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DELAYS AND REVERSALS ON TECHNICAL GROUNDS IN CRIMINAL TRIALS.

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We have made wonderful discoveries and inventions to save time, labor, cost and waste and to lessen distances, but in the courts we still move as slowly as the travelers who in olden times crept along in ox carts and canal boats. We have made remarkable advances in science, medicine and surgery, but we have made little progress in the science of government or in the administration of justice. In all the departments of human activity, except the last two mentioned, men will readily accept teaching and advice from their superiors in ability, skill and learning, and will readily yield to proper leadership; but in governmental affairs and in the administration of justice the ignorant or self-seeking leader can always muster a large following for any error or hoary wrong. Only within the past five years have the better elements of the bar and the bench begun to bestir themselves with a desire to imitate the improvements made in England and in Germany within the past thirty-five years. This change of attitude has been due, in a large degree, to the scientific study and philosophic view of the law as a science in the great law schools of our country.

The common law of England, as we know it and practice it in this country, has been slowly built up, like a coral reef, upon a mass of individual instances and innumerable precedents. Such a system, discouraging broad, philosophic principles, naturally and inevitably begets an intense conservatism in its votaries. Hence, as James Bryce said, in an address to the American Bar Association in 1907, the following were for ages the accepted theories of English and American lawyers:

"*Stare Super antiquas vias . . . Nolumus leges Angliae mutari* . . . It is better that the law should be certain than that the law should be just . . . An ounce of precedent is worth a pound of principle . . . With the love of certainty and definiteness there goes a respect for the forms of legal proceedings and for the precise verbal expression given to rules. This is a quality which belongs to most legal systems in their earlier stages."

That the law of rights—that the substantive law—should be made as certain and definite as possible, so long as the rational and immutable

[1]Member of the Louisville Bar. Paper read before the American Political Science Association at St. Louis, December 28, 1910.

principles of justice are observed, is clear; but it is equally clear that the mere rules of procedure—that the adjective law—the technical rules governing the pleadings, the evidence, the instructions of the court and the procedure in the trial or appellate court—should be simple, flexible and subordinate, and should always allow the court, without delay and without a second trial except in rare and extreme cases, to decide the dispute solely according to the fundamental principles of the substantive law. To bring about such a condition radical changes are necessary (1) in our constitutions, (2) in our codes and statutes, and (3) in the mental and moral attitude of the lawyers at the bar and on the bench. Reforms in the constitutions and in the codes and statutes will become efficient only after long delay and strenuous effort unless the judges who are to interpret them can be radically changed in the habits and opinions of a lifetime. Therefore, it is not only necessary to make the need of reform clear, but the need of it must be incessantly dinned into the ears of the lawyers and the people until public opinion becomes so distinct and strong that dull, conceited or stubbornly conservative lawyers cannot resist it.

Vain or antediluvian judges of some states indulge in hair-splitting decisions either because they hope to appear as ultra-learned, shrewd or logical or because they are really indifferent to the duty of deciding a case according to its merits as determined by the substantive law. Sometimes they are eager to give a decision for the party fairly entitled to win, but, with the erroneous belief that they have not the power to do it on the record, they hunt zealously for some petty technical reasons, based on the adjective law, appearing in the record, to justify a reversal, and thus they increase the chance that another meritorious party will fall into a pitfall in a later case.

Sometimes a judge resorts to such a hair-splitting decision in a criminal case because he does not himself approve the law to be enforced or because his sympathies (acquired when he was himself defending criminals at the bar) are really with the men who have violated the law. There is no chance for a quick and clear condemnation of such an opinion. An adverse criticism in some distant law journal or in a textbook published years thereafter, or in the opinion of some distant court, has little effect. The lawyers directly involved are not allowed, by etiquette, to expose such an abuse of the judicial power, other lawyers that hope to win bad cases by similar opinions are silent, and laymen have no prompt or adequate means of showing their objection or contempt. If they express their dissent they are usually silenced by the untrue statement, delivered with owlish solemnity, that the preservation of our liberties is

