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CRIMINAL JUSTICE IN KANSAS.

WILLIAM E. HIGGINS.¹

A proper understanding of the criminal justice of the state requires a statement of the attitude of the Supreme Court. Logically, this is a result—the result of the Code of Criminal Procedure adopted in 1868 and of the Crimes Act, passed at the same time, together with the precedents established during the last forty-three years. But the administration of criminal justice is of the present and future because of one feature of the Kansas code, adopted in 1868, namely, the requirement that, “on appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.” Within the limits of the constitution and of positive statutory provisions, the Supreme Court has considerable latitude in declaring what shall be regarded as “prejudicial” to the substantial rights of the parties. The state of mind, the attitude of the court, therefore, is of great importance in the present and the future administration of justice.

What is the court's conception of the theory of criminal prosecutions? Two recent cases will suffice to answer this. In speaking of the duties of the county attorney, the court said:

“It is doubtful if any excuse can be urged for depriving him (the accused) of the right to inspect such a record, unless it be founded in the mistaken notion of the rights of a person accused of crime and the relations which the state bears toward such a person. The state is never interested in the conviction of an innocent person, but, on the contrary, is interested in his acquittal. This does not mean that it is the duty of the prosecuting attorney to act as the adviser of accused persons or to conduct their defense. Unless he has good reason to believe that the accused is innocent, the prosecuting attorney must use his best efforts to convict; but he should refrain from doing anything unfair or prejudicial to the rights of the accused to a fair trial. The prosecutor's duty to the state does not require him to withhold evidence which the accused in justice is entitled to the benefit of, nor justify him in treating the accused unfairly in the argument or in remarks made in the presence of the jury.”²

In passing, it may be noted, however, that the court examined the record and found no substantial error, and, therefore, did not reverse and remand the case. On the other hand, the following view is taken of the duty imposed upon the defendant in the presentation of his case:

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²*State v. Hinkley*, 81 Kan. 838.

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"On the trial of criminal cases attorneys for defendant are in court for the purpose of protecting the interests of their clients in every legitimate way. They should not, however, lie in wait to catch the court in error for the purpose of obtaining reversals, but should claim every right of the client at the proper time, as the trial progresses, and object and except to every adverse ruling supposed to be inimical to the rights of the client at the time it is made."

Again, in passing upon the statutory duty of the court to instruct in criminal cases, the court declared that:

"From all the decisions noted it may be concluded that the statute means what it says and should have been followed, but that a duty rests on counsel for the defendant to aid and not to ambush the court, and consequently instructions should have been requested under the circumstances of this particular case."

The court will, of its own motion, sometimes examine the record to see if the accused has had a fair trial. In the above case the court stated that, "though complaint is made of" the rulings and failures of the trial court, no exception was taken at the time, and, "consequently, none is permissible now. However, the court has examined them and is satisfied that they are not open to the criticisms made upon them."

The Supreme Court of Kansas, therefore, is disposed to determine the controversy between the state and the accused upon "the merits of the case." Let it not be understood, however, that cases are to be decided by the "sweet will" of the individuals who may compose the court from time to time. No one may be convicted of a charge simply because the record may show that he is guilty of another offense; neither may the accused be deprived of his right to some fundamental step in procedure which the policy of the law says must be followed in all cases, even though the Supreme Court may believe that "substantial justice" has been done in his case. However, it may here be stated that there are but few such procedural steps required in this state.

Passing from the attitude of the court, it will be found that five fundamentals have been adopted and applied in the statutes and decisions, namely:

1. That the accused is entitled to a fair notice of the nature and cause of the accusation against him.
2. That the accused may waive many, though not all, of his procedural rights.
3. That the trial court must be allowed considerable "discretion" in the trial.
4. That a distinction is made between "prejudicial" and "harmless" error.
5. That offenders are divided into classes and treated accordingly.

