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THE FUNCTION OF CRIMINAL PLEADING¹

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In the United States the scope and content of the indictment have been determined by two general factors: first, the rule to be found in all our constitutions to the effect that the accused shall be fully informed of the accusation against him, and secondly, the rule of judicial law that the accusation shall express all the constituent elements of the offense charged. Sometimes, naturally, these two requirements coincide: full information to the accused is impossible without a statement of all the constituent elements of the crime. But sometimes, again, there is no such coincidence: a given constituent element of the offense may be of no conceivable utility in conveying information to the accused. Thus in a prosecution for statutory rape, where to be convicted, the offender must have attained a designated age, as in Illinois, the age of seventeen years, the fact that the defendant has attained the age in question is necessarily one of the essential elements of the crime. It would be absurd to suppose that the defendant requires to be informed of his own age. Nevertheless, under the second of the above requirements, where that is logically applied, an indictment which failed to state the fact in question would not support a conviction.³

The suggestion that the second requirement should be abandoned has been frequently made by writers on procedural reform. Such abandonment has, in fact, taken place in England, where it is provided by the rules adopted under the Indictments Act of 1915 that "the statement of offense shall describe the offense shortly in ordinary language, avoiding, as far as possible, the use of technical terms, and without necessarily stating all the essential elements of the offense."⁴

In the report of the Institute's Committee on Criminal Procedure for 1910-11 it was recommended, *inter alia*, that "the office of an indictment or information should be (1) to give the accused notice of the crime with which he is charged and of the case on the facts which will be made against him, (2) to set out the facts constituting the alleged

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³Millar, Reform of Criminal Pleading in Illinois, *Journal of Criminal Law and Criminology*, Vol. 8, p. 341.

⁴Rule 4—(1).

offense, with sufficient exactness to support a plea of former conviction or former acquittal, as the case may be. The further office of providing a formal basis for the judgment of conviction, so that the indictment or information must set forth everything which is necessary to a complete case on paper no longer serves any useful end, produces miscarriages of justice and should be done away with."⁵

It may be a question whether the clause "to set forth the facts * * * with sufficient exactness to support a plea of former conviction or acquittal," etc., is here advisable. In some measure, at least, it is at variance with the concluding part of the recommendation. To be sufficient (that is, of itself) to support a plea of former conviction or acquittal, must not the statement be of all the essential elements of the offense? And when you thus require that all the elements be stated, what have you but the "formal basis for the judgment of conviction" which the concluding part of the recommendation proposes to do away with? In truth, the suggestion here contained goes beyond what the positive law, in its strictest mood, has ever demanded. There never has been a time, we may venture to say, when the statements of an indictment had to be self-sufficing for the support of a plea of former jeopardy. Suppose X be indicted, by two separate indictments, for two distinct acts of larceny, in respect of like articles, committed on different days. Under the rule that the prosecution, in its proof, is not confined to the precise day alleged, it is possible, and has been from the earliest times, for the two indictments to be in identical language, including identity in the statement of dates, and yet support the two convictions if the offenses be in fact distinct. If they be in fact distinct, no one would urge that X's conviction under the first is a bar to the second indictment, in spite of the identity of averment. The rule is about as well settled as any rule can be that parol evidence is admissible on the question of the identity of the two offenses. And this rule forms an abundant safeguard to the acquitted or convicted defendant against later prosecution for the same offense. It is, therefore, submitted that we may lay out of view the furnishing of protection in this regard as a primary function of the indictment. An incidental function it necessarily is, for the indictment in giving the defendant notice of what is to be urged against him necessarily will lay a basis, though not imperatively a complete one, for any subsequent plea of former jeopardy. The primary function of the indictment is manifestly that of complying with the just command of the Constitution

⁵Journal of Criminal Law and Criminology, Vol. 1, p 587.

that it inform the accused of the nature and cause of the accusation against him.