dependent upon such hair-splitting decisions for the protection of the accused. Dull, perverse or hypercritical judges, however honest, thus bring the law and the courts and the profession into contempt, making the administration of the law more difficult and crime more frequent. The result in the trial of Thaw and in the trial of the cowardly assassins who murdered Captain Rankin at Reel Foot Lake, in Tennessee, and the reult in many other trials of late where, with unbroken success, the so-called unwritten law has been supported by perjury and maudlin appeals for sympathy, have done incalculable harm. Even a judge of the United States Circuit Court has deliberately said over his signature that a jury ought to have a chance to violate its oath and to acquit a woman who has murdered a man whom she, truthfully or falsely, charges with her ruin; and yet he would probably not advocate the passage of a law imposing the death penalty upon a seducer or libertine. If that were law, the accused might at least have a chance to prove his innocence when his mouth was not closed by death. That there is gross perjury in many cases in which the unwritten law is invoked must be clear to any sensible man. We abolished the duel, in which each man had generally an even chance for his life, but we have let it become almost impossible to convict a bullying murderer or a cowardly assassin. We have saved the guilty from the judgment of the courts, but we have saved neither the guilty nor the innocent from that blind, unreasoning, undiscriminating, bloodthirsty demon, the mob. To carry out the foolish theory that it is better to let ninety-nine criminals prey with safety upon innocent people than to punish one man unjustly accused we have probably allowed judge lynch, who is unknown in Europe, to murder more innocent men in the past ten years than the courts have unjustly condemned in a hundred years. The result is that bloodguiltiness has outrageously and alarmingly increased in late years and far beyond anything known at the present time in any other civilized land. We do not want to have any innocent man convicted; and, if every case is solely decided on the merits by trial courts and appellate courts, and if our governors wisely exercise their pardoning power, the possibility of the conviction and punishment of an innocent man is most remote; but the bare possibility of such a calamity should not lead us into the folly of making it almost impossible to convict the guilty.

In fact, thoughtful men have come to the conclusion that the criminal law, by reason of our absurd procedure, has broken down in parts of this country. It is true that we convict and punish many humble offenders and, in rare instances, an influential offender; that our jails and penitentiaries are full of ignorant, lowly, evil-minded or hardened

criminals; but we rarely convict and punish a murderer or a financial pirate who has influential friends and money enough to hire shrewd, competent lawyers. In some of our states we have annually more murders than in all Europe; and, although 60 to 80 per cent of the murderers there are convicted and punished, we convict and punish less than 2 per cent. When we compare the course of the first Thaw trial, which lasted three months, in New York, with the Crippen trial, which lasted less than five days, in London, we see, if we have sufficient intelligence, how far behind we are.

The delays in civil and criminal trials here are inexcusable, and yet it would not be hard to avoid most of them. These delays are due to the complicated, obsolete nature of our procedure; to the deep-rooted, unreasonable conservatism of our courts, and to the dilatory habits of the lawyers themselves. Delay usually suits the purpose of the defendant; the plaintiff proceeds slowly because he must proceed with caution to avoid the innumerable pitfalls that are needlessly put in his pathway. The follies which we allow in the selection of juries, especially in criminal cases, are astounding. Such absurd indulgence as we show to men accused of crime is unworthy of an enlightened people. In a late splendid report on the criminal law in England, made by Dean John D. Lawson and Prof. Edwin R. Keedy (p. 14), it is said:

"In selecting the jury in the English courts, the challenge of a juror is almost as rare as the challenge of a judge in the United States . . . We talked to more than one practitioner at the criminal bar who acknowledged that he had never seen a juror challenged for any reason, either by the crown or the defense."

If a juror is challenged on account of bias, two triers (laymen) are selected to hear the challenger's evidence and to decide whether the juror is biased or not. The press is not allowed to anticipate, work up and comment on the evidence before the trial, and can only publish fairly what actually takes place in court. At the close of the Crippen trial the editor of the *London Chronicle* was fined $1,000 for publishing as true a fact which was contrary to the evidence given at the trial.

It is astonishing how easily, in actual trials, the victim of crime is overlooked. The defenders of old abuses are eager to give a helping hand to the criminal, but few of them feel the need of giving a helping hand or indemnity to his innocent victim. At a trial the latter even becomes, in most cases, the real scapegoat, and is badgered and denounced as if he were the real and justly hated culprit. If the victim has been killed, his widow and children weep in vain. Their ears are deafened by the approving shouts of the ignorant and sympathetic crowd at the

acquittal of the man that wrought their ruin. To many maudlin or semi-criminal persons there is a halo of heroism about a triumphant criminal, especially if he is a murderer, no matter on what ground he is acquitted; and yet it sometimes happens that a man easily acquitted in a criminal case is held liable in damages for his crime by another jury in an unsensational suit by the persons wronged.

