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THE REFORM OF CRIMINAL PLEADING IN ILLINOIS¹

ROBERT W. MILLAR²

In that commentary on the great work of Beccaria which is ascribed to Voltaire, the author speaks of criminal procedure as "a law which ought certainly to be no less favorable to the innocent than terrible to the guilty."³ But the aim of Montesquieu and Beccaria, of Romilly and Brougham has long since been accomplished. In our day, for English speaking jurisdictions, at least, the problem has changed, the emphasis has shifted. To voice the modern demand, the words of the commentator require to be transposed. The need of today is that criminal procedure shall be "no less terrible to the guilty than favorable to the innocent." It is this need which has prompted the call so frequently uttered during the past quarter of a century for recasting and reformation. In some jurisdictions the call has been answered wisely and well. Abroad, England and the British colonies, at home, the Commonwealth of Massachusetts, have acknowledged the need, and met it in excellent measure. But in the United States, generally, and our own State, in particular, the response has been but feeble and fragmentary.

It is agreed, on all hands, that in any system of penal justice, punishment of the guilty as well as acquittal of the innocent should be swift and certain. But speed and certainty are precisely what our criminal procedure lacks. In some measure, because of a habit of mind on the part of lawyers and judges, but largely because of the refusal on the part of legislators to observe the common sense dictate that when an instrumentality has served its purpose it should be laid aside, the processes of criminal law in this State move haltingly toward an uncertain goal. Too many unnecessary steps are taken, too much time is spent on the non-essential, the quest too frequently becomes a search for the legalistic rather than the human truth. The specific faults from which this condition arises have been often pointed out and remedies efficient to meet them as often proposed, for the most part in vain. But it is to be remembered that Lord Eldon looked upon railroads as dangerous innovations.⁴ Some day these remedies will find lodgment in our statutes, and to hasten that day is

¹A paper read before the joint meeting of the Illinois State Society of the American Institute of Criminal Law and Criminology and the Illinois State Bar Association, at Danville, Illinois, June 1, 1917.

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³Beccaria, *Crimes and Punishments*, lxxii, London, 1769.

⁴Zane, *The Five Ages of the Bench and Bar of England*, 1 Select Essays in Anglo-American Legal History, 724.

the duty of every lawyer who, with Jeremy Bentham, decries the "original sin of judicial procedure—the substitution of the actual ends of judicature for the ends of justice."⁵

Consistently enough with the shifting of emphasis before mentioned, one characteristic of the existing condition is precisely that which in the eyes of the French philosophers of the 18th century might have passed for a virtue, namely, the tendency to cause a given case to be viewed abstractly and decided mechanically, by subordinating the verities to an artificial juristic situation—in other words, the disposition to make the ultimate inquiry, not whether the accused is guilty or innocent, but whether the requirements of the applicable legal formula have been in all respects satisfied. It is the "attitude of record-worship," the "trial of the record rather than the case," to use the phrases of Professor Pound,⁶ that is here in question. And the root of this evil is to be found, for the most part, in the present rules of criminal pleading, particularly in those relating to the framing of the indictment.

From a superficial examination of the statutory provision that every indictment "shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense or so plainly that the nature of the offense may be readily understood by the jury," with the further injunction that after the caption, the offense and the time and place of its commission shall be inserted with reasonable certainty,⁷ it might be supposed that the task of the pleader need not involve great technical skill. But in following the course of decision under this section we become painfully aware that the case is quite otherwise. The "terms and language of the statute" will not suffice except where the statute describes the particular act constituting the offense, and the "nature of the offense" has come to mean something essentially different from the real signification of the words. And this has been brought about by the application of two common law doctrines, generally followed in American jurisdictions—first, that the indictment shall set forth all the juristic elements of the offense, shall allege with completeness the State's cause of action; and, secondly, that its allegations shall answer the test of certainty as fixed by the common law. It is to

⁵Bentham, *Principles of Judicial Procedure*, c. 29.

⁶*A Practical Program of Procedural Reform*, Proceedings of Illinois State Bar Association for 1910, p. 395; Report of Committee E of the American Institute of Criminal Law and Criminology, 1 *Journal of Criminal Law and Criminology*, 587.

⁷Sec. 6, Div. XI, Criminal Code; Sec. 408, c. 38, Hurd's Statutes, 1913.

these doctrines that we owe, in large measure, the miscarriages, not of law, but of justice, which our reports so abundantly disclose.

In any endeavor to improve the system of criminal pleading, with relation to the indictment, the first thing is to determine the fundamental question of procedural polity: Is the office of the indictment to remain as it is, not only that of furnishing information to the defendant of what he is charged with, but also and with equal emphasis that of furnishing a statement of the offense to the court and providing a memorial beyond whose borders we need not look for the legal elements of the crime? In other words, are we to say that the function of the indictment should be more than that of giving reasonable notice to the accused, of advising him of what he is called upon to meet? Every consideration of practical justice requires that a negative answer be returned. So far as notice to the court is concerned, as distinguished from notice to the accused, the supposed benefit of this to the defendant, as marked by a learned writer, is that he is enabled to call for a decision on the sufficiency of the case as shown on the face of the indictment. But, as this writer says: "Of what importance is it to the court to know whether or not the facts alleged constitute an offense, when, after the evidence has been presented, it will have an opportunity to determine whether or not the facts proven constitute an offense? * * * What real difference can it make to him [the defendant] whether he present a defense which he has by a plea of not guilty, or by a demurrer? If he is allowed to present the particular matter which he wishes to allege by a plea of not guilty, he is deprived of no substantial right by a law which abolishes motions to quash. If the right to demur is taken away, it cannot be said that any constitutional privilege has been infringed. Nor can it be said that any right of the defendant is violated if the court is prohibited from deciding the case on the pleadings, and is required to decide it on the facts."⁸ So far as concerns the function which the indictment is supposed to fulfill in providing a memorial, the sole usefulness with which it is credited is in aiding the defendant to establish a defense of *res judicata*. If the defendant were restricted to record evidence in the presentation of this defense, or if record evidence would always suffice to establish the identity of the two offenses, this function might appear an indispensable one. But everyone knows that the defendant is not confined to record evidence in this regard. And it is probably not overstating the fact

