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SHOULD THE STATE HAVE AN APPEAL IN CRIMINAL CASES?

APPEALS by the state in criminal cases were unknown at common law.¹ For many years, however, two states have enjoyed a right of appeal equal to that of the defendant.² Only four states, including Texas, do not permit the prosecution to take an appeal from an adverse ruling on any matter encountered at any stage of the proceedings.³ Between these extremes are jurisdictions which have recognized by statute the state's right to appeal on questions of law, *e. g.*, to review a sustained motion to quash an indictment, or to review a ruling of the trial court upon an issue as to which the prosecution desires an appellate decision for precedential value in future cases.⁴ The Texas Civil Judicial Council has recently

¹ See *United States v. Sanges*, 144 U. S. 310, 312 (1892). The law of England on this matter is not wholly free from doubt, but the theory that at common law the King could have a writ of error in a criminal case after a judgment for the defendant has little support except in statements of Lord Coke and Lord Hale seeming to imply that such a procedure existed.

² CONN. GEN. STAT. (1930) § 6494; *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); VT. PUB. LAWS (1933) § 2425; *State v. Felch*, 92 Vt. 477, 105 Atl. 23 (1918).

³ Maine, Massachusetts, New Hampshire, and Texas. See TEX. CODE CRIM. PROC. (1925) art. 812; *State v. Wilson*, 131 Tex. Crim. Rep. 43, 95 S. W. (2d) 971 (1936).

⁴ Some form of appeal by the state is permitted by statute in the following states: Alabama, ALA. CODE (1940) tit. 15, § 370 (when act on which indictment is based is declared unconstitutional); Arizona, ARIZ. CODE (1939) § 44-2508 (sustained motion quashing the indictment, order arresting judgment, order granting new trial, questions of law reserved by state where defendant takes an appeal, sentence on ground that it is illegal); Arkansas, ARK. STAT. (Pope, 1937) § 4253 (questions of law); California, CAL. PEN. CODE (Deering, 1941) § 1238 (sustained motion quashing indictment, order arresting judgment, order granting new trial, order after judgment affecting adversely the rights of the people); Colorado, COLO. STAT. ANN. (1935) c. 48, § 500 (order quashing indictment, order arresting judgment, questions of law reserved by the state, where act on which indictment is based is declared unconstitutional); Delaware, DEL. REV. CODE (1935) § 4896 (questions of law reserved by the state); Florida, FLA. STAT. (1941) § 924.07 (order quashing indictment, order granting new trial, order arresting judgment, questions of law reserved by the state where defendant takes an appeal, sentence on ground that it is illegal, judgment discharging prisoner on habeas corpus); Georgia, GA. CODE (1933) § 6-701 (questions of law reserved by the state); Idaho,

submitted a proposed amendment to Article V of the state Constitution which includes a provision for appeals by the state where