The first four of these rules have for forty-three years been con-

**State v. Clough*, 70 Kan. 510.

**State v. Winters*, 81 Kan. 414, 421.

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stantly applied in prosecutions and the last one appears in the creation of the juvenile court and in the punishment of adult offenders.

The notice to which the accused is entitled under the constitution and statutes may be given either in an indictment or in an information. The law with reference to grand juries is somewhat cumbersome, but the need of improvement in this respect has not been felt, for the reason that the information has been found to be a fair, convenient and successful means of notifying the accused of the charge against him. The charge must be made by a "statement of the facts constituting the offense, in plain and concise language, without repetition," so that "the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case," but "no indictment or information may be quashed or set aside for any of the following defects: first, for a mistake in the name of the court or county in the title thereof; second, for the want of an allegation of the time or place of any material fact, when the venue and time have once been stated in the indictment or information; third, that dates and numbers are represented by figures; fourth, for an omission of any of the following allegations, viz., 'with force and arms,' 'contrary to the form of the statute,' or 'against the peace and dignity of the state of Kansas;' fifth, for an omission to allege that the grand jurors were impaneled, sworn or charged; sixth, for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; seventh, for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

It is, therefore, possible to employ a short information, so simple in its language that anyone of ordinary intelligence may understand it. This is not infrequently done, but the use of form books and approved precedents, or the lack of training in expression, have often led to violations of the rule. The Supreme Court will not and should not hold an information "fatally defective" merely because of superfluous or cumbersome expressions, for if the pleading contains a fair notice of the elements of the offense, the persons, time, place, etc., it is sufficient in substance. The county attorney, who is often a young man of little experience, naturally follows those forms that have withstood attack, and for this reason it is difficult to secure improvement in the practice of pleading. As explained hereafter, the law school of the state university is attempting to secure improvement in this and other respects.

"Informations may be amended without leave of the court, in form or in substance, at any time before the defendant pleads, and on

trial, the form may be amended, in the discretion of the court, when this can be done without prejudice to the rights of the defendant." In a late case the court decided that amendments in substance cannot be made after the jury has been impaneled and sworn, because jeopardy has attached, but by leave of court amendments in matters of substance may be made after plea if prior to the impaneling of the jury.⁵

The second fundamental principle, which has received liberal application, is the doctrine of "waiver," which has been applied so as to create two classes of procedural rights, those that may and those that may not be "waived." No attempt can be made in this article to enumerate the different rights included within these two classes, but it is sufficient to say that the court has often acted upon its statement that a particular "statute merely prescribes a rule of criminal procedure the benefits of which the defendant may waive, and which is qualified by another statutory rule that on appeal judgment must be given without regard to technical error or defects, or exceptions which do not affect substantial rights."⁶ An information may be waived when both parties treat the complaint as sufficient in its stead.⁷ So the accused may waive the court's statutory duty to instruct the jury, or to instruct upon lesser degrees of crime and offenses included within the principal crime charged.⁸ Again, the constitutional right to face the witnesses may be waived by the defendant.⁹ Generally speaking, the attorneys must obey the rule stated in *State v. Clough*, cited above, that they "should not, however, lie in wait to catch the court in error for the purpose of obtaining reversals, but should claim every right of the client at the proper time, as the trial progresses."

Whatever may be the practice in other jurisdictions, the trial court in Kansas has not been stripped of its power to control the progress of the case. It may make rules to govern the conduct of the business of the court, and in the trial it has a large discretion in limiting the examination and cross-examination of witnesses. In *State v. Laird*, 79 Kan. 681, upon complaint of the refusal of the trial court to permit cross-examination "as fully as justice demanded," the court said: "An examination of the abstract shows that some of the grounds of complaint are very technical and that the rulings of the court could not in any degree prejudice the rights of the defendant." Continuing, the court added:

⁵*State v. Chance*, 82 Kan. 388.

⁶*State v. Winters*, 81 Kan. 414, 421.

⁷*State v. Morey*, 81 Kan. 149.

⁸*State v. Winter*, above.