⁸Charles A. Willard, *The Seventeenth Century Indictment in the Light of Modern Conditions*, 24 Harv. Law Rev. 291.

to say that the production of the record alone of the former proceeding will seldom make out a case for the defendant. In fact, the Supreme Court has gone far toward laying the ghost of this supposed function. Answering the contention in *People v. Brady*,⁹ that the statutory form of indictment for practicing the "confidence game" did not state sufficient facts to enable the defendant to interpose the judgment as a bar to a subsequent prosecution for the same offense, the court said: "Under the present practice, whether the indictment is for the same offense as that charged in a former indictment under which there has been a final judgment is not determined by an inspection and comparison of the two indictments, under a plea setting up the former judgment in bar. The defense of former acquittal or conviction may be made under the plea of not guilty, and on the trial the party accused and the particular offense may be shown by parol testimony." It is plain, therefore, that the function which the indictment is crediting with fulfilling in the present respect is one that it does not adequately fulfill. By dispensing with the necessity of specifying all the legal elements of the offense charged, we change nothing in the rules relating to proof of a former acquittal or conviction. The defendant will start by producing the record and follow with parol evidence if the record does not sufficiently establish the identity exactly as he does at present. He may, on occasion, be obliged to resort to parol evidence for something which at present is in the indictment, but the only difference will be one of degree and not of principle.

That the function last referred to is one which the indictment is not constitutionally required to fulfill seems to admit of no doubt. And that specification of the juristic elements of the offense is constitutionally necessary beyond the bounds of reasonable notice for any other purpose cannot well be contended. Although it has been said by the Supreme Court that the legislature cannot dispense with "a statement of the essential elements of the crime," the decisions in the two cases where this expression was used—one of them being *People v. Brady*, *supra*—and the other language employed in the opinions clearly show that what was meant was not the juristic elements, as such, but the elements essential to give the defendant notice of the nature and cause of the accusation, and that the real test of a constitutional accusation is whether or not it gives such notice.¹⁰

Sometimes, indeed, what amounts to reasonable notice to the

⁹272 Ill. 401, 409.

¹⁰*People v. Clark*, 256 Ill. 14; *People v. Brady*, *supra*.

accused is equivalent to a statement of the legal elements of the crime, but in frequent instances there is a wide gap between the two. Take, for example, the statute as to rape.¹¹ By that statute the offense of rape has been committed when a male person over the age of seventeen years has carnally known a female person, not his wife, under the age of sixteen years, with or without her consent. Now the essential elements of the crime, where there has been consent, are: (1) That the defendant had carnal knowledge of a female person; (2) that the female was not his wife at the time of the act; (3) that, at the time, the defendant was more than seventeen years of age, and (4) that, at the time, the female was under the age of sixteen years. Does reasonable notice to the defendant here require that he be apprised of his own age at the time of the offense or that the victim was not then his wife? Yet today an indictment which omits to state either of these two facts will not support a judgment of conviction.¹² Take again the case of perjury committed in the course of a judicial proceeding. Some diminution of the old strictness of allegation has been here effected by statute, but it is still necessary for the indictment to show, at least by a general averment, that the court in which the proceeding was pending had jurisdiction of the subject matter.¹³ That proof of this fact is essential to conviction, no one can gainsay, but does its allegation in any way aid the defendant in preparing for trial? Still again, take the case of an offense whose prosecution would have been barred by the statute of limitations except for the fact that defendant "was not usually and publicly resident within this State" during the whole or part of the limitation period. Does the defendant need to be told of his own absence from the State? Yet, if the date of the offense appears to be prior to the limitation period, it is held, and under existing law, correctly held, that the omission to state the absence invalidates the indictment.¹⁴ If reasonable notice to the defendant be made the operative test, there will thus become unnecessary a class of allegations whose presence does the defendant no more than an academic good and the public a very appreciable amount of harm.

It is this principle of reasonable notice or information which has obtained entrance into the English Indictments Act of 1915,¹⁵ the Massachusetts Act of 1899,¹⁶ and the draft act prepared by Professor

¹¹Sec. 237, c. 38, Hurd's Statutes, 1913.

¹²*People v. Trumbley*, 252 Ill. 29.

¹³*Kizer v. People*, 211 Ill. 407.

¹⁴*People v. Hallberg*, 259 Ill. 502.

¹⁵*The Indictments Act*, 1915, ed. Herman Cohen, London, 1916.

¹⁶Revised Laws, 1902, c. 218.