IDAHO CODE (1932) § 19-2704 (order quashing indictment, order arresting judgment, order granting new trial, questions of law reserved by the state, order after judgment affecting adversely the rights of the people); Illinois, ILL. REV. STAT. (1945) c. 38, § 747 (order quashing indictment); Indiana, IND. STAT. (Burns, 1933) § 9-2304 (order quashing indictment, order arresting judgment, questions of law reserved by the state); Iowa, IOWA CODE (1946) § 793.1, 793.20 (questions of law reserved by the state); Kansas, KAN. GEN. STAT. (Corrick, 1935) § 62-1703 (order quashing indictment, order arresting judgment, questions of law reserved by the state); Kentucky, KY. CODE (1927) Crim. Prac. § 337 (questions of law reserved by the state); Louisiana, LA. CODE CRIM. PROC. (Dart, 1943) art. 540 (appeal from final prejudicial judgment); Maryland, MD. CODE (Flack, 1939) art. 5, § 86 (questions of law reserved by the state where defendant takes an appeal); Michigan, MICH. COMP. LAWS (1929) § 17366 (order quashing indictment, order arresting judgment, where act on which indictment is based is declared unconstitutional); Minnesota, MINN. SUPP. (1945) § 632.10 (certified questions); Mississippi, MISS. CODE (1942) § 1153 (order quashing indictment, questions of law reserved by the state, questions of law reserved by the state where defendant takes an appeal); Missouri, MO. REV. STAT. (1939) §§ 4142, 4143 (order quashing indictment, order arresting judgment); Montana, MONT. REV. CODE (Anderson and McFarland, 1935) § 12108 (order quashing indictment, order arresting judgment, order granting new trial, order after judgment affecting adversely the rights of the people, order directing verdict); Nebraska, NEB. REV. STAT. (1943) c. 29, §§ 2314, 2316 (questions of law reserved by the state); Nevada, NEV. COMP. LAWS (Hillyer, 1929) §§ 11084, 11091 (order quashing indictment, order arresting judgment, questions of law reserved by the state); New Jersey, N. J. SUPP. (1946) § 2-195A-4 (appeal); New Mexico, N. M. STAT. ANN. (1941) § 42-1503 (order quashing indictment, order arresting judgment); New York, N. Y. CODE CR. PROC. (McKinney, 1930) § 518 (order quashing indictment, order arresting judgment); North Carolina, N. C. GEN. STAT. (1943) § 15-179 (order quashing indictment, order arresting judgment); North Dakota, N. D. REV. CODE (1943) § 29-2807 (order quashing indictment, order granting new trial, order arresting judgment, order after judgment affecting substantial rights of state); Ohio, OHIO CODE (Baldwin, 1940) § 13459-14 (petition in error); Oklahoma, 22 OKLA. STAT. ANN. (1937) § 1053 (order quashing indictment, order arresting judgment, question of law reserved by state); Oregon, ORE. COMP. LAWS (1941) § 26-1305 (order quashing indictment, order arresting judgment); Pennsylvania, PA. STAT. (Purdon, 1936) § 19-1188 (adverse rulings in cases of nuisance, forcible entry and detainer); Rhode Island, R. I. GEN. LAWS (1938) c. 630, § 1 (any person aggrieved by sentence); South Carolina, S. C. CODE (1922) Crim. Pr. § 123 (appeal); South Dakota, S. D. CODE (1939) § 34.4101 (order quashing indictment, order granting new trial, order arresting judgment); Tennessee, TENN. CODE (Williams, 1934) § 11806 (questions of law except after acquittal); Utah, UTAH CODE (1943) § 105-40-4 (order quashing indictment, order arresting judgment, order after judgment affecting substantial rights of the people, petition in error); Virginia, VA. CODE (1942) § 4931 (questions relative to state revenue); Washington, WASH. CODE (Pierce, 1939) § 7290-1 (order quashing indictment, order granting new trial, order arresting judgment, order after judgment affecting substantial rights of state); West Virginia, W. VA. CODE (1931) c. 51, art. 1, § 3 (writ of error, questions relative to state revenue); Wisconsin, WIS. STAT. (1941) § 358.12 (order quashing indictment, order granting new trial, order arresting judgment, questions of law where defendant takes an appeal, certified questions except after acquittal, questions of law); Wyoming, WYO. REV. STAT. (1931) § 33-909 (questions of law).

an indictment or information has been quashed or a statute or ordinance held void.⁵ The trend away from the common-law practice suggests that jurisdictions which have continued to follow the historic procedure should perhaps reconsider the arguments which have seemed persuasive in its support as well as the experience of those jurisdictions which have departed from it.

Although a provision of the present Texas Constitution denies the state any appeal whatever,⁶ an examination of earlier constitutions reveals that there has been no consistent regard for the defendant in this respect. The Constitution of the Republic of Mexico charged the General Congress with the duty of prescribing the procedure of the courts in criminal matters.⁷ The Constitution of 1836 of the Republic of Texas merely provided that the common law should be the rule of decision in criminal cases.⁸ The first Constitution of the State of Texas (1845) left the matter of criminal procedure to the Legislature,⁹ and the Legislature in providing for criminal appeals did not confer a right of appeal upon the state until 1856;¹⁰ although the Constitution of 1845 provided that a defendant could not be again put on trial for the same offense after a verdict of not guilty,¹¹ the provision adopted in 1856 permitted the state to appeal from a sustained exception of the defendant to the indictment or information and from a sustained motion of the defendant in arrest of judgment. The provisions of the Constitution of 1845 were incorporated into the Constitution of 1861.¹² The statute of 1856, permitting a limited appeal by the state, ceased to be operative upon the adoption of the Constitution

⁵ PROPOSED AMENDMENT TO ARTICLE V OF THE STATE CONSTITUTION RELATING TO THE JUDICIAL SYSTEM OF TEXAS AS REDRAFTED BY THE TEXAS CIVIL JUDICIAL COUNCIL (1946).

