

1911

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Recommended Citation

M. C. Sloss, Reform of Criminal Procedure, 1 J. Am. Inst. Crim. L. & Criminology 705 (May 1910 to March 1911)

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REFORM OF CRIMINAL PROCEDURE.

M. C. SLOSS.¹

Not even a casual observer of the times can overlook the fact that there has been, of late years, a growing dissatisfaction with the methods of procedure followed in the courts, and particularly in the hearing and disposition of criminal cases.

About a year ago President Taft, in speaking of this subject, used this strong language: "There is no subject upon which I feel so deeply as upon the necessity for reform in the administration of both civil and criminal law. To sum it all up in one phrase, the difficulty in both is undue delay. It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization and that the prevalence of crime and fraud which here is greatly in excess of that in European countries is due largely to the failure of the law and its administration to bring criminals to justice." I think no one will deny the truth of these statements nor question the necessity for taking such steps as may be necessary to alter the conditions so described.

The problem thus presented is one that is agitating the minds of good citizens everywhere in the United States. Naturally, however, we here are more particularly concerned with the situation in California, and I shall, in the remarks which I am about to make, confine myself, so far as possible, to some suggestions which I believe would make for the betterment of conditions in our state.

Before proceeding to suggest a remedy for any evil, whether physical, sociological or governmental, it is well first to ascertain and define the evil complained of and to understand the conditions under which it has grown up. Now what are the matters which have mainly given rise to criticism of our system?

First, it is urged that the entire scheme of procedure is too cumbersome and involved, and that, in consequence, prosecutions which should be successful sometimes fail, particularly in the appellate courts, for reasons that do not go to the real merits. I feel that there is much force in this criticism and that improvement may and should be had.

The second point of objection is that the law in its present

¹Justice of the Supreme Court of California.

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condition gives too great an advantage to the accused as against the state that is prosecuting him. In some respects, which I shall point out, I believe this to be true and capable of being remedied.

Third in order, but perhaps first in importance, is the delay in disposing of prosecutions; delay at every stage of the proceedings, from the charge of crime to the final disposition of the case on appeal, if it should go that far. The seriousness of this consideration can hardly be overestimated. Punishment for crime, in order to be effective as a deterrent—and I assume that this is the basis upon which it is inflicted—should be both speedy and certain. While both factors are important, I believe that the swift disposition of a criminal charge is even more essential to good government than a reasonable certainty that guilt will ultimately be followed by conviction and punishment.

The point first spoken of is that of complication, resulting in the escape of criminals in the trial courts, or the reversal, in upper courts, of judgments against them, on grounds that are generally classed as technical. I cannot forbear to point out, in this connection, that in a constitutional government like ours in which the powers of government are distinctly divided between the executive, the legislative and the judicial branches, no judge has the right to deny to any suitor in his court the benefit of any provision of law enacted in his favor by the legislature or granted by the constitution itself. The duty of the judge is to declare, not to make, the law. A government under which the judges should undertake to set aside the plain provisions of law and to substitute therefor their own opinion of what would be expedient or in accordance with any uncertain standard of policy or personal belief, would be a form of despotism, none the less dangerous because the exercise of arbitrary power would be concealed under the form of judicial decrees.

Granting, therefore, that the constitution of the legislature, whether wisely or not, has provided that certain privileges shall be extended to persons accused of crime, I take it to be self-evident that the trial court has no right to deny those privileges to the accused. If they ought to be taken away, this must be done by amendment to the constitution or by statute. But if the trial court has, to the prejudice of a defendant, gone counter to the law, what is the court to which an appeal is taken, to do? Here we meet one of the points most earnestly urged by many—namely, that a judgment of conviction should not be reversed where the evidence

shows that the defendant was guilty. But this position is not open to any appellate court under the constitution of California as it now stands. That instrument gives to the courts of appeal and the supreme court jurisdiction of criminal cases in questions of law only. The reviewing power of these courts does not extend to questions of fact.

On an appeal by a defendant from a judgment of conviction the upper court, being limited under the constitution to a consideration of questions of law alone, is required to ascertain whether there has been, in any ruling against the defendant, a departure from the rules of law established by statute or precedent. If there has been such departure, and it is substantial rather than formal in character, the court of appeal has no recourse other than to reverse the judgment. There are, of course, errors which, on the face of the record, may be seen to have had no possible effect in leading to the verdict complained of. In such cases the error should be disregarded. But, as the constitution and the law now stand, the higher court cannot disregard an error merely because it *may* not have harmed the defendant. It must appear reasonably certain that the error did not or could not harm him. This conclusion, which has been declared in many decisions, is the logical result of the constitutional provision limiting the jurisdiction of appellate courts in criminal appeals to questions of law alone. Having no power to review the facts, these courts must, regardless of the question of probable guilt or innocence, decide the case on the questions of law presented.

