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SOME NEEDED REFORM IN CRIMINAL PROCEDURE¹

JESSE L. DECK²

Members and visiting friends of the Illinois State Branch of the American Institute of Criminal Law and Criminology: I salute you with a hearty welcome to this, the sixth annual meeting of the Illinois branch of the national organization which has as its most commendable object "to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and co-ordinate the effort of individuals and of organizations interested in the administration of certain, speedy justice."

It is said that "the greatest study of mankind is man."

Accepting this proverb as true, there is great necessity for the existence of this society of which we are members and of fostering its principles for the reason that here we are endeavoring to so arrange human affairs that the individual in both his private and public relationships will accomplish the greatest amount of good in this life, first by preventing, so far as possible, inclinations toward crime, and secondly, where crime has been committed to work a restoration of the offender to a self-respecting life and to a useful position in society

An organization working along such lines commends itself to all who regard the highest interests of society, and has a right to demand of us our careful thought and a maximum of our co-operative effort.

Being a State's Attorney engaged in the active administration of the criminal law of the state, I take it that this body would be more edified by my consideration in this address of some needed reforms in our criminal procedure, as I view the matter as a practitioner, rather than by any effort I might make at a consideration of the criminal from a scientific viewpoint which I would be illy prepared to do before a body of persons such as are here assembled, who have thought deeply along those lines.

I take it that in your selection of a man who is actually engaged in the administration of the law, that this action was taken with the expectation that he would take this turn in the matters appearing in his annual address.

¹Presidential address before the annual meeting of the Illinois Society of Criminal Law and Criminology, Danville, Ill., May, 1917.

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I understand also that the prevailing thought in the meeting of the bar association in session at this time, is as to matters which should be considered in connection with the drafting of a new state constitution and as some of the suggestions I shall make are to be considered in this connection, my suggested line of thought will be at least somewhat in keeping with the hour.

Being the chairman of the Committee on Criminal Law and Criminology of the State Bar Association this year, you need not be surprised if the suggestions here made are quite similar to those contained in the report of that committee to the State Bar, as your president happened to be close by when that report was prepared and concurs in all the reforms in criminal procedure there made. However, I feel that the measures there suggested are of sufficient importance to have the consideration of this body as well as that of the State Bar Association and the co-operation of both organizations in working out their passage into law.

Under the law of Illinois jurors are, by statute, made judges of the law as well as the facts. For many years it has been considered by our best legal talent that this is an ill-advised statute. At the opening of the case the juror takes an oath to well and truly try the issues joined in the case and to render a true verdict according to the law and the evidence. The case is tried upon certain theories of the law presented by the two contesting sides. The judge instructs the jury, particularly giving them the statutory definition of the crime involved and as a part of the statement of the law in the case. Along with other instructions the judge of the court at the request of defendant's attorney tells the jury that they are not only the sole judges of the facts but also they are the judges of the law of the case, and that they have the perfect legal right to disregard all that the judge has instructed them as to the law and themselves determine the law, provided they can, upon their oaths, say they are better judges of the law than the judge himself is, taking into consideration his superior means of knowing the law because of study and legal training.

Under this instruction the jury at once becomes the legislature and the court, and may say that the law should never have been passed, or that it was illegally passed or that the word black means white and that the legislature didn't mean by the statute what it said, or that the statute is unconstitutional and void, even if the Supreme Court has ruled a dozen times that it is constitutional.

This statute is certainly an anomaly and at the same time an enigma in our jurisprudence. If there ever was any justification for its being a part of our law it would seem that the reason therefor has long since ceased to exist.

Following it to its logical conclusion, our Supreme Court was, in the very recent case of the *People v. Zurek*, 277 Ill. 620, compelled to hold that the trial court is without power to direct a verdict for the defendant even in a case where the evidence is so flimsy that the court knows, before verdict, that the verdict will not be allowed to stand for the reason that under this statute the jury is made the judge of the law as well as the facts and the court cannot, preemptorily, interpret the law for the jury. A fine situation, indeed, for a court, of any respectability to be in, isn't it?

Our courts should not be so impotent but should be clothed with legal authority to direct verdicts for defendants where the evidence will not justify verdicts and thus put an end to useless and expensive litigation.

