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PROPOSED REFORMS IN ILLINOIS CRIMINAL LAW AND PROCEDURE¹

JESSE L. DECK²

At the 1921 session of the Illinois State Bar Association the Committee on Criminal Law and Criminology, of that organization, made certain recommendations along the line of improving the administration of the Criminal Law of the state. It has been suggested that there is sufficient general interest to merit further mention and amplification of these matters in the JOURNAL that deals particularly with matters of needed reforms, along this line.

Upon request of the editor, the author, as chairman of the committee mentioned, takes pleasure in performing that service in the hope that the suggested improvements may be made, if found to be meritorious, not only in Illinois, but in other states where similar reforms are needed.

1. It was recommended that the sitting Constitutional Convention make constitutional provision authorizing the state's attorney to file informations in felony cases, making provision also for indictment by grand jury when desired, reserving authority to the presiding judge to call a grand jury when in his judgment public necessity demands it.

There are many felony cases where all the facts are known to the prosecutor. In these instances nothing is gained by having it investigated by a grand jury at the expense of witnesses, officials and taxpayers.

Frequently, upon arrest, the defendant admits his guilt and desires to plead guilty. Under the present system, if unable to give bail, he is frequently required to languish in jail for months before the convening of a grand jury which may consider his case and authorize an indictment against him, to which he may plead guilty.

In the interests of such defendants and the speedy administration of the law, the filing of an information by the state's attorney in such cases would be an advanced step and a humane provision of the law.

In states where the law authorizes the proposed procedure, grand juries are seldom called, thus saving much expense to the taxpayers

¹Read before the annual meeting of the Illinois State Bar Association at Dixon, Ill., July 3, 1921.

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and waste of time to the courts and officials who have to do with them. At the same time the benefits of the grand jury are preserved; for in special instances they may be called, when the presiding judge considers an investigation by that body to be of public interest.

As a corollary to the proposed provision, legal authority should be vested in the courts to accept pleas of guilty under felony informations during recess of court and in vacation, as well as in term time.

2. Recommendation was made for the reduction of the number constituting the grand jury to nine resident citizens of the county instead of twenty-three, as now provided by law, with the further provision that seven of that number constitute a quorum and that the concurrence of five of the jury should be sufficient to authorize an indictment. The original purpose in providing for twenty-three grand jurors was so that every community in the county would be represented thereon, to the end that no crimes committed in the county would escape the attention of that accusing body.

In these modern times, and days of the swift dissemination of news, when in our newspapers today we read the current events of Japan and all other foreign nations of yesterday, this necessity no longer exists. All events of any importance in the county are now reported in our various county seats promptly through the mediums of frequent mails, newspapers and telephones, and it is therefore unnecessary for all corners of the county to be represented on the grand jury to prevent the oversight of matters which that body should investigate.

The reduction of the number, as proposed, would make a much more wieldy body and very materially curtail the expense attending the same.

3. The report recommended the extension of legal authority to the state's attorney to amend indictments in matters of form and also of substance so long as the crime charged by the amended indictment is the same as that voted by the grand jury and attempted to be stated in the indictment.

Under our present system if the crime charged by the grand jury is imperfectly stated in the indictment, from a legal standpoint, upon motion the indictment is quashed by the court and the time of another grand jury must be taken by an investigation of the same matter, the witnesses again inconvenienced and caused to suffer the loss of their time while attending before the second grand jury, the expense of a subsequent investigation is cast upon the taxpayers, and if the defendant is unable to procure bail he must languish in jail until the convening of another grand jury, at a later term of the court, when his

case may be re-investigated. The administration of the law in such cases is made to lag, whereas, in the interests of good government, it should be expeditiously administered.

It would seem that no injustice could result to the defendant by making effective this proposed reform; for, at best, the indictment is in the language of the state's attorney who prepares it, and if amended, as proposed, it but speaks that which the grand jury intended when the indictment was voted, and it would seem that the defendant has no just right to expect that it should be otherwise.

