have the anomaly of a verdict which in its expression has been set aside and, in its implication, has been suffered to stand. Only by the most bizarre reasoning can we conceive of an implication existing without an expression. Apart from its inherent unsoundness the majority rule gives the defendant an unfair advantage over the state, encourages unfounded appeals and stands in the way of a correct administration of the criminal law.

Many jurisdictions repudiate the rule under criticism purely as a matter of judicial decision. Others have attained the like result by legislative aid. A statute providing that "the granting of a new trial places the parties in the same position as if no trial had been had" finds place in New York, Indiana, Kansas and Kentucky.⁴⁶ In Missouri a modification of the double jeopardy clause of the constitution so as to permit a new trial "on a proper indictment" after arrest of judgment for insufficiency of the indictment or error of law effected the repudiation.⁴⁷ Arizona is more explicit. Section 1104 of its penal code provides that "if a defendant prosecuted for an offense which includes within it lesser degrees be convicted of an offense lower than that for which he is charged and a new trial granted him or the judgment be arrested upon his motion the verdict upon the first trial shall not be considered an acquittal of the higher offense, but he may upon a second or subsequent trial be convicted of the offense for which he was charged or any offense included thereon." It is believed, however, that a statute of a general character such as the one which obtains in New York and elsewhere, as above noted, would be a satisfactory form of enactment to urge upon those jurisdictions which have not yet departed from the mistaken rule.

⁴⁶Note to *People v. Trono*, *supra*, 4 A. & E. Ann. Cas. 779.

⁴⁷*State v. Simms*, 71 Mo. 538; 4 A. & E. Ann. Cas. 780.

IX. *Should not admission to bail after conviction be prohibited in cases of felony?*

This may appear as a radical suggestion, but it is one which in the interest of deterrence of crime is entitled to serious consideration. It cannot be doubted that the ease with which an offender, in most jurisdictions, can regain his liberty, pending review, is a constant source of evil. Speaking of the institution of bail as it exists in Italy, and the release of the offender after conviction, Baron Garofalo says: "Is not this sort of thing utterly opposed to reason and common sense? Whatever grounds may be urged in justification of such a system there is no gainsaying the fact that it is not natural, that it is unsound; that it cannot be comprehended by the popular intelligence, least of all by that of a Southern nation. How is it to be supposed that a people with the meridional characteristics of little foresight, of little sensibility to that which is not present and immediate can be impressed by the menace of an imprisonment which is not to take effect until after the lapse of an indefinite period—one or two years or even more in the event of a new trial being ordered by a higher court. Remote menaces of this description may not be without influence upon people of a cold and calculating turn of mind. Up to a certain point they are understandable in the North, but in the South, to apply Spencer's expression, "there must be penalties which are severe, prompt and specific enough to be vividly conceived."'⁴⁸ It may be questioned whether the learned Baron has not made undue allowance for the people of the North. Certainly, in the United States with its mixed population, the necessity that punishment be capable of vivid conception is just as pressing as it is in Italy. And to the extent that the institution of release on bail blurs that conception is it subject to just criticism?

There is apparently but one state in the Union which does not allow bail pending appeal—that is, Kentucky, which has a statute declaring that "after conviction the defendant cannot be admitted to bail."⁴⁹ Elsewhere bail seems to be allowable after conviction under greater or less restrictions. In one class of states it is allowable in the discretion of the court where the offense was originally aailable one. This is true probably of the greater number of jurisdictions. Another class of states makes it of right where the punishment is by fine and discretionary in all other except capital cases. California, Idaho, Montana, and Nevada follow this rule. In other states it is of right except where the punishment is death or life imprisonment. This is true of Indiana

⁴⁸*Criminology*, Modern Crim. Science Series, pp. 348-9.

⁴⁹Sec. 75, Title V, Code of Practice in Criminal Cases, Carroll's Kentucky Codes, Vol. I, p. 675.

and Oklahoma. Oregon makes it of right except in cases of murder, treason or personal injury likely to cause death, where if death ensues the offense would be first degree murder. In Texas there is a right to bail on appeal only when the punishment does not exceed fifteen years' imprisonment.