This troublesome situation could be remedied by the simple repeal of the statute mentioned.

AMENDING INDICTMENTS.

Power should be conferred on the prosecutor to amend indictments in form as well as substance as long as the amendment is in furtherance of a legal statement of the offense for which the grand jury found the indictment.

Under our system of legal machinery, the indictment is framed by the prosecutor anyway and the grand jury has simply adopted his language in making the charge. Consequently where some mistake has intervened to invalidate the indictment why should not the power be extended to the person who drafted it to correct such error and thereby breathe into it the breath of life and at the same time make it say just what the grand jury intended it should when they voted the bill?

This plan would frequently be of benefit to the defendant as well as of advantage in dispatching the business of criminal courts by saving the defendant from awaiting in jail for months before another grand jury convenes to try its hand on a new bill in his case.

In case such amendments as those proposed, worked prejudicial surprise to the defendant the statute could provide for continuances in those instances, giving him ample time for preparation for trial.

ABOLITION OF THE GRAND JURY.

In view of what I have said as to amendments to indictments I anticipate that some will say why not obviate the difficulty suggested by abolishing the grand jury entirely, which could be done by statute and give the State's Attorney the power to institute all prosecutions by filing informations in our trial courts as is the law and practice in some of our states.

I did not suggest that because I do not agree with many of the members of the legal profession who feel that this ancient institution should be abolished.

In my judgment the grand jury has its place.

It is an open investigating and accusing body to which all have access.

Where one initiates all prosecutions he wields a tremendous power and is under an over-burdening responsibility.

When prosecutors happened to be in office, under such a system, who did not see fit to do much at prosecuting, the community would suffer greatly.

No man will occupy this office long until some of his personal or political friends will be in the toils of the law somewhere, and, in such cases he is made glad that there is a body with the power to prefer the charge. In such cases it is plain to be seen that without the grand jury the prosecutor might be very slow to start proceedings against such persons, whereas, with the grand jury, preferring the charge he can try his case without embarrassment in the discharge of his every-day duty.

However, I do think that the number of grand jurors could very properly be reduced in these days of newspapers and rapid transit of news.

When the system was originated it was so designed that there would be a representative present on the grand jury from every little neighborhood of the county so that there would be some member of that body who knew of every crime of any consequence occurring in every neighborhood in the county.

In these days when we read before breakfast what was transpiring in all the nations of the earth the day before, the reason of having so large a number on the grand jury no longer exists.

In this day seven is an amply large number of persons to constitute a grand jury. They could do all that is required of that body just as well, with more dispatch and with far less expense to the county.

Under the present plan it isn't an infrequent thing that it costs the county from \$40.00 to \$50.00 each for the mere returning of the indictments that the legal machinery may be set in motion for the trial of defendants.

By reducing the number of grand jurors this expense could be materially curtailed without the loss of any efficiency.

PEOPLE SHOULD HAVE REVIEW.

The people should be allowed to have a review of the decisions of our trial courts in rulings upon matters of criminal pleadings which is now denied them in Illinois.

Under our present practice if the trial court quashes the indictment, that is an end of the case whether the court is right or wrong in the ruling.

This right of review, it is perceived, should be granted the people in the interests of substantial justice.

PAROLE SHOULD BE EXTENDED.

My practice has demonstrated to me that the benefits of the parole statute should be extended to prisoners serving sentences in our county jails. At the present time it has no application to these prisoners. Under the present system when the term of court is closed at which sentence is imposed, the court is powerless to modify the sentence.

I have seen many cases where unforeseen circumstances have arisen under which, in strict justice, there should have been a modification of the sentence and where the trial judge wished he had the power to modify the sentence, but found himself powerless, because the term of court was adjourned at which the sentence was imposed. Physical conditions often arise where this course would be advisable rather than through the circuitous route of a pardon by the governor.

Under the plan proposed the prisoner near the close of his sentence, upon application, could be placed upon parole and thus be placed under surveillance of a parole officer to assist him in obtaining and continuing in honorable employment and to teach him how to live honestly and to the best interests of himself and society.