Mikell of the University of Pennsylvania and presented in the report of Committee E of the American Institute of Criminal Law and Criminology for 1914.¹⁷ The English act contains nine sections laying down broad lines to be worked out in detail by the rule committee which it appoints. By the central provision of the act, "every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offense or offenses with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."¹⁸ This is supplemented by the rules adopted under the act, thus: "A count of an indictment shall commence with a statement of the offense charged, called the statement of offense."¹⁹ 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*, and if the offense is one created by statute, shall contain a reference to the section of the statute creating the offense.²⁰ After the statement of the offense, particulars of the offense shall be set out in ordinary language in which the use of technical terms shall not be necessary."²¹ As illustrations of what is intended to be effected may be cited the following forms contained in the appendix to the rules, each being preceded with the title of the court and the allegation "A. B. is charged with the following offense (or offenses):" In case of murder—"Statement of Offense: Murder. Particulars of Offense: A on the.....day ofin the county of.....murdered J. S." In case of receiving stolen goods—"Statement of Offense: Receiving stolen goods contrary to Section 91 of the Larceny Act, 1861. Particulars of Offense: A. B. on the.....day of.....did receive a bag, the property of C. D., knowing the same to be stolen." In case of arson—"Statement of Offense: Arson, contrary to section 3 of the Malicious Damage Act, 1861. Particulars of Offense: A. B. on the.....day of.....in the county of..... maliciously set fire to a house with intent to injure or defraud."²²

The Massachusetts Act provides that, in addition to a caption, the indictment shall contain "a plain and concise description of the act which constitutes the crime or the appropriate legal term descrip-

¹⁷Journal of Criminal Law and Criminology, 5, 827.

¹⁸Sec. 3 (1).

¹⁹Rule 4 (2).

²⁰Rule 4 (3).

²¹Rule 4 (4).

²²Indictments Act, 1915, ed. Cohen, pp. 30, 33, 35.

tive of such act without a detailed description thereof," that "the words used in a statute to define a crime or other words conveying the same meaning, may be used,"²³ and that "the circumstances of the act may be stated according to their legal effect, without a full description thereof."²⁴ It also provides that "the court may upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime shall do so at the request of the defendant, if the charge would not be otherwise fully, plainly, substantially and formally set out."²⁵ "Fully, plainly, substantially and formally," it may be parenthetically observed, is the phrase used in the Massachusetts Bill of Rights as characterizing the manner of accusation to which the defendant is entitled.²⁶ It further provides that "if in order to prepare his defense, the defendant desires information as to the time and place of the alleged crime or as to the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid." Forms of indictment appropriate under the act are the following: *Murder*: "That A. B. did assault and beat C. D., with intent to murder him, by striking him over the head with an ax, and by such assault and beating did kill and murder C. D." *Receiving stolen property*: "That A. B. one watch of the value of.....dollars, the property of one C. D., then lately before stolen, did buy, receive and aid in the concealment of, the said A. B. well knowing the property to have been stolen as aforesaid." *Arson*: "That A. B. maliciously did burn the dwelling house of C. D. in.....County."²⁷

In Professor Mikell's draft act, it is similarly provided that "(1) the indictment may indicate the offense by using the specific name given to the offense by the common law or by a statute" or "(2) that the indictment may indicate the offense by stating so much of the offense either in terms of common law or of the statute defining the offense, or in terms of substantially the same meaning, as is sufficient to give the court notice of what offense is charged."²⁸ Further, that

²³Sec. 17.

²⁴Sec. 18.

²⁵Sec. 39.

²⁶Art. I, Sec. XII.

²⁷Schedule of Forms, Revised Laws, 1902, Vol. II, pp. 1847, 1850, 1851.

²⁸Sec. 5.

when an indictment indicates an offense in either of these two ways, "but does not inform the accused of the nature and cause of the accusation against him, the prosecuting officer may of his own motion and shall, when ordered by the court, which in all cases shall so order at the request of the accused, file a bill of particulars as may be necessary to give the accused information of the nature and cause of the accusation against him."²⁹ "Nature and cause of the accusation," it is to be noted, is the more common expression definitive of the defendant's constitutional right to information. In addition, the court is given power to require a bill of particulars giving the defendant "information desirable for the defense of the accused upon the merits of the case."³⁰ Under this act, an indictment for murder not supplemented by bill of particulars would contain the words "A. B. murdered C. D."; an indictment for arson, "A. B. committed arson, by burning the dwelling house of C. D."; an indictment for robbery, "A. B. robbed C. D."³¹

It will be seen that these three acts agree in providing for (1) a designation of the offense, and (2) such particulars as will reasonably convey information to the defendant of the offense charged. The method is substantially that of charge and specification long obtaining in the practice of military tribunals. Two differences, however, appear between the English act on the one hand and the Massachusetts act and the draft act on the other. The first is a difference in form, namely, that the English act contemplates the inclusion of the particulars in the indictment, while, under the other two, these are primarily matters for bills of particulars. But it would be perfectly practicable under the Massachusetts act to draw the indictment in such wise as to dispense with the necessity of a bill of particulars, if such a course was deemed desirable. As to the draft act, the committee say: "There is nothing in the act to prevent the stating of the transaction³² in the first pleading and the expectation is that * * * such information will usually be found in the first pleading."³³ Moreover, under the draft act, the bill of particulars is taken as amending the indictment.³⁴ The second difference is one of substance, and is due to the constitutional provisions for notice to the accused, which must be taken into consideration by American legislation. The Eng-

²⁹Sec. 8.

³⁰Sec. 8.

³¹Sec. 7.

³²"Transaction" is the name given in the act to the subject matter of the specification, "offense" is the name given to the subject matter of the charge.

³³Journal of Criminal Law and Criminology, 5, 828.