⁹*State v. Adams*, 20 Kan. 311.

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"On cross-examination the defendant interrogated the witness about the number of tracks, the number of cars, their color, and the names of the companies on them, apparently for the purpose of confusing the witness about the identity of the car at which defendant had been seen. The court shut off this examination, which we think was within the scope of the discretion which every court has in fixing the limit of proper cross-examination."

Again, it was said in the same case, "courts must necessarily be given a wide and liberal discretion in the control of trials before them, and reviewing courts cannot interfere unless this discretion in so far transgresses as to prejudice the rights of the complaining party. The proper administration of justice and the prompt dispatch of pending business demand that time shall not unnecessarily be consumed in the discussion of unimportant and frivolous questions or in the presentation of immaterial or irrelevant testimony. Trial courts are charged with the duty of giving to every litigant a full and fair hearing, and at the same time of transacting business as rapidly as the proper administration of justice will permit. To discharge this difficult task requires patience, forbearance, and at times the enforcement of rules which may seem harsh and arbitrary."

Sometimes the trial court may have pressed the rule as to prompt dispatch of business too far, as in recalling a jury and lecturing it on the desirability of an agreement, but although the Supreme Court remarked that such practice is not to be commended, it refused to reverse the particular case upon that ground, since no prejudice to the rights of the defendant was shown.¹⁰

Probably no other rule in Kansas has so often shattered the roseate dreams of the counsel for appellant as the statutory requirement that "on appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." While this does not amount to the requirement that the appellant must make an affirmative showing of error, the advisability of which under all circumstances may well be doubted, yet the rule has been so applied as virtually to free the state from showing affirmatively that every procedural step was taken or every possibility of prejudice was eliminated under the particular circumstances; thus, in *State v. Moore*, 79 Kan. 688, the Supreme Court did not assume that the trial court had refused defendant the opportunity to offer rebuttal testimony when defendant complained because the state was permitted, in what the Supreme Court says is the sound discretion of the court, to open the case in order to identify the pistol with which the alleged crime was committed and to offer the same in evidence. It may not have occurred to the Supreme Court that the record does not affirmatively show that after such evidence was introduced opportunity was given the accused

¹⁰*State v. Rogers*, 56 Kan. 362; *State v. Garrett*, 45 Kan. 93.

to offer rebuttal testimony, but the illustration is offered here as one of many to show that the court does not as a rule search the record for the absence of an affirmative showing upon the part of the state. Under the Kansas decisions, "error" of the trial court has been treated in the following manner:

1. The defendant may have expressly "waived" his right to complain of it. 2. He may have "waived" it by failure to object at the time. 3. The error may have been "cured" by subsequent proceedings. 4. It may have been "invited" by the defendant, in which case he cannot complain. 5. It may have been "harmless." 6. It may have been "prejudicial."

What constitutes "prejudicial" error may be summarized as (1) the denial of a constitutional right, (2) the denial of a procedural right necessary to prevent fraud, intimidation and the like, and (3) a mistake in declaring or applying some rule of pleading, practice or evidence as will probably induce a wrong judgment. The last act necessarily involves personal judgment upon the *gravity* of the error. In determining the "probability" of the consequences of the mistake of the third class mentioned above, the inquiry of the Supreme Court has been: "Has the accused had a fair trial?" The answer, as shown by the decisions, has generally been in the affirmative. An example is to be found in *State v. Nelson*, 83 Kan. 450, where the accused was prosecuted for keeping a place or room to which persons were accustomed to resort for the purpose of gambling. The Supreme Court said that, while technically the information was defective in omitting the word "place" or "room," a fair trial was had and it was evident that the defendant had not been misled by the omission.

One more instance may be mentioned before passing to other matters. Although verdicts cannot be amended after the discharge of the jury, the rule is that "if the court can determine with certainty from the information and the verdict the real intention of the jury, judgment may be pronounced upon it in the same manner as if amended." Accordingly, the court in *State v. Wade*, 56 Kan. 75, refused to follow a Texas case cited and overruled an objection to a verdict which read: "We, the jury, _____ the defendant guilty as charged in the information."