Whatever may be said of permitting release on bail after conviction in the discretion of the court, the giving of the defendant an absolute right to it, as do some of these jurisdictions, where the punishment stops short of life imprisonment, is little less than playing into the hands of the criminal classes. The whole matter of bail in our system, if we stop to consider it, negatives equality of treatment of defendants. It makes provisional release depend upon possession of property or propertied friends. The accused with this advantage escapes the confinement that his less fortunate fellow must endure. But we tolerate this essential inequality and will continue to tolerate it, pending conviction, because of the presumption that the accused is innocent. Where, however, conviction ensues, with a sentence of imprisonment, should not that presumption be regarded as sufficiently rebutted to restrain the accused of his liberty? Clearly it should be so far as regards admission to bail as a matter of right. We can and should take steps everywhere, as has been done in many states, to credit on the defendant's term of imprisonment the period spent in confinement pending review. And with this as the rule, there is good reason for contending that we should go to the full extent and forbid such release even as a matter of judicial discretion. The argument here is principally that of Garofalo, namely, that the returning of the accused to that society which a jury has solemnly said he has outraged conveys to the ignorant the idea that he has successfully flouted the law and that they too may do so with impunity. And, it may be added, even those who are not ignorant cannot escape the impression that the prosecution has degenerated into a mere law suit with the state, a sort of moot and academic contest. To use a current term, the proceeding gives rise to the notion that the state has no "teeth." The fact that, if the conviction be affirmed he will be retaken into custody and made to serve his sentence, does not mitigate to any appreciable extent the effect thus produced. For his return to freedom after conviction had an element of the spectacular which the later circumstance wholly lacks.

On the other hand, there is the danger of injustice being committed in the confinement of an accused who is ultimately released by action of the reviewing court. While this argument loses some of its force from the consideration that if the accused be unable to give bail,

he is exposed to the same injustice under the existing system, it may nevertheless be strong enough to require a more conservative recommendation, with relation to bail after conviction, than that of its total prohibition.

X. *Should not the state see to it that a defendant may appeal without advancing costs, irrespective of his pecuniary condition?*

Most of the faults of the existing system inure to the benefit of the defendant. But there are some which operate to his prejudice. Not the least of these is the fact that in various jurisdictions he cannot appeal without a considerable expenditure of money. Sometimes he is required to advance clerk's costs in order to have his case docketed in the upper court, but his chief grievance in this regard concerns the preparation of the record and the expenses of printing incident to appeal. Where the burden of paying for these items is cast upon him the effect is a virtual denial of justice.

A number of states have adopted measures by way of remedy. A favorite form of enactment is one which relieves the defendant from some or all of the expenses of appeal upon his showing of inability to pay. Iowa, Montana, Oklahoma, Texas, Utah and Washington have statutes to this effect.⁵⁰ Arizona, Missouri, Nebraska, Oregon and Virginia are in the same or substantially the same case. South Dakota provides that the state furnish a transcript of the proceedings when the court deems it essential to the protection of the defendant. In other jurisdictions the clerk of the lower court is required to prepare the record without charge irrespective of the appellant's ability to pay. This is true, for example, of Nevada and North Dakota. West Virginia provides *inter alia* for printing the record at the expense of the state. Many other provisions on the present subject are to be found in different jurisdictions, the exact effect of which (as indeed of at least some of the statutes directing preparation of the record without charge) is difficult to estimate in view of the divergencies in appellate procedure. Certain it is, however, that there are still sundry jurisdictions in the same case as Illinois, where the defendant who cannot obtain funds to pay for a transcript of the testimony has no alternative but to submit to his sentence, however erroneous may have been the trial proceedings.

The ideal system of criminal appeal, of course, would be something like that obtaining in the army. There every record of trial by general court-martial goes up to the proper authorities for review. Such a review, regardless of the defendant's volition, may not be practically desirable in the criminal justice of civil life, but one feature of it com-

⁵⁰17 C. J. 103.

mends itself for universal adoption—that is the transcribing and certifying in all cases of the evidence heard on the trial. It would be a distinct advantage to all concerned if a record were thus to be made of the evidence, wholly apart from any question of appeal. Maine now requires this in murder cases, and no doubt there are other jurisdictions where it is done. But it is probably true, in the majority of jurisdictions, that the stenographer's notes are not written up, at least for official certification, until there is need for a bill of exceptions or the equivalent. The practice suggested would facilitate the exemption of the defendant from costs, for the original transcript itself could be laid before the appellate court.

It is clear that statutes basing the exemption upon a showing of indigence are neither adequate nor just. So long as the state permits a revision of criminal sentences so long should it make good the promise that justice shall be free. No legislation can be satisfactory which does not relieve the appealing defendant from advancing costs of any description, whether he be pauper or millionaire. The enactments of those states which accomplish this should be pressed upon the attention of their backward neighbors.