⁶ TEX. CONST. (1876) Art. V, § 26.

⁷ CONSTITUTION OF REPUBLIC OF MEXICO (1824) Tit. 5, § 3, Art. 137, 138.

⁸ TEX. CONST. (1836) Art. IV, § 13.

⁹ TEX. CONST. (1845) Art. IV, § 3; *State v. Daugherty*, 5 Tex. 1 (1849).

¹⁰ TEX. CODE CRIM. PROC. (1856) art. 718.

¹¹ TEX. CONST. (1845) Art. I, § 12.

¹² TEX. CONST. (1861) Art. I, § 12, Art. IV, § 3.

of 1869, following which the prosecution was afforded a right to appeal apparently equal to that accorded the defendant in felony cases.¹³ This development was of brief duration, however, inasmuch as the present restriction came into being with the adoption of the Constitution of 1876.¹⁴

The provision of the Texas Constitution guaranteeing against double jeopardy must be considered as presenting a possible obstacle to the adoption of any proposal for appeals by the state.¹⁵ In a number of jurisdictions such a constitutional provision has been considered to be violated by a statute permitting such an appeal.¹⁶ The degree of difficulty presented depends possibly upon the manner of determining the time at which jeopardy first attaches. The Texas Court of Criminal Appeals has held that jeopardy does not attach when a jury in accordance with the charge of the trial judge finds a defendant guilty of "homicide," there being no such offense, and thus makes a finding not responsive to the allegation in the indictment.¹⁷ And a retrial after reversal of conviction has been held not to violate the rule against double jeopardy.¹⁸ In an earlier Texas decision, however, it was held that once a defendant is placed on trial under a valid indictment for an offense involving life or liberty and a competent jury is impaneled, sworn and entrusted with his case, he is put in jeopardy and if acquitted cannot be again prosecuted.¹⁹ The seeming inconsistency between the latter case in which retrial of the defendant was precluded and the two former cases in which it was permitted may be explained on the ground that a defendant

¹³ *State v. Wall*, 35 Tex. 484 (1871); *State v. Hedrick*, 35 Tex. 485 (1871).

¹⁴ TEX. CONST. (1876) Art. V, § 26.

¹⁵ TEX. CONST. (1876) Art. I, § 14, provides as follows: "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."

¹⁶ *People ex rel. Hodson v. Miner*, 144 Ill. 308, 33 N. E. 40 (1893); *City of Portland v. Erickson*, 39 Ore. 1, 62 Pac. 753 (1900).

¹⁷ *Whiteside v. State*, 115 Tex. Crim. Rep. 274, 29 S. W. (2d) 399 (1930).

¹⁸ *Johnson v. State*, 108 Tex. Crim. Rep. 499, 1 S. W. (2d) 896 (1927).

¹⁹ *Powell v. State*, 17 Tex. App. 345 (1884).

is held to waive his defense of former jeopardy when the appeal is taken by him, as in the two cases first referred to.²⁰ The Texas courts dispose of the inconsistency upon the theory that there is no final adjudication when the defendant appeals from a conviction and hold, therefore, that he may be subjected to a second trial without violating the guarantee against double jeopardy.²¹ Thus it would seem that under the Texas decisions an appeal by the state which results in a second trial would be unavailing as the retrial would fall within the condemnation of the constitutional guarantee. Some jurisdictions, however, hold that jeopardy does not attach until there has been a trial free from error and thus preclude any constitutional issue in this connection.²² The jeopardy clause of the Fifth Amendment to the United States Constitution is not applicable to state procedure, nor is immunity from former jeopardy one of the fundamental rights secured by the Fourteenth Amendment from invasion by the state.²³