³⁴Sec. 8.

lish act proceeds on the theory, as, of course, it may, that, when the indictment has been drawn in accordance with its provisions and those of the rules, the accused has a right to no more. It does not touch the pre-existing power of the court to order a bill of particulars, but this remains, as before, discretionary. The Massachusetts act recognizes the right of the defendant to have the charge "fully, plainly, formally and substantially described," as required by the Bill of Rights, and, while dispensing with the necessity of satisfying this right in the indictment itself, makes it the duty of the State to accomplish this purpose, on the defendant's request, by bill of particulars. If he makes no request, his constitutional right will be deemed to have been waived. The same is true of the draft act, except that here the constitutional provision kept in view is the one contained in our own Bill of Rights, namely, that the defendant shall be informed of the "nature and cause of the accusation." Up to the point of being so informed the defendant has a right to have the offense described either by the indictment alone or by the indictment and bill of particulars. Beyond this point, the acts, in varying terms, both provide for the discretionary granting of a bill of particulars.³⁵

If we should resolve upon the introduction of the salutary principle contended for, that of reasonable notice or information to the accused, pattern and precedent are thus ready to hand.

Along with this principle, and the consequent discarding of the doctrine that the indictment shall necessarily set forth the legal elements of the crime, measures are required to counteract that second doctrine which has contributed so seriously to reversals of criminal convictions—the doctrine relating to the certainty requisite in allegation. We shall have to take care that in conveying information to the accused, the averments shall not be subjected to the over-nice tests of the present standard. The rule is a well settled one in this State, that the highest degree of certainty is required in an indictment.³⁶ Sometimes this is spoken of as "reasonable certainty,"³⁷ as "a reasonable degree of certainty, using the term 'certainty' in its common law sense."³⁸ But the difference of name has little effect in the result. What we have with us is still Coke's "certainty to a certain intent in general."³⁹ Illustrations of the pernicious working of the rule may

³⁵Massachusetts Act, Sec. 39; Draft Act, Sec. 8.

³⁶*Wilkinson v. People*, 226 Ill. 135; *People v. Hallberg*, 259 Ill. 502.

³⁷*Gunning v. People*, 189 Ill. 165.

³⁸*Prichard v. People*, 149 Ill. 50, 55.

³⁹See Stephen, *History of the Criminal Law of England*, I, 281.

be found without much delving. In *Cochran v. People*,⁴⁰ a prosecution for abortion, the conviction was set aside because the indictment averred that the defendant "did administer and use a certain instrument on one S. R.," without stating the manner of its use. In *Gunning v. People*,⁴¹ where the defendant had been convicted for his offer, while acting as assessor of the Town of South Chicago, to receive a bribe in consideration of reducing the assessment on certain real estate described in the indictment by a lot and block number "in the original Town of Chicago, together with building thereon known as the Reliance Building * * * in the County of Cook," a reversal ensued because the indictment did not allege that the premises were situated in the Town of South Chicago. In *Prichard v. People*,⁴² the indictment charged that the defendant, Joseph Ferguson Prichard, being married to one Eliza Ann Sweet, known as Eliza Ann Prichard, married one Virginia M. Lewis, "well knowing that the said Eliza Ann Ferguson, his former wife, was then alive." Here the absence of a direct allegation that Eliza Ann Prichard was then living and the obviously inadvertent substitution of the name "Eliza Ann Ferguson" for "Eliza Ann Prichard" were held fatal to the conviction. Other examples of this same default in certainty are the failure to set out a literal copy or aver the copy set out to be a literal copy of an instrument alleged to be forged,⁴³ the failure to negative a statutory exception,⁴⁴ the failure to specify the coins or bills which were the subject of a pecuniary larceny,⁴⁵ the failure to specify the juristic nature of the owner of stolen goods where that owner is other than an individual.⁴⁶ Here, too, belongs the matter of technical terms. "Certain technical terms," says a writer experienced in criminal practice, "must be borne in mind constantly in the preparation of the indictment. If the statute says that a thing 'wilfully and maliciously' done is an offense, the statutory words must be averred and to omit them is fatal. This applies to 'corruptly,' 'burglariously' and many other words used by the statute in the specific offense."⁴⁷

To attain fully the object in view—that of making it clear that the "highest degree of certainty" test is once and for all laid aside—will require a number of detailed rules. At the outset will be useful

⁴⁰175 Ill. 28.

⁴¹189 Ill. 165.

⁴²149 Ill. 50.

⁴³*People v. Tilden*, 242 Ill. 536.

⁴⁴*Lequat v. People*, 11 Ill. 330.

⁴⁵*People v. Hunt*, 251 Ill. 446.

⁴⁶*People v. Brander*, 244 Ill. 26.

⁴⁷Thomas Marshall, *The Preparation of Indictments*, 6 Ill. Law Rev. 162.

some such general rule as the following from the draft act: "No indictment or bill of particulars is invalid or insufficient for the reason merely that it alleges indirectly or by inference, instead of directly, any matters, facts and circumstances connected with or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding."⁴⁸ This might well be associated with the English rule generally applicable to description that "it shall be sufficient to describe any place, time, thing, matter, act, or omission * * * in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to."⁴⁹

Following general provisions of this character would come other rules providing that certain requirements due to specific application of the present test should no longer obtain. It will have to be considered, for example, how far we may dispense with the allegation of the *means of commission*. In England, it was provided by statute, as long ago as 1861, that in cases of murder the manner or means of causing the death need not be set forth.⁵⁰ This, likewise, is the present rule in something like twenty American states. Under the Massachusetts act⁵¹ and the draft act,⁵² the means in no case need be stated unless they are essential to the designation of the crime. Under the former, as already seen, they are expressly mentioned as the proper subject of a bill of particulars,⁵³ the granting of which, however, would be discretionary where their statement would not be essential to a compliance with the constitutional requirement. There is no such express mention in the draft act, but the general provision as to bills of particulars would permit like information under a like condition.