If the proposed amendments could legally be made, the particular case could proceed to trial without delay, further annoyance to witnesses and the expense involved by the necessity of the return of a new indictment by a grand jury upon the same facts.

Should real surprise result because of such amendments, upon a proper showing by the defendant, the court could grant him further time for the preparation of his case, and all his rights be thus protected.

4. It was proposed that the present immunity statute of Illinois, which is now limited in its operation to cases of bribery and attempted bribery, be extended by law to make it of general application. No good reason is perceived why this salutary statute should be so limited as it is in its provisions.

The proposed immunity statute would provide most effectual means for ferreting out crimes where under existing law in many cases it is quite impossible to obtain the facts, or if obtained, to get them in usable form.

Under the present law, excepting in the two cases mentioned in the statute, a number of persons may be engaged in the prosecution of an unlawful enterprise, and if they all claim their constitutional privileges against giving evidence which might tend to incriminate themselves, no evidence of the commission of the crime can be had, and all go unwhipped of justice.

The proposed statute would authorize the court to enter an immunity order as to some of the parties to the crime and compel them to furnish evidence upon which others could be tried, and thus prevent a total failure in the administration of justice in such cases.

This would materially aid in procuring evidence in gaming cases, cases against disorderly houses, riots, conspiracies and in many others that readily suggest themselves. From the standpoint of the prosecutor, whose business it is to enforce the law and to make it a living power for the general welfare, this reform is much needed.

The federal courts have used such a statute with most telling effect in many cases and it is submitted that to allow the present impotency of the law in this regard to continue is inexcusable and itself a crime against the common good.

5. It is proposed that the law be amended allowing payment of a moderate fee to lawyers appointed by the court to defend pauper defendants, to be paid out of the county treasury of the proper county.

The justice of this provision would seem to be clear upon its face.

No fair-minded person expects another to render services by which he earns his livelihood without just compensation, and therefore any constitution or statute which compels such service is pernicious and should be so changed and modified as to comport with fair play and justice.

Under the Illinois Constitution, Article II, Section 9, the accused in a criminal case is given the right to defend in person and by counsel. By Section 2 of Division XIII of the Criminal Code it is provided, among other things, that if a defendant in a criminal case is unable to procure counsel, the court shall assign him *competent counsel*, who shall conduct his defense. The Supreme Court has held that as one of the burdens of his office an attorney so appointed must serve, and serve gratuitously.³

The committee which prepared the report believed that necessary steps should be taken to correct the injustice worked by the administration of the present law in this respect.

6. The people should be given the right of review by the appellate tribunals upon matters pertaining to criminal pleadings.

Under the existing law, if the trial court, erroneously, holds that an indictment or information fails to charge the defendant with the commission of a crime, a motion to quash is sustained and the people are without recourse so far as a review of such ruling is concerned. This is seemingly a defect in the law which could and should be remedied in the interests of substantial justice.

To illustrate: Assume that one of two joint owners of a building burns it under circumstances when, if owned by a stranger, the offense would without question be arson; and suppose that upon a motion to quash the trial court should hold that since the defendant was a part owner of the property burned he did not commit arson, for which reason the indictment is quashed; and suppose further that the Supreme Court had held or would hold that such facts did make out a case of arson. The effect of a failure to review such ruling upon the

³*Vise v. Hamilton County*, 19 Ill. 78.

pleadings is in all probability to deprive the people of the right to ever have that case tried and the defendant brought to justice.

Many similar cases will suggest themselves, and it is but stating a fact to say that many injustices have undoubtedly been done by erroneous rulings along this line, from which the people have no recourse under the present law.

In the interests of the common good, why should this defect not be remedied?

7. The probation statute should be amended, giving authority to the presiding judge to impose such additional conditions to probation to those now imposed by law as to the court may seem peculiarly fitting to the particular case. The present statute imposes certain general probation conditions only.