Contentions against adoption of this procedure have also been rested upon considerations of policy. Thus it has been asserted that the right of appeal in the prosecution might impose hardship upon the defendant, especially if he is in difficult economic circumstances; that in a time of social unrest the appeal may become an instrument of oppression; that prosecuting attorneys cannot be expected to exercise sufficient discretion as to when to take an appeal.²⁴ It would seem, perhaps, that the state, having made an investment in crime investigation and detection, in the preliminary examination, in the impaneling and proceedings before the grand jury, and in the actual trial of the case, could well afford to protect

²⁰ *Trono v. United States*, 199 U. S. 521 (1905); *In re Keenan*, 7 Wis. 695 (1859).

²¹ *Thompson v. State*, 9 Tex. App. 649 (1880).

²² *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); see Justice Holmes, dissenting in *Kepner v. United States*, 195 U. S. 100, 134 (1903): "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."

²³ *Palko v. Connecticut*, 302 U. S. 319 (1937).

²⁴ ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939) 62-3.

such investment by providing for the cost of appeal to the impoverished defendant. The state travels a perilous path from apprehension through the actual trial with each defendant and may not resort to the appellate court for a decision no matter how damaging the error in favor of the defendant may have been. The permission of the trial judge should be a prerequisite to a state's appeal, and this, coupled with a deference by prosecuting attorneys for a jury's acquittal after scrutiny of the defendant, should prevent such appeals from becoming oppressive.²⁵ Moreover, such a requirement of the trial judge's permission should prevent abuses that might otherwise result from an unlimited discretion in attorneys of the state as to when an appeal should be taken.

Other arguments that have been advanced against an appeal by the state have been that a second effective prosecution presents difficulties for the state; that the attorney general does not get adequate assistance from the prosecuting attorney. Some also argue that the state should not be permitted to continue appealing until a defendant is convicted since there are too many criminal appeals already, while others equally opposed urge that such an appeal is seldom resorted to in those states where permitted and hence must be regarded by prosecutors as unfair to the defendant. It must be conceded that a second trial may prove more difficult for the state, especially if the prosecutor is less ready to resume the task due to a falling off of public interest or of the enthusiasm of the prosecuting witness, or because of loss of a material witness by removal from the state or death; moreover, the jury on a second trial may be likely to be sympathetic toward the once-acquitted defendant. However, these difficulties would seem to be matters for the consideration of the state's attorney whenever they arise rather than serious objections to a procedure which the prosecution arguably would find desirable in perhaps a considerable number of cases in which such difficulties would not be present. The experi-

²⁵ CONN. GEN. STAT. (1930) § 6494 requires permission of the trial judge before an appeal can be taken by the state.

ence with the state's appeal in Connecticut indicates that a single member of the prosecution staff, or in small counties the prosecutor himself, could furnish more than adequate assistance to the attorney general in handling the appeals. The fact that appeals have been too freely allowed to defendants presents no argument against appeals by the state apart from the possibility that increasing the number of appeals might result in an overburdening of the judiciary. The latter consideration, however, is persuasive only insofar as the public is unwilling to provide judicial machinery for an adequate system of criminal justice. In Connecticut, where the state has a right of appeal equal to that of the defendant, there were three reported appeals by the state, as compared with 23 reported appeals by the defense, during a recent three-year period, which seems to indicate that appeals by the state have not unduly increased the normal burden of criminal litigation which must be disposed of by the appellate court in that state.²⁶ The fact that the appeal is seldom resorted to might mean that defense attorneys are more diligent in the suppression of errors, that the trial judge no longer tends to favor the defendant on a doubtful issue because of the possibility of reversal on a defendant's appeal, or that the trial judge and prosecutor are often unwilling to disregard the verdict of the jury.