The first step toward such reforms as will prevent unnecessary delays in trials and needless reversals by appellate courts for mere errors in procedure is to convince the leading lawyers and judges of the country that such changes will not prevent the attainment of substantial justice to the parties concerned and will not mar the standing of the profession or take from the learned and able lawyer the natural advantage of learning and skill. Such radical reforms in mere procedure would, however, leave untouched that more important branch of the law, the substantive law, by which our legal rights are determined, and under which, by reason of the necessary universality of the law, there must, now and then, be great hardship and apparent injustice in individual cases.

Fortunately, we have at the bar and on the bench in America to-day many lawyers of broad culture and of broad view who are willing to lead in this reform. Roosevelt and Taft and some of the most eminent lawyers in America have given their hearty support to this movement; and yet, when all the judges of California were invited to express their opinion as to the causes of delay in their courts, only thirty answered, and most of them merely suggested that there were not enough judges in the state. Only three said that these delays were caused by "too great attention to technicalities and trivialities." When the judges of a state are in that condition of mind, it is not surprising that codes and statutes intended to eliminate useless "technicalities of practice and procedure" should be nullified by foolish interpretations or be stubbornly ignored. Prof. John H. Wigmore, in his just but scathing criticism of the narrow and inexcusable opinion of the Supreme Court of California when it reversed the conviction of Mayor Schmitt, truly said:

"All the rules in the world will not get us substantial justice if the judges have not the correct, living, moral attitude toward substantial justice . . . . We do not doubt that there are hundreds of lawyers whose professional habit of mind would make them decide just that way, if they were elevated to the bench to-morrow in place of those other anachronistic jurists who are now there. The moral is that our profession must be educated out of such vicious habits of thought."

When the Supreme Court of Missouri, in *State v. Campbell,* 210 Mo. 202, reversed Campbell's conviction for rape because the indefinite

article "the" was omitted from the indictment, it would have been well if the foremost lawyers of the state could have expressed their condemnation in clear terms for the honor of the state and the profession. Such a folly, which has been so universally condemned, would not have been soon repeated.

Justice delayed is often justice denied. In Magna Charta the promise was: *"Nulli Differemus . . . justitiam."* To one aggrieved the remedy is as important as the right. Of what value to us is the richest fruit beyond our reach or the clearest right that we cannot enforce? Unavoidable uncertainties in substantive law we can endure; we can bear defeat on the merits; but it is outrageous that we should lose a clear right because of some slip by a lawyer in trying to avoid the innumerable pitfalls of an antiquated system of procedure that grew up in England when it was only half civilized and when the people needed protection from barbarous laws or from unjust prosecution at the whim of an arbitrary king or his ministers. Delays increase the costs greatly, cause the loss of important witnesses, and often compel parties, especially if poor, to compromise or surrender a clear right.

In a jury trial innumerable questions arise as to the competency of evidence and as to the court's instructions to the jury, and yet juries, in fact, wisely pay scant attention to the nice points that arise in such a way; but, whatever the verdict—however just it may appear to be from the whole record—the appellate court often scans these small points of procedure with a microscope and, in about 40 per cent of the cases, finds a flaw somewhere. And once more the parties, after a delay ranging from six months to two or three years, must fight the whole battle over again, though every judge on the appellate bench might admit that the winning party ought to have won and should win again. But even if the appealing party is right, he must make his motion for a new trial at the right time and on the right grounds, and must get his long bill of exceptions in perfect order before the court, and must take the appeal at the right time and in the right way, and must have the entire record copied, at great expense, though nine-tenths of it may have nothing whatever to do with the only question that will be considered by the appellate court. If his lawyers make a slip anywhere, he will lose his right, though the appellate judges may express deep regret that they are unable to allow so just a claim or defense.