After being under such tutelage for a year the prisoner, in many instances would be reclaimed to society, whereas under the present system he is liberated from the county jail at the end of his sentence, usually without means of support or employment, with the result that he frequently goes back to old associates whose companionship is detri-

mental to his welfare and often back to the same practices which caused his arrest in the first place, only to again be brought to other or greater trouble than before.

The parole system has proven itself to be of great benefit to prisoners in our penitentiaries. Is it not time now to take another advance step and extend its benefits to prisoners who are serving sentences in our jails and work houses?

The administration of such a statute could be given over to some county officer without any additional expense, or with but slightly additional expense to the county.

AGE OF RESPONSIBILITY SHOULD BE ADVANCED.

I am impressed with the fact that the age at which children may be found to be delinquents should be raised from the present maximum age of 17 for boys and 18 for girls. It should be at least 18 for boys and 20 for girls, in my judgment. There are many girls between the ages of 18 and 20 who could be saved from lives of debauchery if the courts had the power to handle them as delinquents, thus exercising supervising control over them.

By raising the age, suggested as to females, males would frequently be deterred until girls are two years older from doing those things which tend to lead them astray, for fear of prosecution for doing acts tending to render them delinquent.

So many girls are of immature judgment at 18 that the present statute in many cases falls short of accomplishing the good for them that it should.

Under the present statute, after the girl is 18 years of age, the court has no control over her actions, excepting she may be convicted of crime, and is powerless to commit her to a training school where she could be trained in decent living.

The use of the delinquency statute has demonstrated to my satisfaction, particularly in the case of girls, that it could be made much more efficacious if the existing age limits were raised as suggested.

SPEEDING UP JUSTICE.

In the matter of the working out of *speedy justice* our law should be such that the verdict of a jury may be constituted by an affirmative vote of less than twelve jurors.

In civil as well as misdemeanor cases nine affirmative votes should be sufficient to constitute a verdict, and this reform could, even with much propriety, be extended to include felonies, capital cases excepted.

By this reform the one stubborn juror will be eliminated, in most cases justice more expeditiously dispatched, and chances for designed miscarriages of justice will be greatly reduced.

When the gravest felony cases go to the Supreme Court, a concurrence of a majority of the judges is all that is required to constitute a judgment by that tribunal. It would seem that a concurrence by three-fourths of the jurors trying a case, either civil or criminal, capital cases possibly excepted, would be sufficient to guarantee a proper administration of justice, especially with the trial judge sitting nearby to grant a new trial in cases of verdicts that are not justified by the evidence.

THE IMMUNITY STATUTE.

The immunity statute which applies to cases of bribery and attempted bribery only, should be extended so that it is of general application in criminal cases.

It is a very effective statute in the cases to which it applies. In cases of bribery and attempted bribery the court is empowered to make an order of record exempting a witness from prosecution himself, because of any criminal connection he may have had with the affair, and then compel him to testify to all facts in his possession pertaining to the case.

Why should so effective an instrument in the administration of criminal law be so circumscribed and limited in its operation as it is by the present statute?

Suppose a case where twelve men are engaged in unlawful gaming or any other unlawful enterprise, excepting in the cases mentioned in the statute. Under the present law all they have to do is to keep silent when they are brought before the grand jury or court and claim their constitutional privilege, and no evidence is to be had in the case.

Would it not be well, in the interests of justice, for the law to be such that the court could give two or three of such persons immunity from punishment and then compel them to testify?

In this case some could be brought to justice and the unlawful practice involved discouraged, while under the present status of the law all the offenders go unwhipped of justice. For a more detailed discussion of this subject by the writer see the February issue, 1916, of the "Illinois Law Review."

SECRECY OF GRAND JURY SESSION.

There should be a statute making it a criminal offense for a witness before a grand jury to divulge what was there asked him.

The effectiveness of the work of the grand jury is frequently impaired by witnesses going out and publishing to the world the persons who may be under investigation. At the present time, the court can handle this matter so far as the jurors themselves are concerned, but seems to be powerless to control the actions of witnesses after they have been discharged. If the witness could be given to understand that he was legally bound to secrecy, the administration of the criminal law would be materially strengthened.

BASTARDY STATUTES.

There is no prosecutor anywhere in Illinois, and but few general practitioners, but who have been profoundly impressed with the impotency of our bastardy statute. The present statute is antiquated and altogether inadequate from the standpoint of justice.