The matter of *time* and *place* will similarly demand attention. Here the Massachusetts act and the draft act, in harmony with the rule obtaining in England since a statute of 1851,⁵⁴ do not require the allegation of time, except when it is of the essence of the offense. They both apply the like rule to place. Unless otherwise stated the time is taken to be a time before the finding of the indictment, after the act became an offense and within the limitation period, and the place, a

⁴⁸Sec. 30.

⁴⁹Rule 8.

⁵⁰24 & 25 Vict., c. 100, s. 6.

⁵¹Sec. 21.

⁵²Sec. 12.

⁵³Sec. 39.

⁵⁴14 & 15 Vict., c. 100, s. 24.

place within the territorial jurisdiction of the court.⁵⁵ But the granting by bill of particulars of information relating to time and place is governed in each by the same considerations which apply to the means of commission.

Such rules should also be directed to the question of the *description of property*. The English rule in this regard is that the description "shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to."⁵⁶ In particular, the enumeration of so many coins, so many bills, etc., in describing money should cease to be necessary, in any case. This requirement likewise was done away with in England in 1851.⁵⁷ There, consequently, it is no new thing "to describe coin or bank notes as money without specifying any particular coin or bank note."⁵⁸ The draft act has a provision to the same effect and extends the principle to every species of negotiable security.⁵⁹ And, subject to the express statutory reference to a bill of particulars in such instance, the same is true of the Massachusetts act.⁶⁰ By the draft act, moreover, non-negotiable securities may be described in the indictment as "funds."⁶¹

The connected questions of *value* and *ownership* should also receive attention. In England, by the act of 1851, already mentioned, it was provided that the absence of a statement of price or value should not vitiate the indictment except where price or value is of the essence of the offense.⁶² This particular provision is repealed by the new legislation, but in the rules it is substantially re-enacted by the provision that value need not be stated except where the offense depends "on any special value" of property.⁶³ The other two procedures in question concur in this principle.⁶⁴ With a rule of this sort it would be necessary, for instance, in a charge of larceny to show on what side of the statutory dividing line the value of the property falls. But here it should be possible, as it would be under a provision like those of the Massachusetts act and the draft act, to allege that the value was less or more than fifteen dollars without specifying any amount.⁶⁵ Ownership, under the English rule, is treated

⁵⁵Massachusetts Act, Sec. 20, Draft Act, Secs. 11, 12.

⁵⁶Rule 6 (1).

⁵⁷14 & 15 Vict., c. 100, s. 18.

⁵⁸Archbold's Criminal Pleading, 23 ed., p. 77.

⁵⁹Sec. 21.

⁶⁰Sec. 23.

⁶¹Sec. 21.

⁶²14 & 15 Vict., c. 100, s. 24; Bowen-Rowlands *Criminal Proceedings*, 2 ed., p. 157.

⁶³Rule 6 (1).

⁶⁴Massachusetts Act, Sec. 24; Draft Act, Sec. 14.

⁶⁵Massachusetts Act, Sec. 24; Draft Act, Sec. 14.

on the same basis as value. It is not to be stated except where the offense depends on "any special ownership."⁶⁶ The Massachusetts act similarly provides that if the property is sufficiently described in other respects to identify the act, the name of the owner need not be alleged while the draft act goes perhaps a little farther than either of the others, dispensing with the allegation of ownership except where necessary to indicate the offense.⁶⁷ Under this head would also come a provision solving the difficulty which is presented when, in a case where ownership has to be alleged it is found to be vested in a voluntary society or unincorporated association composed of a large number of members. The English rules reach this by providing that it shall be enough, in such case, to lay the ownership in one of the members "with others," or to use the collective name if there be one.⁶⁸ The draft act adopts the same method "for the purpose of identifying any group or association" generally.⁶⁹ And a further valuable contribution of the draft act in this particular is the provision "that it is not necessary for such purpose of identification to state the legal form of such group or association of persons or any corporation."⁷⁰ The propriety of such a rule is emphasized by recollection of *People v. Brander*,⁷¹ where an indictment charging embezzlement from the "American Express Company, an association," was held insufficient to support a conviction, on the ground that it lacked "any averment of ownership in any person, firm, corporation or other entity that may be the owner of property."⁷²

A further result of the existing test calling loudly for modification is the one which requires that "every indictment for forgery or other crime, the essence of which consists in the publication or fabrication of a written instrument,"⁷³ must not only set out the instrument *in haec verba*, but must profess to so set it out. The case of *People v. Tilden*, exhibits the unfortunate effect of this requirement. There, though the indictment had set forth the instrument apparently in the precise terms proved at the trial, the conviction could not stand because the prefatory allegation used the expression "in words and figures in substance as follows," instead of "in words and figures as follows": There is need of neither part of the requirement. The

⁶⁶Rule 6 (1).

⁶⁷Sec. 15.

⁶⁸Rule 6 (2).

⁶⁹Sec. 19.

⁷⁰*Ibid.*

⁷¹244 Ill. 26.

⁷²P. 32.

⁷³*People v. Tilden*, 242 Ill. 536.

indictment ought to be sufficient if it identifies the instrument. Here the English rule is that "when it is necessary to refer to any document or instrument in an indictment, it shall be sufficient to describe it by the name or designation by which it is usually known or by the purport thereof, without setting out any copy thereof."⁷⁴ In England this change in the common law rule dates from the statute of 1851.⁷⁵ In this country, also, statutes dispensing with the necessity of setting out a copy are to be found in a number of jurisdictions. The Massachusetts act and the draft act likewise render this unnecessary.⁷⁶ Under such a provision, therefore, it would be in the discretion of the court, in the given case, as to whether the accused ought to be furnished with a copy of the instrument in a bill of particulars, but the inclusion of the copy in the indictment would under no circumstances be essential to the validity of the judgment.