It sometimes happens that the trial court makes a ruling during the trial which results in the acquittal of the accused. The code of 1868 gave the state the right to appeal on a "question reserved" by it, and under this provision several attempts have been made to procure the review of rulings of the trial court because of which the accused has

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been acquitted. The Supreme Court has refused to consider such rulings, for the reason that the defendant had been acquitted and could not, therefore, be again placed in "jeopardy" by the appeal.¹¹ It is evident that the provision would be of great benefit in cases where the trial court had made a ruling that would affect future prosecutions in its district, for, unless convinced of its error, its view of the law would prevent the conviction of accused persons, so that the question would never reach the Supreme Court until there had been a change of judges in the district. While it must be granted that the Supreme Court of Kansas was right in declaring that the accused could not be again placed in jeopardy, it by no means follows that measures should not be provided by which such questions might not be taken to the Supreme Court for the future guidance of the lower courts. Three methods occur to the writer:

1. To amend the constitution so as to require the Supreme Court to pass upon "questions reserved" and provide statutory means by which counsel might be assigned to argue the matter *pro* and *con*. The accused, of course, would not be bound by the decision, and neither would defendants in future litigation, so far as concerns their right to reopen the matter on appeal. But trial courts would have the ruling for guidance until some defendant by appeal caused the Supreme Court to reverse itself.
2. To provide statutory and constitutional changes by which the trial court may have the jury settle the issues of fact arising under the "question reserved," with power in either the trial court or the Supreme Court "to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require."
3. To change or modify the constitutional provision as to "jeopardy" so as to permit one appeal by the state and a new trial, if the state prevails upon appeal.

The first proposition is an extension of the "advisory opinions" of Massachusetts, Rhode Island and four other states of the United States. The writer expresses no opinion upon its advisability. The third proposition is revolutionary, but it may be possible to safeguard the accused against "persecution." The second proposal is one recommended by the American Bar Association and is now before the State Bar Association of Kansas in the report of its special committee, which has reported constitutional and statutory provisions embodying the idea.

A review of the administration of criminal justice in Kansas would not be complete without mention of the rule that a change of venue cannot be taken by defendant without making an actual showing of preju-

¹¹*State v. Crosby*, 17 Kan. 396; *State v. Hardenbaugh*, 75 Kan. 849.

dice, and without mentioning, further, that early in the judicial history of the state it was determined that a "mere impression" gathered from reading the newspapers was not such an "opinion" as would disqualify one for jury service. Beginning with *State v. Medlicott*, 9 Kan. 257, where the court says that "impressions, slight and fugitive in their character, such as everyone forms from reading the daily press on nearly every crime that is committed, cannot be held as rendering such persons unfit for jurors," and ending with *State v. Bassnet*, 80 Kan. 392, a liberal view has obtained.

The limits of this article will not permit more than a brief mention of the rule that on charge of certain offenses, degrees or lesser and proper instructions of the court, may be had. The writer has slowly been coming to the conclusion that the administration of criminal justice in Kansas does not need improvement so much in its procedure, outside of one measure to simplify the information and two or three others to crimes are included within the charge, so that conviction, under proof procure a review of the errors without the necessity of a new trial, as it does in the definition of offenses, and in the improvement of certain of the agencies used in the trial.

In conclusion, it may be stated that the following agencies are at work either to secure improvements or to maintain efficiency in the administration of criminal justice in Kansas: 1. The State Bar Association, through its special committee on criminal law and procedure. 2. The State Conference of Charities and Corrections. 3. The State Conference of District Judges. 4. The annual meeting of the county attorneys. 5. The Conference of Probate Judges. 6. The school of law of the state university.

A brief account of each of the above agencies may not be out of place.