This method of disposing of criminal appeals frequently results in decisions which are unsatisfactory. The ultimate object of every judicial inquiry is to ascertain the facts, *i. e.*, the truth, and to render such judgment on these facts as may accord with the conception of justice evidenced by the law in force at the time. Where there has been a painstaking and laborious examination of the facts, in the form of a trial before a court and jury, and the result has been a determination that the guilt of the accused has been established, the entire proceeding seems to be reduced to futility when the judgment is reversed upon some ground which has no direct relation to the ultimate question of guilt or innocence. If we could imagine the ideal condition of having none but infallible trial judges and jurors, we might well say that the judgment in the trial court should be conclusive, and that no appeal should be permitted. But trial judges, like men in every other walk of life, do sometimes

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commit errors, and juries are sometimes prejudiced and unfair. Innocent men are often accused and sometimes convicted. Desirous as we may be of expediting trials and of making the results certain, we must not in our eagerness to insure the speedy punishment of the guilty forget to provide adequate safeguards for the innocent. It would, of course, greatly simplify the procedure, and would make convictions virtually conclusive, if the right of appeal in criminal cases were entirely abolished. But I think the most severe critic of our present system would hesitate to advocate so extreme a step. We have been accustomed to contrast our criminal procedure with that of England, much to the disadvantage of the former. For centuries the law of England permitted no appeal in criminal cases. But, notwithstanding the obvious advantages of this method in point of celerity of operation, we have seen within a few years the enactment by the British Parliament of a law reversing the ancient policy and giving an absolute right of appeal in criminal cases. It would seem anything but wise for us to adopt a system which has, after so many years, been abandoned in the country of its origin.

But if we are to retain appeals as a safeguard in order to prevent injustice we should so regulate the right as to obviate the danger of its being used to obstruct justice. The means of doing this are, I think, furnished by a study of the English law above referred to. That law, after providing for appeals on grounds involving questions of law or questions of fact, goes on to declare that "the Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal. Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." Underlying the proviso just quoted is the same fundamental idea that has been so frequently expressed in this country—namely, that where a man has been declared guilty of crime by a jury, the verdict should not be upset for any irregularity or error, unless the error or irregularity

appears to have led to a false or unjust verdict. To avoid any possible misunderstanding, I repeat what I have already stated that I am not now speaking of mere formal or technical errors or defects which do not affect any substantial right of the parties. Ever since 1851 there has been on our statute books (California) an express declaration that no judgment should be reversed for such errors, *i. e.*, those which, as affirmatively shown by the record, could not have harmed the defendant. But we have to do with another kind of error—an error which is substantial in its nature, but which may or may not have influenced the verdict against the accused. Even such errors, as many believe, should be disregarded where the appellate court, upon an inspection of the entire record, is satisfied that the result is clearly right, and that the same result would, in all probability, have been reached if the error had not been committed. I agree with this view, which, as I have said, is in effect that which is made the rule of decision in the English courts by the Criminal Appeals Act. Where the appellate court can see from the record that the defendant's guilt has been clearly shown, and that he has had the essentials of a fair trial, the verdict should be permitted to stand. But it is apparent from what has been said that this course of decision cannot be adopted by an appellate court whose constitutional powers are limited to a review of questions of law. The inquiry whether a verdict is right or wrong, just or unjust, necessarily requires a decision upon the facts. That such inquiry may be made by an appellate court is demonstrated by the decisions of the English court under the Criminal Appeals Act. It may be made by our appellate courts, provided we enlarge their powers by amendment of the state constitution. I believe the constitution should be so amended as to give the higher courts power, in criminal appeals, to review questions of fact as well as of law, to the extent necessary to determine whether or not any error of law, or any omission, has, in the judgment of the court, worked a substantial injustice to the appellant. If it is found that no such injustice has been done, the conviction should stand. I am, of course, merely suggesting the general scope of the proposed amendment and not undertaking to set forth the words in which it should be phrased. That is a matter requiring careful study, for which I have not had the necessary time. The advance here urged could, I have no doubt, be effected by an amendment to the state constitution alone. There is nothing in the federal constitution requiring the states to allow an appeal in criminal cases prose-

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cuted in the state courts. The state has the power to take away the right of appeal altogether. Clearly, therefore, it may regulate or limit the right as it sees fit.

The suggestion I have made would, I believe, meet every reasonable ground of objection to the present procedure on appeal, with the exception of the question of delay, of which I shall have a word to say when I come to the special matter of expediting proceedings.