There are cases where there are present certain special causes which contributed to the commission of the crime, or might work a breach of the probation, such as the inordinate use of intoxicating liquor or drugs, etc., against which the court should be authorized to impose special conditions for probation.

In such cases the court should be given the right to impose the special condition that the defendant shall refrain from the use of such things, which, if he fails to do, a *legal* breach of the conditions of probation may be assigned.

It is not sufficient to say that courts do impose such special terms, for their actions in this regard are not authorized by statute and are without any binding effect. This liberty so exercised by the courts, if it is, should be made lawful and effective. As it is, the statute is impotent in this very material respect.

8. The statute should be repealed which prevents reference by the state's attorney in argument to the defendant's failure to testify in his own behalf in criminal cases.

The purpose of a trial of a criminal case is to determine the guilt or innocence of the defendant of the crime charged.

If a defendant is not guilty of the charge, it would seem that he should be determined to take the stand and explain why he should not be convicted.

If he is guilty and fails to testify, it would seem that there is no sound reason why his failure to deny the charge should not be the subject of comment by the prosecutor.

At the present time, if before trial he stands mute when accused of the commission of the crime, that fact may be shown against him in evidence and argued to the jury as a tacit admission of his guilt; at

least the jury may consider his failure to deny such accusation in determining his guilt or innocence. Upon principle it would seem that the people should have the same right to argue his failure to reply when accused upon the trial.

In civil suits the fact that the defendant has made no denial of the plaintiff's claim is one of the most formidable weapons used against him in argument.

It is difficult to understand why any distinction should be made between civil and criminal cases in this respect.

9. It was next suggested that it be made a felony for any person, aside from peace officers while on duty and persons otherwise authorized by law, to carry deadly weapons concealed about their persons.

It is perfectly apparent that the purpose of such a statute is to reduce crimes of violence in which such weapons are used.

The effective enforcement of such a statute, it is believed, would reduce murders in the state fully fifty per cent. Many of the murders are in the heat of passion arising out of arguments between the parties. In cases of such arguments murders are not likely to happen if no such weapons are present.

10. The report proposed to make it a felony for a man to desert his wife, without reasonable cause, within eighteen months of his marriage, where the marriage was to abate prosecution for bastardy, rape, seduction or any other crime where abatement of prosecution is worked by marriage.

This suggestion is made because of the frequency of marriages to abate such prosecutions which are not contracted in good faith, and where the husband immediately deserts the wife after his criminal case has abated because of the marriage.

A statute such as the one proposed would cause men to be slow about deserting their wives in such cases, and in many instances would no doubt result in a lasting union between them. It is believed that all students of criminal law and procedure will be impressed with the efficacy of such a statute.

11. It is proposed to make more effectual the statute designed to prevent marriages within certain periods of time after divorce by making it possible to prosecute the felony, provided by the statute, either in the county in which the unlawful marriage takes place or in which the parties may subsequently cohabit; such as may be done under the bigamy statute.

The present statute is made, largely, a farce by people going out of the state and contracting marriages contrary to its provisions and

then coming back to Illinois and flaunting themselves in the face of the law.

Since the unlawful marriage in such case was not contracted in Illinois, the felony provided by the statute cannot be prosecuted here. The best that can be done, in the matter of criminal proceedings, is to prosecute the parties for living in an open state of adultery or adultery and fornication or for disorderly conduct, all of which are misdemeanors, and wholly inadequate to properly meet the situation, and, being so, are frequently ignored in toto.

If the venue section of this statute were so amended that such parties could be prosecuted for the felony provided by the statute in any county in which they cohabit subsequent to such illegal marriages, this offense would be almost entirely eliminated, whereas under existing law it is growing daily.

Under the proposed statute an illegal marriage out of the state in such cases would not protect the parties from prosecution for the felony provided by the statute.

Another way to make this statute effective along the line indicated would be to so amend it that a divorce decree would not become absolute and effective to the extent of permitting a new contract of marriage by the parties until the expiration of the prohibited period provided in the statute.