To show how far the mere machinery of the courts is raised to absurd importance, it is only necessary to say that, while the American and English Encyclopædia of Law—covering the entire field of substantive law defining our rights—contained 32 volumes of about 1,400 pages

each, the Encyclopædia of Pleading and Practice, published by the same corporation and intended to treat only of our remedies—of the mere machinery of the law—covered 23 volumes of 1,100 pages each. We also have an Encyclopædia of Evidence, in 14 volumes of 1,000 pages each. Think how absurd it is that the equity procedure of our federal courts to-day is based upon England's technical procedure of seventy years ago and that the Supreme Court of the United States has told us in *Thompson v. Wooster,* 114 U. S. 104, that the best exponent of that practice is Daniel's Chancery Practice, issued in 1837, for which an English lawyer now has no more use than he has for the code of the Visigoths.

Many cases are tried twice, some three times, and some even oftener, not because it is uncertain who ought to win on the merits under the substantive law, not because the merits of the controversy are in doubt, but because the winning lawyer and the trial judge, in the opinion of the appellate court, made some mistake in pleading, in evidence, in instructions to the jury, or in some other matter of procedure; and yet in every state using a code of practice it is provided, in substance, that "a judgment shall not be reversed or modified except for an error to the prejudice of the *substantial rights* of the party complaining thereof." That the English trial courts try cases faster than our courts and that the English appellate courts reverse fewer cases and grant new trials far less often than our courts has been shown so often by the statistics and is now so well known among well-informed men, that I need not dwell upon the subject. In England, at least, a new trial or reversal is not granted for any technical error in procedure—is not granted if the party that won was entitled to win on the merits; but, as Prof. Roscoe Pound has said, our appellate courts do not try the case; they only try the record; they only decide whether all the outworn subordinate rules of the game were carefully observed. The Court of Appeals in England, acting for 32,000,000 of people, grants only about twelve new trials a year. From September 24, 1909, to March 10, 1910—not six months—there were thirty-eight cases appealed in Kentucky by defendants convicted of crime. Of these thirty-eight cases, seventeen were reversed and twenty-one were affirmed; and of the thirty-eight cases sixteen were for homicide. Of these sixteen homicide cases, six were reversed and ten were affirmed, and in only one of the ten was death the penalty. Some of these cases were tried twice and one was tried three times. The same story may be duplicated in almost any state of the Union. Is it any wonder that England, Ireland and Scotland, with almost twenty times the population of Kentucky, have fewer murders?

Section 340 of the Criminal Code of Kentucky provides:

"A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the *substantial rights* of the defendant have been prejudiced thereby."

Under such a statute, here and in other states, the appellate courts generally excuse their technical reversals by falling back upon the doctrine of "presumed prejudice from error." In other words, if there is a flaw in the indictment, in admitting or excluding evidence, in the court's instructions or in the procedure generally, the case must be reversed, if the accused is convicted; but never, of course, if he is acquitted. If he appeals, the burden is on the state to show," beyond a reasonable doubt," that the error could not have hurt him, no matter how clear the proof of his guilt is. Not so in any other civilized land. It is said that every man accused of crime has a constitutional right to be tried by a jury; that the jury alone can pass upon his guilt; that the court has no right to say, when a technical error has been committed, that the jury would have convicted him if the error had not been committed. Nobody can be convicted unless a jury has rendered a verdict against him; nobody wants him to be convicted without such a verdict; but it is reasonable and fair to say that if a jury has convicted him, and if the appellate court, after reading all the evidence, is convinced beyond doubt that he is guilty, his "substantial rights" could not have been prejudiced by a technical error in the pleading, in the evidence or in the instructions. At any rate, he should be compelled to show that the error probably did prejudice his "substantial rights." When he thus appears guilty by the verdict of a jury and is guilty in the opinion of the appellate court, he ought not to be given a new trial, unless evidence of a vital character has been improperly admitted or excluded, or unless the court has plainly and clearly given a misleading instruction. No quibbling over words or phrases, no mere fault-finding or strained constructions, should be allowed. Wherever the constitution of the state will not allow a verdict of a jury to be affirmed, merely because some error of procedure has been committed, although the appellate court believes the accused guilty beyond doubt, the constitution should be changed. In some states such a change of the constitution would not be necessary if the judges were in sympathy with the right view of the matter.

I have not time to point out all the remedies that should be applied to lessen delays and to prevent technical reversals in civil and criminal trials. No petty tinkering, here and there, with existing law will suffice. Our codes and statutes as to procedure should not be minute. They should give the courts more latitude in making flexible rules and in exer-

cising a reasonable discretion. The changes must be radical, as they were in England and in Germany, but some changes that would be beneficial in criminal trials and that would tend to prevent delays and technical reversals may be hurriedly mentioned as follows:

(1) It should be possible to prosecute a criminal (a) by indictment and, in misdemeanors at least, (b) by information on the part of the public prosecutor, with the concurrence of some magistrate or judge.