We are led, then, to the second head of objection—*i. e.*, the undue advantage allowed by our present law to defendants in criminal cases. Our American jurisprudence is built upon the model of the English common law—a law which was developed in the course of a struggle of centuries to establish and maintain the rights of the individual citizen. That struggle, carried on by a brave and liberty-loving people who were in constant danger of oppression at the hands of arbitrary power, finally culminated in the recognition of certain principles, which were regarded as essential to the safety of the individual. Thus there grew up the doctrines that no man should be convicted of a grave crime except by a verdict of a jury of his peers, that a man should not be twice placed in jeopardy for the same offense, that he should not in a criminal proceeding be compelled to be a witness against himself, that he should, except in capital cases, be entitled to give bail before conviction; that he should be entitled to a speedy and public trial—all rules designed to guard the citizen against the abuse of arbitrary power. These principles were carried into most, if not all, of the American constitutions. All of them are declared in the constitution of California.

With most of these safeguards to men who may be unjustly accused, I think no fair man can quarrel. Provisions guaranteeing the right to release on bail before trial, protecting an accused from a second trial for an offense of which he has been once acquitted or convicted, granting him the right to have a charge against him promptly heard and disposed of are all of the essence of justice and fair play, as those terms are understood by Englishmen and Americans. So, too, we would all, I think, hesitate to question the right of anyone accused of a felony to have his guilt or innocence determined by a jury. There are those who would abolish jury trials altogether, but such experience as I have had leads me to disagree with them. In the main I have found that a jury gen-

erally manages to decide the facts of a case according to substantial right.

There are, however, two particulars in which I think the constitutional right to trial by jury in criminal cases may well be modified. It has been held that the right so given is the common-law right to be tried by a jury of the vicinage, or neighborhood, and that, therefore, the place of trial may not, without the consent of the defendant, be changed from the county where the crime was alleged to have been committed. This should be altered. There have been instances in this state of the commission of crimes whose perpetrators could not be effectually prosecuted because the counties in which the trial had to be held were small, and the entire list of men available for jury duty was exhausted before a complete jury could be obtained. There would be no hardship to defendants in allowing the prosecution upon a showing that the ends of justice would be served to obtain an order that the place of trial be changed from one county to another. The state should, of course, in such case secure to the defendant the attendance of any material witnesses whose testimony he might require.

The other point with regard to the right to a jury is suggested by the frequency of mistrials on account of the failure of a jury to agree. Originally, the twelve jurors were required to be unanimous in order to find a verdict in any kind of case. Such is still the rule in the federal courts. But upon the adoption of the present state constitution in 1879 it was provided that three-fourths of the jury might render a verdict in civil cases. At that time this innovation was, no doubt, regarded by many as revolutionary. The public and the legal profession soon became accustomed to it, however, and I do not find that the verdict of nine jurors in a civil case is regarded as any less binding or any less likely to be right than the unanimous verdict of twelve in a criminal case. The three-fourths rule has the great advantage of permitting a verdict, notwithstanding the opposition of one or two stubborn or corrupt men who may have gotten into the jury box. I see no reason why this rule should not work equally well in criminal cases, at least in all cases except such as, upon conviction, are punishable with death or life imprisonment. Where so severe a penalty may be imposed, let the question of guilt or innocence be determined, as heretofore, by the concurrence of twelve men. I would, therefore, suggest the amendment of section 7 of article 1 of the constitution by permitting the trial of felony charges in proper cases and upon proper

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conditions to be removed from one county to another, and by providing that in all cases, except the trial of persons charged with crimes punishable by death or life imprisonment, three-fourths of the jury may render a verdict. These changes, like the one regarding appeals, would not, under the decisions, infringe any right protected by the federal constitution.

One of the constitutional guaranties already spoken of is the right of the accused to refuse to be a witness against himself. This means not only that the accused shall not be required to testify on his own trial, but that his refusal or failure so to do shall not be considered by the jury as a circumstance tending to establish his guilt. It must be plain that this theory is contrary to common experience in the ordinary affairs of life. If, in any situation outside of a courtroom, a person is accused of wrongdoing, the first thought of the accused is to demand an explanation of the circumstances which have created suspicion. If such explanation is refused the natural inference is that of guilt. Why should not the mental processes that influence thought and action in other relations of life have weight in criminal trials? The presumption that a man is innocent until he is proven guilty should not be weakened; the requirement that no man should be convicted of crime unless his guilt be established by the state beyond a reasonable doubt should be maintained. But it is no abandonment of these principles to say that when the prosecution has shown a state of facts which points to the guilt of the accused and those facts are such that a denial or explanation of them by the accused would tend to establish his innocence, his failure or refusal to make that denial or give that explanation may be considered by the jury as an item of evidence bearing upon the question to be decided. In the same connection I think the state should be permitted to compel the production by subpoena, of documents or papers which may be material to the inquiry, even though such papers may be in the possession or control of the defendant. Such compulsory production has been held by the Supreme Court of the United States to be a violation of the provision of the federal constitution against self-crimination or of the accompanying guaranty against unreasonable searches and seizures. While these guaranties of the United States Constitution do not bind the states, we should guard against a like interpretation of like clauses in our own constitution.