It should be further provided that a statutory exception need not be negated by the indictment. The distinction between exception and provisos so often depends upon mechanical considerations, that no prejudice will be worked to the defendant by relegating, in pleading, all exceptions to the present status of provisos. Under the existing rule the validity of a conviction may turn upon a tenuous question of statutory construction in nowise affecting the merits of the case.⁷⁷ This change has been effected by the English rules⁷⁸ and the draft act.⁷⁹ The Massachusetts act after recognizing what, in part, at least, is the rule obtaining in this State that there need be no negating of "an excuse, exception or proviso which is not contained in the enacting clause * * * or which is stated only by reference to other provisions of the statute, * * * unless it is necessary for a complete definition of the crime," distinctly provides that "if a statute which creates a crime permits an act which is therein described to be performed without criminality, under stated conditions, such conditions need not be negated."⁸⁰

By the same token, it should not be incumbent upon the State to negative in the indictment an exception to the statute of limitations. Logically, initial proof that the prosecution is barred should be for the defense, as in common law causes, and the indictment ought to be

⁷⁴Rule 8.

⁷⁵14 & 15 Vict., c. 100, ss. 5, 7; 24 & 25 Vict., c. 98, ss. 42 and 43.

⁷⁶Massachusetts Act, Sec. 22; Draft Act, Sec. 22.

⁷⁷Sec. *e. g.* *People v. Butler*, 268 Ill. 635.

⁷⁸Rule 5 (2).

⁷⁹Sec. 28.

⁸⁰Sec. 37.

sufficient if it shows a *prima facie* case apart from the question of time. There is really no good reason why a defendant who seeks to shield himself under this defense should not be required to plead the statute. The three procedures under discussion seem to preserve the practice in this regard as it stands with us, but the rule suggested has been sanctioned by the Supreme Court of the United States,⁸¹ as well as by the courts of South Carolina,⁸² Mississippi,⁸³ and Colorado.⁸⁴ In the Mississippi case passing on this question, it was said: "A statute of limitations is never part of an offense, but always a matter of defense, nor is any allusion to time contained in our statute relative to grand larceny. It will be time enough, therefore, for the district attorney to plead the exceptions to the statute when the statute itself has been pleaded by the accused. No sound rule of pleading can require him, in preferring the indictment, to anticipate the defense, and negative it by setting forth the facts which render it unavailing."⁸⁵

Another suggestion which commends itself is that concerning allegations in the alternative. Although the rule is that "where a statute forbids several things in the alternative, it is usually construed as creating but a single offense, and the indictment may charge the defendant with committing all the acts using the conjunction 'and,' where the statute uses the disjunctive 'or,'"⁸⁶ yet cases may arise where such construction cannot be put upon the statute.⁸⁷ It should be allowable, therefore, to charge the act or omission in the disjunctive. The same thing is true of the intent in cases where the act may have been done with one of several different intents. Allegations in the alternative are provided for by all three procedures under discussion. By the Massachusetts act "different means or intents,"⁸⁸ and, by the draft act, "different acts, means, intents or results,"⁸⁹ may be alleged in the alternative, while under the English rules, it is "acts, omissions, capacities or intentions or other matters stated in the alternative in the enactment" which may be thus charged.⁹⁰

To these topics, therefore, with others which experience and

⁸¹*United States v. Cook*, 17 Wall. 168.

⁸²*State v. Howard*, 15 Rich. Law (S. C.) 274.

⁸³*Thompson v. State*, 54 Miss. 740.

⁸⁴*Harding v. People*, 10 Colo. 387; *Packer v. People*, 26 Colo., 306.

⁸⁵*Thompson v. State*, *supra*, p. 744.

⁸⁶*Blemer v. People*, 76 Ill. 265.

⁸⁷See Bishop *New Criminal Procedure*, 2 ed., s. 585, *et seq.*

⁸⁸Sec. 31.

⁸⁹Sec. 29.

⁹⁰Rule 5 (1).

study may suggest, should be addressed the rules auxiliary to the purpose of preventing "reasonable notice" from being confounded with that "reasonable certainty of allegation" which confessedly implies the highest degree of certainty. Some of the changes recommended might be held not fully to consist with the constitutional requirement, but as to these, the burden can be cast upon the defendant, as in Massachusetts, to demand such further statement as the constitutional words may entitle him to. But in most cases the change can be made without trenching upon the constitutional provision in the original statement. In most cases, that is to say, with the change effected, the indictment will sufficiently state the "nature and cause of the accusation" without giving the defendant any absolute right to amplification or supplement. Though, in this State, we cannot pretend to be aught but laggards in the march of procedural reform some steps have been already taken in the direction indicated, some legislative precedent furnished for cutting down the common law doctrine of certainty in the indictment. For one thing, there is the statute with reference to arson, under which it is sufficient to charge the burning of a "building the property of another,"⁹¹ without describing the building as would be required by the common law rule. In giving this construction to the statute, the Supreme Court recognized the principle which justified all such changes. The defendants said the court "were as well informed of the particular offense with which they were accused as if the indictment had described the building. If the indictment should be held insufficient, it would not be because, as a matter of fact, plaintiffs in error were not apprised of the particular offense with which they were charged. It would have to be because the indictment did not describe the building with the 'technical niceties' of the common law precedents. It would not be because plaintiffs in error were injured or suffered any prejudice because the building was not particularly described, but because the indictment did not meet the technical requirements of the common law rule, founded upon good reasons at the time of its adoption, but which reasons do not now exist in this State."⁹²

Then, again, there is the statute as to embezzlement which has made it sufficient in all such cases to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with intent of funds of a person, bank, incorporated company, or co-partnership to a certain value or amount, "without specifying any particulars of such

⁹¹Sec. 19, Criminal Code, Hurd's Statutes, 1913, p. 800.