The present statute is working so many hardships, both as to property rights and domestic relations, that its immediate amendment seems of prime necessity.

12. A statute was proposed making it a felony for persons confined in county jails, either awaiting trial or serving sentences, to break jail.

Many persons are surprised to learn that there is no direct statute in this state against such an offense. Our failure to have such a statute is only a premium upon this thing from which so many of our counties suffer. It is believed that a statute squarely dealing with the subject would materially reduce this trouble in Illinois.

One of the first questions asked by an escaped prisoner from an Illinois jail who was captured in Missouri was whether or not it was a felony to break jail in Illinois, and when he was told it was not he was reassured. It would seem that the only punishment now provided by statute is by way of a collateral proceeding for malicious mischief for causing damage to the building in the escape.

13. To make the work of grand juries most effectual their

proceedings should be secret. In contemplation of law their investigations are secret, but not so in practice.

It is proposed to make it a misdemeanor for witnesses before that body to divulge any of the proceedings during their presence there.

At the present time there is nothing to prevent witnesses from publicly divulging all that transpired while they were before the grand jury, and that they frequently do is a matter of common knowledge. This often interferes with the efficiency of the work of the jury by giving defendants notice of the investigation and an opportunity to escape or to bring unjust pressure to bear to prevent an indictment, or both.

14. It was proposed to amend the bastardy statute, making it an extraditable offense. At the present time bastardy is a civil and not a criminal proceeding, and if the putative father crosses the state line he may, with impunity, defy the law and is as safe from prosecution for bastardy as if he had never been in the state.

This often works great injustice both on the prosecutrix, who is called upon to bear her shame alone, and to the offspring, who has the moral right to the support of the man who brought it into being and also to a legitimate birth into the world.

This is a matter which, it would seem, has been too long delayed.

15. It is proposed to amend the statute which requires a trial of defendants within four months of their incarceration in jail, giving the presiding judge the right to extend the time of such trial, upon a proper showing by the state's attorney, where it appears that trial cannot be had within the four months' period, when failure to proceed within that time is no fault of the prosecution.

This proposed amendment arises out of the necessities of Cook County, where, because of the vast volume of business before the courts, it is sometimes impossible to hear all the criminal cases within the four months' period. If the situation is such that the courts cannot hear all the cases within four months after arrest, it would seem that the proposed amendment should be made in the interests of the commonwealth.

16. It is believed that the time has come when the law should provide for a verdict by the affirmative vote of three-fourths of a jury, instead of a unanimous verdict, in both civil and criminal cases, capital cases excepted, and this was so recommended by the committee.

This provision would be as fair to the defendant as to the people and would dispense with the one "obstinate" juror who frequently

delays the conclusion of litigation, and would also reduce to a minimum the matter of unlawful tampering with juries.

In the Supreme Court a bare majority of the judges determine the decisions of that court involving issues of life and death and the financial fortunes of our citizens.

The trial judge, sitting as the thirteenth arbiter, is always present with full power to grant a new trial if he believes the verdict is contrary to the weight of the evidence, and with this situation present it would seem that all the legal rights of the defendant would be amply and completely subserved by this proposed innovation, and justice in consequence would be much more expeditiously and effectively administered.

17. With the fast growing menace to the public health from venereal diseases, made so apparent in the examination of soldiers for service in the World War, it was proposed that the law be amended providing more severe penalties in cases of convictions for conducting houses of ill-fame.

A graduated punishment was proposed, providing a penitentiary sentence for a third conviction for this crime. This amendment is proposed as a step in the right direction in the eradication of this baneful influence to public health. More drastic regulations as to the segregation and quarantine of persons afflicted with such diseases would also produce most wholesome results along these lines. The time has now come when this menace to the physical well-being of our citizenship must be faced and curbed or the decay of our mental and intellectual powers as a nation is inevitable.