To perform this function it must either in itself or by proper supplementation fully apprise the accused of the case to be proved against him so that he may intelligently prepare his defense. Questions necessarily arise (wholly apart from that of the constituent elements of the offense) as to whether a given statement is sufficiently full to furnish the accused the necessary information. Every such question should be raised in advance of trial; the possibility of reserving such a question until after it is too late to remedy the fault, if there be one, should be cut down as far as possible. And here, it is submitted, any adequate scheme of reformation should lay hold of the ingenious device embodied in the present Massachusetts act, as well as in the draft code presented by the Institute's Committee on Criminal Procedure for 1914-15.⁶ That device is to permit the indictment itself to be in general terms and to require the defendant, if he desires further information, as he may be entitled to under the constitutional provision, to apply for a bill of particulars. If he fails to make such application, he cannot later object to the generality of the indictment. If he does make the application, then the prosecution is compelled to furnish him with supplemental information, by way of bill of particulars, to the full extent of the constitutional requirement. In this plan is provided an effective means of lessening the number of purely artificial objections to the indictment. It is obviously not intended, in the least, to trench upon the defendant's right of information, but merely to regulate it and prevent it from being made the instrument of non-meritorious attack.

The English rules, to which reference has already been made, afford a further suggestion. They require that "if the offense charged is one created by statute" the statement "shall contain a reference to the section of the statute creating the offense."⁷ This is a feature, too, of the Italian and German systems, where the *atto d'accusa* in the one case,⁸ and the *Anklage* in the other,⁹ must specify the statute under which the prosecution is being had. It is a matter of interest also to note that this same thing was one of the desiderata in the system of civil pleading proposed by Jeremy Bentham. On the assumption of a codified law he requires that the plaintiff's demand contain "reference to the article or articles * * * of the body of the law upon which his demand is grounded."¹⁰

⁶Journal of Criminal Law and Criminology, Vol. 5, p. 827.

⁷Rule 4—(1).

⁸*Codice di Procedura Penale*, Art. 288.

⁹*Strafprozessordnung*, § 198.

¹⁰Rationale of Judicial Evidence, Bentham's Works, Vol. 7, p. 271.

There can be no doubt that in many cases a knowledge of the particular statute relied upon by the prosecution is as important an aid to the intelligent preparation of a defense as a knowledge of the facts intended to be proved. The growing complexity of statutory law is such that in all fairness to the defendant the notice here implied ought to take the place of the barren formula "against the form of the statute in such case made and provided."

In any remodeling of our criminal procedure, equality of position in the trial of the case, as between prosecution and defense, should be steadfastly maintained. And to that end the state, it is submitted, should have exactly the same advantage in respect of antecedent notice of the facts to be proved by the other side as is accorded the defendant. In other words, the defendant should be required to state the defense upon which he relies in the same manner, as near as may be, as the prosecution has been obliged to state the charge. Of course the conditions are not the same in the two cases; the ordinary defense is a "downright no"—that the defendant did not do the act complained of. But if some special state of facts is relied upon to substantiate the denial, as in the case of an alibi, it would seem proper that the state be given notice thereof by written specification, under the plea of not guilty or otherwise. And any defense which involves an admission of the fact charged, such as former jeopardy or the statute of limitations should be made the subject of a special plea. The function of the defensive statement, whatever its form, should, like that of the indictment, be the furnishing of necessary information to the opposite party. Any special plea should be required to state the elements of a defense only so far as coincident with the giving of such information. And, like the indictment, such special plea should be permitted to be made in general terms, with the right vested in the opposite party to demand further particulars of the defense as a condition precedent to assailing the validity of the pleading. It would also be open to the prosecution to demand further particulars of a specification under not guilty and to obtain such particulars if, in the opinion of the court, they are necessary to impart proper information of the defense.

The same stressing of the idea of equality between the state and the defendant in the presentation of the case leads us even further. Under the existing law in most jurisdictions the prosecution is required to furnish the defendant with a list of the witnesses to be called on behalf of the state. This list, says Mr. Bishop, "is differently regarded according to the terms of the varying statutes. Under some the prosecuting attorney must either examine all or have all in court to be called