A further contention frequently urged against appeals by the state, that the verdict of the jury should not be subject to reversal on appeal, has its source in the common law.²⁷ Of course, the verdict of a jury is not to be lightly dismissed. However, there are instances when it would seem desirable to have an appellate court review a judgment based upon a verdict, *e.g.*, where the trial judge by misconstruing the nature of the allegation has induced an acquittal,²⁸ or where the defense counsel by stepping beyond the

²⁶ Three year period from Jan. 1942 to Jan. 1945 as reported in the Atlantic Reporter.

²⁷ 3 BL. COMM. *378-9 reads as follows: "Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English Law."

²⁸ *Cf. Whiteside v. State*, 115 Tex. Crim. Rep. 274, 29 S. W. (2d) 399 (1930).

bounds of proper conduct has aided materially in producing an acquittal,²⁹ or where the verdict or punishment assessed is not commensurate with the crime committed.³⁰

The argument against a state's appeal which is most difficult to understand is that the reputation of an acquitted defendant would be materially injured by subjecting him to an appeal by the state. But if the defendant is innocent, will not the discriminating citizen be more willing to repose confidence in one whose innocence has been affirmed by the highest appellate court than in a person whose acquittal has been only at the trial stage—as to which the public may entertain unfortunate associations resulting from the notoriety given to instances of jury misconduct, intimidation of witnesses, corruption of judges, and erratic behavior of defense counsel?

It seems arguable that the failure in certain jurisdictions to modify or abandon the common-law practice may be attributed not so much to the persuasiveness of the arguments considered as to the influence of factors unrelated to the issues involved. Judge Justin Miller, who has advanced a realistic analysis as to why the common-law doctrine has persisted, has written thus:

“Probably the real reason which has permitted a continuation of the discrimination is society's lack of interest in securing a better adjustment, coupled with a very active interest on the part of defense attorneys in preserving the advantages now enjoyed by them. A large percentage of our state legislators are lawyers. Generally these are men whose experience with criminal cases has been limited to the side of the defense. As a consequence they are alert to protect their own interests and the fate of any measure designed to put more teeth into criminal procedure is in their hands. The other members of the legislature are usually willing to take the word of the lawyer members as to the desirability or undesirability of any proposed change in legal procedure, and there it ends.”³¹

The tendency toward modification of the historic practice denying the state an appeal has been stimulated by dissatisfaction with

²⁹ *Cf.* *Williams v. State*, 125 Tex. Crim. Rep. 410, 412, 68 S. W. (2d) 501 (1934).

³⁰ *Palko v. Connecticut*, 302 U. S. 319 (1937).

³¹ Miller, *Appeals by the State in Criminal Cases* (1926) 36 YALE L. J. 486, 502.

certain seeming weaknesses in the administration of criminal justice. Among such deficiencies for which a state's appeal has been proposed as a corrective is the ability of defense counsel to influence the course of prosecution by behavior which is recognized as improper but can be engaged in with impunity so far as the position of the defendant is concerned. For example, counsel may secure an acquittal for the defendant through corrupt practice, and yet the state will have no opportunity to reexamine the merits of the defendant's case however much it may have been aided by the questionable act of counsel.³² The defense attorney may be subject to a contempt proceeding or possibly to prosecution for a serious offense; nevertheless, the man whom he defends, if acquitted, is beyond the reach of the public defenders. This immunity of the defense which results from the impossibility of correction on appeal of flagrant, abusive, or intimidating conduct of the defense counsel is to be contrasted with the position of the state's attorney above whom is always suspended the threat of reversal or of a new trial.³³

Moreover, the subject matter of appeals has been limited so as to confer an undeserved and one-sided advantage upon the defendant.³⁴ A bill of exceptions by the district attorney, to the ruling of the court excluding testimony, cannot be considered on an appeal taken by the defendant.³⁵ The Committee on Criminal Law of the Texas Bar Association has recommended that, where the defendant takes an appeal, the state should have the right to file

³² In *Luttrell v. State*, 40 Tex. Crim. Rep. 651, 51 S. W. 930 (1899), it was held that evidence that defendant's attorney had attempted to bribe an important witness neither tends to connect defendant with such attempted bribery nor shows that he had authorized the act of his attorney.

³³ *McCue v. State*, 75 Tex. Crim. Rep. 137, 150, 170 S. W. 280, 287 (1914).