The State Bar Association has ceased to meet merely for the purpose of listening to academic papers upon interesting topics, but for several years has appointed committees for *ad interim* work upon matters of practice and procedure. By the latter means it approved a new code of civil procedure after three years of conscientious work upon the part of a committee and secured the adoption of that code by the legislature. In keeping with the same policy, it appointed a special committee to investigate the criminal law and procedure of the state, and that committee, after two years, has reported that it "is able to make a favorable report upon the condition of the criminal procedure of the state," but that "it does not believe that this procedure is perfect or that it can not and should not be improved wherever possible." It then pre-

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sented drafts of seven different statutes and constitutional amendments by which the following might be accomplished:

1. The sufficiency of an indictment or information when it gives the defendant reasonable information of the act or omission proved and when it identifies the transaction charged with sufficient exactness to support a plea of former conviction or former acquittal, without setting forth every element of the offense unless necessary for the above purpose.

This is in keeping with the doctrine of "harmless" and "prejudicial" error, which the Supreme Court is now authorized to apply.

2. Amendment of the information during trial so as to prevent variance, but with such terms as will afford the accused reasonable notice and opportunity to make his defense.

3. The review of all questions raised in the trial court either by the state or defendant, without the necessity of a new trial on all the issues of fact, the facts being found by the jury subject to a question reserved, or by the court, where the facts are not those required to be found by a jury.

4. The review of errors of law by a question reserved by the state, even though the defendant has been acquitted.

The rule as to amendments is now liberal, but it is proposed to extend it so as to prevent miscarriages of justice, safeguarding the accused by review of the action of the trial court to ascertain if his "substantial rights have been prejudiced," a rule with which Kansas is familiar to the extent already noted in this article. The report of the committee was received, considered and then laid over until the next meeting, in 1912, and the committee continued for such further investigation and report as it might desire. The State Conference of Charities and Corrections meets annually and seeks increased efficiency in the management of state institutions, so as to improve the condition of persons convicted of crime.

The attorney-general of the state now annually calls a meeting of the county attorneys, who confer with him and with each other about affairs connected with the office of the prosecutor. Increased efficiency and better legislation is bound to come from such conferences.

The same statements may be made concerning the meetings of the respective associations of the district and probate judges, the latter of which deal with juvenile offenders. These two associations have not yet, however, been attended by a majority of the judges, due to press of official duties or to indifference.

The school of law of the state university has exercised an influence

on the administration of criminal justice by virtue of the fact that many of its graduates become county attorneys very soon after graduation. It is, therefore, bound to meet the situation. In addition to the course of instruction upon such topics as are usually found in such schools, it has established a practice court in each of the three years of the course, the last two of which deal directly with preparation of cases by teaching the student (1) where to look for the law, (2) how to look for the law, (3) how to present it in court. In the trial work of these courts, special emphasis is laid upon the preparation of the theory of a case, the drafting of pleadings in simple and concise language, the duty of the attorney as an agent in the administration of justice and in the presentation of the facts systematically and expeditiously. The writer feels that this is no place for the exploitation of the work of any school of law, but the same feeling that inspired the editorial comment on "Criminology in the Law Schools," in the last number of this JOURNAL, has caused the school of law of the University of Kansas for a number of years past to give special attention to the preparation of students in the prosecution and defense of cases. In Kansas, as in the other western states, the graduates step almost immediately into trial practice. We feel, therefore, that it is the duty of a school supported by the state to give considerable training in trial practice and procedure, and to accomplish this by actual controversies in practice courts. Not only can some efficiency thus be imparted to the graduate, but the proper attitude towards the administration of justice can be inculcated as well. It is not beyond reasonable expectation that young men may in the future prepare themselves in the state institution for the service of the state, either as prosecuting attorneys or as magistrates in minor positions, trusting that experience, bottomed upon preparation, may lead to advancement. It is certain that even now in this state young men do become prosecuting attorneys soon after graduation. The relationship of the State University of Kansas to the administration of criminal justice is thus direct and the duty to prepare its students for such service is almost imperative.