The necessity for a modification of the rule protecting a person from giving testimony against himself arises from the fact that

in the complexity of modern life and conditions, the crimes which are most dangerous to the common welfare are at the same time the one most difficult to detect and to prove. They are, in the main, committed secretly under circumstances which unite in guilt all the parties having knowledge of their commission. The public cannot successfully cope with the perpetrators unless it has the right to call upon them to either give a statement of the facts or run the risk of having an unfavorable inference drawn from their failure to give it. Nor would there be danger of injustice from the adoption of this change. An innocent man could rarely, if ever, be harmed by taking the witness stand to declare his innocence. "It must not be forgotten," said a prominent New York lawyer in a recent address, "that the rule that a defendant in a criminal case cannot be compelled to incriminate himself was enacted at a time when the defendant was not allowed to be a witness in his own behalf." And he added the opinion that "nine out of ten crimes go unpunished because of this tradition, which found its birth in the Dark Ages."

Side by side with the limitation of the right of the accused to stand mute should go the absolute prohibition of testimony or confessions obtained from persons under arrest as the result of private questioning by officers of the law. The horrors of the "third degree" are the direct result of the rule prohibiting the prosecution from calling the accused as a witness or basing any argument upon his failure to take the witness stand in his own behalf. Surely it is far better to question the accused in open court, where he may have the assistance of counsel and the protection of an impartial judge, than to endeavor to convict him by means of an alleged confession which may never have been made and which, if made, may have been extorted from him in ways that, if known, would throw great doubt upon its reliability.

Such other suggestions as I may have to make come more appropriately, I think, under the third head—that of delay. At the outset I may remark that one of the main grounds of complaint in this regard has been removed by certain amendments to the Penal Code, adopted by the legislature at its session of 1909. Prior to these enactments a great deal of time was consumed, after verdict and judgment in the superior court, in getting the case into the appellate court for presentation and decision. The defendant was allowed to take his appeal at any time within ninety days after the judgment. The record which was to go before the upper court con-

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sisted, in nearly all cases, of a bill of exceptions, that is to say, a condensed statement of the proceedings at the trial. This bill of exceptions was prepared, in the first instance, by the appellant, and was finally, after the district attorney had had an opportunity to suggest amendments, settled by the trial judge. Before such settlement was finally made there was a delay, often of months and sometimes of years. The respective counsel would be mutually indulgent and the court would permit them to give each other innumerable extensions of time by stipulations. Both sources of delay—that in taking the appeal and that in preparing the record upon which the appeal is disposed of—are done away with by the changes in the Penal Code to which I have referred. Under the law as it now stands a defendant must, if he desires to appeal from a judgment or order, announce in open court, at the time that the judgment or order is rendered, that he appeals from the same. Instead of a bill of exceptions the appeal may be heard upon a transcript of the shorthand reporter's notes, certified by the reporter and the court. The time within which the reporter may make his transcript is closely limited and cannot be extended by the trial court. Under these amendments there is no good reason why, hereafter, the time elapsing between judgment in the lower court and the hearing of the appeal in the higher court should not be brief. Indeed, the experience of the reviewing courts since the adoption of the new system shows that this prediction may confidently be made. There is still, of course, the opportunity for delay in the upper courts after the appeal is ready for hearing. The case may not be argued, or, if argued, decided as soon as it should be. But these are matters largely within the control of the courts and of the attorneys representing the state. They can readily bring about a prompt hearing and determination of the appeal when it is once ready for hearing. It might be added, in this connection, that the prompt and effective presentation of criminal appeals on the part of the state would be aided by the enactment of a statute requiring the district attorneys of the respective counties, upon the request of the attorney-general, to assist that officer in the preparation and argument of any criminal case appealed from their counties. As matters now stand the district attorney prosecutes a case in the superior court to conviction, but as soon as an appeal is perfected and the record for the appellate court completed his duty in connection with the case ceases. It then goes into the hands of the attorney-general, who represents the people in all proceedings in the higher court. Natu-

rally, this officer is at a disadvantage by reason of his want of familiarity with the case or its history. He should be entitled to have the assistance of the attorney who was in charge of the case from its inception and during its trial.