⁹²*People v. Covitz*, 262 Ill. 514, 520-1.

embezzlement.”⁹³ In the absence of this rule, said the Supreme Court, “it would be difficult to make the proof and the allegations of the indictment correspond.”⁹⁴ And in a later case, the court, declining to hold erroneous the refusal of the lower court to grant a bill of particulars, speaks of the statutory indictment as “sufficiently specific to advise the plaintiff in error of the charges he was required to meet.”⁹⁵

Another statute of the sort is that relating to perjury and subornation of perjury, which, though preserving in a milder form than existed at common law the requirement before referred to that the court wherein the false oath was made shall be shown to have jurisdiction of the subject matter, does relieve the pleader entirely from other consequences of the common law rule, that is to say, from setting forth the proceedings at large, the commission and authority of the court and the form of the oath, with its mode of administration.⁹⁶

But the furthest step which has been taken in this direction is the statute in relation to the “confidence game.” The form of charge here given the stamp of approval is that the defendant “did on, etc., unlawfully and feloniously obtain (or attempt to obtain, as the case may be) from A. B. his money (or property) by means and by use of the confidence game.”⁹⁷ The history of decision under this enactment may be found in the case, already mentioned in another connection of *People v. Brady*.⁹⁸ Originally attacked in 1868, in *Morton v. People*,⁹⁹ the provision has repeatedly been held not to violate the constitutional requirement. In *People v. Clark*,¹⁰⁰ the conclusion was reached that the indictment need not describe the money so obtained or state its amount, and *People v. Brady* held valid an indictment for obtaining property which stated neither the description nor the value of the property.

This line of cases in particular, affords promise that alterations of the kind under review may be in large part accomplished in the contents of the accusation without impairing the right to knowledge of its nature and cause. In *People v. Clark*, *supra*, the court refers with approval to the Michigan case of *Brown v. People*,¹⁰¹ as holding “that the provision of the constitution was not intended to pre-

⁹³Sec. 82, Criminal Code, Hurd's Statutes, 1913, p. 820.

⁹⁴*Ker v. People*, 110 Ill. 627, 647.

⁹⁵*People v. O'Farrell*, 247 Ill. 44, 50.

⁹⁶Sec. 227, Criminal Code, Hurd's Statute, 1913, p. 850.

⁹⁷Sec. 98, Criminal Code, Hurd's Statutes, 1913, p. 825.

⁹⁸272 Ill. 401.

⁹⁹47 Ill. 468.

¹⁰⁰256 Ill. 14.

¹⁰¹29 Mich. 32.

vent the legislature from dispensing with matters of form only in the description of an offense, nor with any degree of particularity or specifications which did not give to the defendant substantial and reliable information of the particular offense intended to be charged and without which he would receive substantially the same information." And in *People v. Brady, supra*, it was said: "The indictment here charges the accused obtained 'the property' of Douglas Flake by means of the confidence game. That informed him of the nature and cause of the accusation and was sufficient. * * * Defendants were in no way prejudiced because the indictment did not aver the property to be a stock of goods. Of course, it can be imagined that because there is real property and several kinds of personal property, a defendant might not know which kind of property he was charged with obtaining, but it is hardly imaginable that when the person from whom he was charged with obtaining it is named, he would not know the kind or character of the property. Legislative acts should not be held invalid upon any such supposititious theory. * * * The object of the constitutional provision is notice to the accused, and when the statute so individuates the offense that an indictment in its language is notice to the defendant of the nature and cause of the charge and what he is really to be tried for it is sufficient."¹⁰²

No doubt, in the light of the arguments advanced in the minority opinion *People v. Brady*, was a departure in some measure from the older standards, but it has definitely opened a way to rationalization of the indictment.

The propriety granted of a set of rules such as indicated, the question remains as to the manner, extent and effect of objections to the accusation. Under the English act, "notwithstanding any rule of law or practice, an indictment shall subject to the provisions of this Act and not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this act."¹⁰³ As the new act does not deal with the mode of objection, failure to comply with the act and rules in the allegations of the indictment would be taken advantage of either by demurrer or motion to quash. But note this further provision: "When before trial or at any stage of a trial it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments

¹⁰²Pp. 406, 407.

¹⁰³Sec. 3 (2).

cannot be made without injustice. * * *^{103a} In most instances, therefore, the objection would have no serious result, for wherever it could be obviated without actually prejudicing the defendant an amendment would be permitted. Presumably, the rule in question would not allow any amendment after verdict, but even before the act, partly no doubt because of the attitude of the courts, partly because of aid by verdict, common law and statutory,¹⁰⁴ the situation was such that writing in 1910 a learned writer could say that "a motion in arrest of judgment is rarely successful."¹⁰⁵ And since in no case need there be interference on the part of the Court of Criminal Appeal "if they consider that no substantial miscarriage of justice has occurred,"¹⁰⁶ it is plain that there is slight margin, under the English practice for the kind of objection with which we are too familiar.