In the first place it provides a maximum amount of \$550.00 to be paid by the putative father upon conviction for the support of his offspring, and the father has the right to scatter this out in installment payments covering a period of nine years. In the present day this maximum amount is wholly insufficient to buy the child the necessities of life, to bring it up to school age to say nothing of providing any education for it.

In the next place bastardy should be made an extraditable offense so that the putative father could be apprehended anywhere any brought back for trial.

Under the present law, when he leaves the state of the mother's residence she is powerless to bring him back for trial and in many instances is not only compelled to bear her shame and disgrace alone but single-handed to provide the means for the support and education of the child. A law with such inherent weakness is the merest makeshift and should no longer incumber our statutes.

A statute should displace it subjecting the putative father to extradition for trial, and also with sufficient breadth, upon his conviction, to compel him to support and educate his offspring to the same extent that a legitimate father is required for his child. A statute with less power than this is an unjust discrimination against the bastard child who is in no way responsible for his situation.

For a number of years attempts have been made to get some legislation along the lines suggested, and it does seem that we should be to the point now where the present statute could be supplanted by a more just and humane one.

COMPULSION OF WITNESSES.

I am impressed with the fact that legal authority should be vested in some officer, likely best in the State's Attorneys or Chiefs of Police, so that witnesses could be compelled to come before them, and under constitutional guarantees, be compelled to state what evidence they may know concerning the commission of recent crimes, to assist the authorities in obtaining the facts while they are fresh in the minds of the witness and before unrighteous and smuggling influences have had an opportunity to intervene.

In all of the counties outside of Cook, it is sometimes months after a crime is committed before a grand jury convenes, and aside from the grand jury there is no legally constituted agency with authority to compel witnesses to answer questions. The witnesses should also be required to answer under oath under the pains and penalties of perjury.

At the present time the State's Attorney and Chief of Police may invite the witnesses to come to their offices for interviews, but there is no compelling power behind it and if, perchance, they come there is no law requiring that they shall answer the questions truthfully.

The statute I have in mind is the present statute pertaining to the authority of the Fire Marshal and his deputies, extended so that it is of general application in all cases and so arranged that it may be of use to State's Attorneys and Chiefs of Police who are particularly charged with the administration of our criminal statutes.

The splendid work done by our Fire Marshall and his assistants during the last three or four years has only been possible because of this statute that gives them power to call witnesses before them and to compel them to tell the truth, under the pains and penalties of wilful perjury concerning suspicious fires.

This statute has demonstrated itself to be of such efficiency in breaking up arson rings and fire-bug combinations that I am convinced that such right of inquiry should not be limited to supposed arson cases, but extended to proper officers in all criminal cases. By such a statute law enforcement would be greatly aided.

COMMENT ON DEFENDANTS FAILURE TO TESTIFY.

The statute should be repealed which prohibits the prosecutor from commenting upon the failure of the defendant in criminal cases to take the stand and testify in his own behalf.

In civil cases the defendant's failure to contradict the plaintiffs

evidence by his own testimony is one of the strongest weapons in argument against him.

In criminal cases it is perceived there is just one reason for the defendant's failure to contradict the position taken by the state against him, and that is that for him to do so may subject him to a prosecution for perjury.

If it is true that he is a law violator as charged in the indictment, and he is in practically every case where he fails to testify, it is perceived that there is no good reason in justice why he should be shielded by a statute that places a muzzle upon the prosecutor and refuses him the right to say that the defendant himself has not denied the case made out against him, and this being true why should the jury do that for him, or to use other similar arguments. If there ever was any good reason for the statute mentioned it would seem that it has long since failed. I have heard much discussion concerning this statute and have never yet heard of a single satisfactory reason for burdening our statute books with this nuisance of a muzzle.

FILING INFORMATION.

In redrafting the state constitution, provision should be made that in a case where a defendant is arrested on a felony charge and desires to plead guilty at once, the State's Attorney may file an information immediately in the Circuit Court and the court at once, either in term time or vacation, take his plea and pass sentence.

It frequently happens that a person is arrested in such cases just after the adjournment of a grand jury and desires to plead guilty to the charge and begin serving his sentence without delay.