So much for the lessening of the delays on appeal. We are still confronted by the question of how to shorten the time consumed in bringing important cases to a conclusion in the superior court. One general observation may be made to apply to the delay at every stage of the proceedings. Freedom of action and expression on the part of the trial judge is, in my opinion, too much hampered by two conditions: First, the apprehension that any attempt to restrict counsel for the defendant in the examination of jurors or of witnesses, or even in argument, may be regarded in the appellate court as a ground for reversal, and, second, the constitutional provision prohibiting judges from charging juries with respect to matters of fact, a provision which, again quoting President Taft, reduces the power of the judge to little more than that of "a moderator in a religious assembly." I believe the first condition would be, in large measure, removed by the adoption of the change of which I have spoken, *i. e.*, that of giving the appellate courts power to review the facts and to affirm, notwithstanding error, if satisfied that the verdict and judgment accord with substantial justice. If trial judges knew that appeals would be disposed of on this theory they would be more likely to take a firm hold of the proceedings and endeavor to guide them to a reasonably prompt termination. This purpose would also be advanced by removing the restriction upon charging the jury with respect to the facts. So long as we have the jury system the jurors must remain the ultimate arbiters of the facts. They may, however, be aided in reaching a true verdict by a judge who is presumably unbiased but who is experienced in weighing and applying testimony. The prohibition of the constitution enforces undue caution in the making of comments which might serve to materially abridge waste of time. In the English as well as the United States courts judges are permitted to comment on the evidence and this liberty has not, so far as I know, been thought to have resulted in inducing juries to return verdicts which should not have been rendered.

With the power of the judge enlarged as suggested I believe the unnecessary delay at almost every step of a trial could be eliminated. It would be possible, while allowing counsel on both sides every reasonable opportunity to protect the rights of their clients,

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to bring within proper limit the impaneling of juries, the examination and cross-examination of witnesses and the charging of juries. It should not be necessary to go any further in order to remedy the objections that have been made to the practice with reference to these three steps. Nor is it advisable to go further, at least until we have tested the efficacy of the methods here suggested. The right of a party to a jury composed of men who have not prejudged the case, to have that jury put in possession of all proper evidence which he may be able to offer without being misled by improper evidence, and to have the essential principles of law governing the crime charged plainly stated to the jury, go to the very essence of a fair trial. We should not destroy or unduly limit any of these rights, as I think might be done, if some of the measures which have been advocated were to be adopted.

Our code does, however, accord to defendants some privileges which, in actual practice, seem to accomplish little beyond affording an opportunity to delay a trial on the merits. One of these is the challenge by a grand juror or a motion to set aside an indictment on the ground of the bias of one or more grand jurors, or for other grounds affecting the competency of a member of the grand jury. Such motions result in long examinations of the individual grand jurors, and not only delay the trial of the main case, but distract attention from it to side issues. An indictment is merely an accusation, and it does not require the concurrence of the entire body. Before the person charged can be convicted his guilt must be shown beyond a reasonable doubt to a trial jury, in the selection of which he has had a voice. It is, no doubt, a hardship for one who has not been charged by a lawful body of accusers to stand trial. But, where the grand jury is summoned and drawn in the manner provided by law, substantial injustice will rarely result from the fact that some one or more persons who are not qualified happened to be drawn upon the jury. Inquiry into the qualifications of those drawn should be made by the court before it impanels the grand jury, and its action on such inquiries should be conclusive. This is one of the instances in which a remote possibility of slight injury to an individual is outweighed by the more important public consideration of making proceedings speedy and certain.

As I said at the outset, the need of a more rational and less technical administration of our criminal law has long been apparent and has now come to be generally regarded as imperative. It may be that the members of the legal profession, both on the bench and at

the bar, in their adherence to established usage, have often failed to distinguish between what is substantial and what is mere matter of form, and have thus retarded progress. To those who have made the law their life study the community has a right to look for guidance in the effort to find a way to make that law more effective. A large part of the necessary reform will consist in bringing to the consideration of criminal cases a more liberal point of view in the effort so to mold the practice that it may best accomplish the final purpose of rapidly bringing the guilty to punishment, and as rapidly freeing the innocent. I feel safe in asserting that this liberal spirit has already made great headway in the courts. But beyond this there must be such changes in our constitutions and statutes as will make the procedure more simple and effective. I am sure that every true lawyer and every conscientious judge will be glad to do his utmost to bring about a speedier, a simpler and a more efficient method of disposing of criminal cases.