³⁴ In *Commonwealth v. Cummings*, 3 Cush. 212, 213 (Mass. 1849), the court said: "In favor of sustaining the writ, it seems to be necessary, in every well ordered government, that the decisions and adjudications in matters of law, of all courts and bodies vested with judicial powers, within the jurisdiction of any one state or government, should be brought, in some form, to the final adjudication of a tribunal, having a common jurisdiction over the whole of such state, in order to insure uniformity in judicial administration of the law."

³⁵ *Prescott v. State*, 52 Tex. Crim. Rep. 35, 105 S. W. 192 (1907).

cross-assignments of error in the same case.³⁶ The opportunity of the state to participate in the process of judicial law-making is limited to those occasions which are presented by defendants and with respect to those issues which may advantageously be raised by the defendant. The state's contribution to the development of the substantive law would be encouraged by a provision for an appeal in which the state can present exceptions.

Appeals by the state have also been effective in producing a uniform administration of the criminal law throughout a jurisdiction. Under the present system in Texas, for example, a statute upon which an indictment is founded may be declared unconstitutional by any justice of the peace, county judge, or district judge, and the defendant thereupon discharged.³⁷ In an adjoining county or district, however, the same statute may be held constitutional when a similar indictment is challenged, and a defendant be convicted. If the constitutionality of a penal code provision is denied, the state has no opportunity under present practice to raise the question on appeal until in some other county the issue is decided adversely to a defendant. An early determination of the constitutional issue presented by a criminal statute could be made possible by provision for an appeal by the state. The federal system, for example, provides for such an appeal from a district court in which an indictment based upon a federal statute is quashed, set aside, or fails to stand the test of a demurrer.³⁸

It may also be urged that an appeal by the state would relieve the trial judge of pressures to which he is presently exposed when he is in doubt on a close question presented in the trial. A ruling against the defendant is attended by the risk of a reversal; moreover, a ruling in favor of the defendant is not subject to appellate review. In this situation a trial judge can be expected frequently to recur to the fate of his decisions in the appellate court and is

³⁶ (1915) 34 PROC. TEX. BAR ASSO. 35.

³⁷ *Id.* at 34.

³⁸ 56 STAT. 271 (1942), U. S. C. § 682 (Supp. 1946).

thus encouraged by circumstances to rule for the defense. The experience of other jurisdictions would seem to indicate that where flagrant cases of improper trial are reviewed, the possibility of review makes both the trial court and attorneys more careful and as a result fewer appealable errors are committed.

The proposal of the Texas Civil Judicial Council for amendment of the Texas Constitution so as to permit an appeal by the state from a quashed indictment or with respect to the validity of a statute or ordinance seems worthy of serious consideration as an aid to the conservation of the state's investment in the apprehension of criminals, in the preliminary and grand jury proceedings, and in the actual trial of cases. It goes no farther than have statutes in a number of other jurisdictions, yet is somewhat less favorable to the prosecution than are statutes in other states. The proposed amendment falls somewhat short of the American Law Institute's recommendations set forth in its Code of Criminal Procedure in 1930. In addition to an appeal where an indictment or information has been quashed, the Institute has proposed that the prosecution be given an appeal from an order granting a new trial, an order arresting judgment, a ruling on a question of law adverse to the state where the defendant was convicted and appeals from the judgment, or from an illegal sentence assessed against the defendant.³⁹ Even more favorable to the state would be a provision extending the scope of determination on appeals to issues of fact as well as of law by permitting an appeal whenever error prejudicial to the prosecution has been committed. The requirement of the approval of the trial judge should be relied upon to prevent appeals that would harass the defendant.

If the proposed constitutional amendment is adopted as presently drafted by the Council rather than in accordance with the proposal of the Institute or in conformity with the statutes in other jurisdictions which place the state in a position equal to that of the de-

³⁹ AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 428.

defendant, experience under the provision as adopted should continue to be examined from time to time to determine whether a provision more favorable to the state could later be adopted without fear of overburdening the Court of Criminal Appeals or of imposing undue hardships upon the criminal defendant.

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