Under the present law of Illinois, felony charges must be preferred by a grand jury so that in the case suggested the prisoner, if unable to give bail, must be in jail for months for the convening of the grand jury and returning of an indictment by that body before he can have the privilege of pleading guilty. All the time he has spent in jail is absolutely lost to him and an expense to the county, while under the plan suggested he could, during the same period have his time partially served out in the penitentiary while he would otherwise be languishing in jail for the convening of a grand jury.

Where a defendant has had a preliminary hearing before a Justice of the Peace it is perceived that there is no real necessity to again take the time of a grand jury to consider the same case.

While amending the constitution I propose that where a person has been held by an examining magistrate that he be not held to

answer to an indictment preferred by a grand jury, but to an information filed against him by the State's Attorney, and that the mere fact that he is held by the magistrate shall be sufficient to require the prosecutor to file an information in the case, both in misdemeanor and felony cases.

These are days of efficiency in business, and our criminal law should keep pace. I suggest this plan as a means of expediting the administration of the criminal law and making the administration of the criminal law more effective and businesslike at less expense.

In a preliminary hearing the Justice of the Peace considers two questions. First, Has a crime been committed? and, second, Are there reasonable grounds for believing that the defendant charged committed it? If he answers both of these questions affirmatively he binds the defendant over to await the action of the grand jury. The defendant then waits in jail, possibly for months, if he cannot give bail, and finally a grand jury is convened that considers the same case.

Precisely the same questions are before the grand jury that were before the examining magistrate, and if the grand jury answers the same two questions affirmatively an indictment is found. Why this double hearing with its incidental delay and expense?

The suggestion is that when a magistrate answers the two questions affirmatively from the evidence before him, that this shall *ipso facto* require the State's Attorney to file an information at once against the defendant in any court having jurisdiction to finally dispose of the case without the circumlocution of the grand jury again hearing and passing again upon the precise case. One hearing and one expense incidental thereto should be sufficient in such cases. In the event of the filing of such informations the law should be such that the defendant could plead at once, if he desires, either in term time or vacation, for the reasons previously stated.

CONCURRENT JURISDICTION FOR COUNTY AND CIRCUIT COURTS.

To relieve the congestion in our Circuit Courts, I would suggest that in counties in which the probate and county courts are separated that the County Courts be vested with concurrent jurisdiction with the Circuit Courts in all criminal cases, providing that such County Courts can try such felony cases, as well as misdemeanor cases, as are certified to them by the Circuit Courts, and providing for the certifying of felony cases in the discretion of the Circuit Court as well as misdemeanors to such County Courts for trial.

In this paper I have made suggestions as have occurred to me

as worthy of consideration by those who are interested both in the welfare of the criminal, and in the expeditious administration of the criminal law.

If upon consideration of the reforms proposed any of them appear to be worthy of the effort of this society to the end that they may be passed into law, I trust that we may get vigorously behind any such and use the influence of this organization in bringing about their passage by the legislature, for after all our meeting and discussing and resolving can only come to fruition when our suggestions have been crystallized into law, and if we fail here we shall largely fail in our effort.

This initial address of our meeting this year would be lacking, it seems to me, if I did not at least suggest that possibly the greatest crisis in national history is upon us, when democracy is to be tried out and tested out as never before.

May the principals for which we stand nationally, as a people, be loyally supported by every member of this organization, to the end that the blessings of liberty, of conscience, of speech, and equality before the law which we possess may be enjoyed by mankind everywhere.

May we stand every man in his place round about the camp as did the Israelites of old, and may our effort be so ordered that victory may come to our arms and tyranny be driven from the face of the earth. When this has come to pass we will observe that which the poet foresaw with a prophet's eye when he beheld the day:

When navies are forgotten
And fleets are useless things,
When the dove shall warm her bosom
Beneath the eagle's wings;

When memory of battles
At last is strange and old,
When nations have one banner
And creeds have found one fold;

When the hand that sprinkles midnight
With its powdered drifts of suns,
Has hushed this awful tumult,
Of sects, and swords, and guns;

When hate's last note of discord,
In all God's world shall cease,
In the conquest that is service,
In victory that is peace."