by the defendant if he wishes. Widely, he is not required to produce all on the witness stand. On this sort of question, opinions as well as statutes are not quite uniform. A witness not named in the list may, in most localities, testify, as of favor or of right, either by having his name first added to the list or without; but there are exceptional states in which this is not allowed."¹¹ In Illinois such a list must be given as a matter of course in cases of felony and upon request in all other cases.¹² It is there held that it is within the discretion of the court to permit the calling of a witness not named in the list and that the exercise of such discretion will not be reviewed except in case of surprise, the burden of showing which rests upon the defendant.¹³ The furnishing of such a list should be an essential feature of any system of criminal procedure. The requirement as it stands, however, should be extended to include the furnishing to the defendant, where that is possible, of copies of documentary evidence intended to be relied on by the prosecution. Thus, with the information supplied by the indictment and particulars, if any, the defendant will have complete knowledge of what is to be advanced against him. But all the cards are not yet upon the table. Ought not the state to be advised to the same extent as to the case of the defendant? It is a dramatic moment in a criminal trial when the defendant unexpectedly produces a witness who testifies, say, that he saw a man, not the defendant, steal out of the victim's house on the night of the murder. The jury lean forward in rapt attention; the spectators are shivering with the thrill. What will the prosecution do? is the question on everyone's lips. Counsel for the prosecution whisper excitedly. * * * Perhaps they succeed in impeaching the witness; as likely as not they are helpless. Such a moment can never be other than dramatic, but it has no place in a disinterested search for the truth. We may well afford to lose the spectacle in the consciousness of accomplished justice. Forewarning the prosecution of the production of such a witness would have accomplished the result of enabling it, by impeachment or otherwise, to meet his testimony, if this was found to be false. On the other hand, if, upon investigation, the state was convinced of its truth, the advance notice in question might well be the means of saving the expense of a trial.

Accordingly, it would seem that some workable method could be devised whereby the present duty of the prosecutor to furnish the defendant with a list of the prosecution's witnesses could be extended and made bilateral, in such wise that the names of all the witnesses,

¹¹Bishop, *New Criminal Procedure*, 4th ed., Vol. I, § 966c.

¹²Crim. Code, § 1, Div. VIII.

¹³*People v. Strosnider*, 264 Ill. 434.

with a brief indication of the subject of their testimony, together with copies of all documents to be used in evidence, should be mutually communicated in advance of trial. So far as the state had prepared its case at the time of the return of the indictment, so far as the accused had prepared his defense at the time of pleading, the names of the witnesses, with the above mentioned indication of their testimony and the copies of the documentary evidence could be contained in a schedule annexed to the indictment and pleas respectively. Any evidence to be introduced in rebuttal could be similarly designated in what we might call a replicatory schedule. Moreover, as any further evidence came to light, down to the eve of trial, it could be similarly communicated by supplemental schedule. In case the documentary evidence was too bulky to permit of copies being furnished, an offer of submission to inspection would take the place of such copies. In all cases notification in the manner suggested would be a condition precedent to the introduction of the evidence, leaving always some room for the exercise of the judicial discretion.

Possibly such a plan might break down when put to a practical test. But this is by no means certain, for, as already noted, a considerable fraction of it is in operation today. If it is feasible it would eliminate wholly, from criminal trials, the element of surprise and correspondingly minimize the element of chance. And apart from the direct object which it is intended to accomplish—that of giving each side notice of the other's evidence—it is not at all unlikely that it will incidentally tend to bring about, on the part of each side, an earlier and closer attention to its own evidence than perhaps is now generally the case and, from this direction also, contribute to the production of a more trustworthy basis for verdict and judgment.

To sum up, therefore, the true function of criminal pleading is manifestly that of giving each side adequate information of what it is to be called upon to meet at the trial. The pleadings should be deemed sufficient when they give such information without reference to the legal elements of the charge or the defense save as these necessarily appear in the fulfilment of the function stated. And provided that the indictment or pleas state in general terms, to be regulated by statute, the charge or defense, their failure to give all the necessary information should be ground only for a preliminary motion on the part of either side to be satisfied by supplementing the pleadings with bills of particulars. Moreover, as ancillary to the pleadings in the discharge of the function in question, there would appear to be room for a system of mutual notice as to the evidence to be relied on at the trial. If such

a system is practical, then by these means the prosecution and defense may come to trial, each knowing the case of the other and prepared at all points to subject that case to such thorough sifting that the truth will seldom fail of ascertainment.