(2) An indictment should be short and simple. It should briefly state the nature of the crime and only such facts as are necessary (a) to enable the accused to know what is the offense with which he is charged and where and when it was committed, and (b) to enable the court to enter such a judgment as will prevent a second prosecution for the same offense. All of that could be stated in any case in five or ten lines.

(3) The prosecutor should have the right to amend the indictment at any time, provided the whole character of the crime is not changed and the accused is given the right to a continuance, when necessary, to get new proof for his defense.

(4) The rules of procedure should be held to be directory, not mandatory. In the appellate court the accused should be allowed to complain only of an abuse of the trial court's discretion in passing upon such questions. Even if the trial court erred in preventing him from producing proper evidence, or in admitting incompetent evidence, or in giving an erroneous instruction, a new trial should not be ordered, unless the court has a reasonable doubt of his guilt or unless the trial court abused its discretion.

(5) The press should be allowed to publish only a report of what actually occurs in court. It should not be allowed to exploit, in a sensational way, the anticipated evidence in cases to be tried or to publish exaggerated or biased accounts or to express opinions of a case actually on trial.

(6) Jurors should not become disqualified because they have read of the crime in the newspapers or heard rumors about it or formed hasty opinion on such newspaper reports or rumors, if they can still, in the opinion of the judge, give the accused a fair and impartial hearing. The present method of allowing lawyers to spend days and weeks and months in the interrogation of jurors should be forbidden. It is an abuse that makes a fair trial almost impossible, eliminates the most competent jurors and brings the courts and the law into contempt. At common law, in olden times, juries were selected from the neighborhood, because they were presumed to know some of the facts, at least.

(7) Expert testimony should be carefully regulated; hired partisan

experts should be carefully tested and scrutinized by the court; their number should be limited and their fees regulated. They should not be allowed to receive large fees or contingent fees to warp their sworn opinions.

(8) Nine or ten jurors should be allowed to render a verdict. Unanimity is obtained only by a compromise of conscience in most cases. One or two corrupt or stubborn or ignorant jurors should not be allowed to prevent a verdict. The appellate court can protect the innocent. A majority verdict was allowed by the ancient law of Rome and is allowed now by the modern law of Germany and other European countries.

(9) The accused should be allowed to remain silent, but his silence ought to be a fair subject for comment. The state should have the right, in an orderly way, to compel him or anyone else to produce any paper or thing that may be important in the trial.

(10) Perjury should be more promptly prosecuted and punished. It is a growing evil and an awful hindrance to justice.

(11) Jury service should be exacted of our best citizens, but the jurors should be treated with more consideration.

(12) The state should have the same number of peremptory challenges as the accused and the number should be smaller. Either party should have a right to a change of venue when a fair trial cannot be obtained in the county where the accused was first charged with the offense.

(13) A transcript of the evidence of a dead, insane or unavoidably absent witness of a former trial should be competent evidence in a second trial.

When a lawyer is retained to defend an accused man his first effort is to get delay. He wants time, that public sentiment against the criminal may die out, that prosecuting witnesses may be weakened or become uncertain as to the details of their testimony, and that some may die and others move away. When a trial is reached, every possible effort is made to get some technical error into the record on which a reversal in the appellate court may be asked and further delay secured. As time passes the probability of conviction and the degree of punishment become less and less. As final punishment thus becomes uncertain, and as it follows long after the offense, there is no deterring effect upon other persons of criminal instincts. The most popular criminal in America seems to be a murderer. It is said that in the United States, in 1896, for each million of the population there were 118 homicides; in Italy, less than 15; in Canada, less than 13; in Great Britain, less than 9; in Germany, less than 5.

Petty offenses in Ireland are promptly disposed of in the small courts. When the higher judges, in their circuit, come to any town where there is not a single criminal case to be tried the town officers, with impressive formality, present the judges with a pair of white kid gloves. This ceremony is quite often carried out, even in towns of considerable size. Before we can reach that condition here, radical reforms must be made in our legal procedure and there must be a change in public opinion and in our religious and moral standards.