The Massachusetts act contains no provision authorizing amendment of the indictment. But, under its theory, as previously explained, the same purpose is accomplished by bills of particulars. Even though the indictment does not "fully and plainly, formally and substantially" inform the defendant of the charge, yet if it complies with the statutory provisions, the defendant's remedy is not by demurrer or motion to quash, but by application for bill particulars. "Of course," as said by the Supreme Judicial Court, "the bill of particulars cannot enlarge the scope of the indictment. It cannot specify a charge not covered by the indictment. Its only purpose is to specify more particularly the acts constituting the offense."¹⁰⁷ The great virtue of this plan, however, is that upon failure to move for a bill of particulars it forecloses all objections relating to the lack of certainty or lack of specification of the elements of the crime. If the court should refuse a bill of particulars granting information to which the defendant has an absolute right in order to be constitutionally informed of the charge, then this would be set right on appeal. For example, in *Commonwealth v. Sinclair*,¹⁰⁸ a prosecution for causing death with intent to produce a miscarriage, the upper court went to what would seem the unnecessary extent of holding that the defendant was entitled to a new trial, for the refusal of the court below to order particulars of the instrument which the defendant was charged with using, on the ground that the description of the instrument was substantially essen-

^{103a}Sec. 5 (1).

¹⁰⁴Archbold, *Criminal Pleading*, 23 ed., pp. 84, 226.

¹⁰⁵Bowen-Rowlands, *Criminal Proceedings*, 2 ed., p. 274.

¹⁰⁶Sec. 4 (1), Criminal Appeals Act, 1907; Boulton, *Criminal Appeals*, p. 14.

¹⁰⁷*Commonwealth v. Kelly*, 184 Mass. 320.

¹⁰⁸195 Mass. 100.

tial to the validity of an indictment for the offense in question before the passage of the act. But in the same case it was held that a motion to quash for the lack of the description had been properly overruled. The motion to quash or demurrer, therefore, as well as the motion in arrest, it would appear, can only operate upon the original indictment, in the simple form to which it is reduced, upon the charge, that is to say, as distinguished from the specification, and the charge alone, if properly stated, will support the judgment.

In this regard the draft act, proceeding on the same plan, is more explicit and effectual. To quote from the committee's report: "The first pleading on the part of the State * * * need only state the offense which is to be proved against the person accused. If this be stated such pleading is sufficient to give the court jurisdiction, and if the accused requires no further information, it is sufficient to warrant and sustain a trial and judgment."¹⁰⁹ The indictment is "*valid*," if it indicates the offense in the general way already pointed out. It is "*valid and sufficient*" if in addition to so indicating the offense it "contains so much detail of the circumstances of the transaction and such particulars as to the person (if any) against whom and the thing (if any) in respect to which the offense was committed as are necessary to identify the transaction and to give the accused reasonable notice of the facts."¹¹⁰ Further provision is that no indictment which indicates the offense in the general way mentioned "shall be quashed, set aside or dismissed, nor shall any demurrer thereto be sustained on the ground that it fails to identify the transaction, but the accused shall in such cases be entitled to a bill of particulars."¹¹¹ The only case apparently in which a bill of particulars can be looked to on motion to quash is where it discloses that the statute of limitations has run, and here the prosecution is permitted to file a new bill if it can show otherwise.¹¹² Moreover, it is expressly stated that no indictment is to be held invalid because of "any defect, imperfection or omission in the manner of charging the offense, or describing the transaction, provided that the indictment indicates an offense" as before prescribed. Amendment of the indictment is permitted. "The court may at any time amend the indictment in respect to any such defect, imperfection or omission,"¹¹³ and in case the defendant in the opinion of the court, 'has been actually misled and prejudiced in his

¹⁰⁹Journal of Criminal Law and Criminology, 5, 828.

¹¹⁰Sec. 6.

¹¹¹Sec. 38.

¹¹²Sec. 9.

¹¹³Sec. 38.

defense upon the merits by any such defect, imperfection or omission' there may be a postponement of the trial."¹¹⁴ Finally, there occurs this significant clause: "No motion made after verdict nor writ of error or appeal based upon any such defect, imperfection or omission * * * shall be sustained unless it be affirmatively shown that the defendant was, in fact, prejudiced in his defense upon the merits and a failure of justice has resulted."¹¹⁵

The question of *variance* is also important in the present connection. The new English act contains no provision on this subject. But by legislation, dating back to 1848 and 1851, a curative amendment is in England permitted where the variance relates to written or printed matter,¹¹⁶ and in all cases where it relates to place, name or description of the owner of property or the person injured, description of ownership of property, or description of any matter or thing mentioned, is not material to the indictment, and cannot prejudice the accused in his defense on the merits.¹¹⁷ The amendment may occur at any time before the case goes to the jury, and, if necessary, the court may postpone the trial.¹¹⁸ One amendment, however, is all that may be made.¹¹⁹

By the Massachusetts act, "if there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial."¹²⁰ Apart from this amendment of the bill of particulars, there is to be no acquittal of the defendant on the ground of variance, "if the essentials of the crime are correctly stated, unless he is thereby prejudiced in his defense."¹²¹ Precisely what is here meant by "essentials of the crime" is open to doubt. To interpret the expression as meaning the "legal elements of the crime" would be in conflict with the principle of the act. It would be more logical to treat it as meaning the "essentials" of the crime necessary to satisfy the constitutional requirements. In either event, it is a provision calculated greatly to lessen unmeritorious objections on the present score.

Preserving a like attitude to that which it has toward defects in the indictment, the draft act offers even less room than the Massachusetts act for objections because of variance. If the indictment identifies

¹¹⁴Sec. 38.

¹¹⁵Sec. 38.

¹¹⁶11 & 12 Vict., c. 46, s. 4.

¹¹⁷12 & 13 Vict., c. 45, s. 10.

¹¹⁸*Ibid.*; Bowen-Rowlands, *Criminal Proceedings*, 2 ed., pp. 244, 245.

¹¹⁹Archbold's *Criminal Pleading*, 23 ed., p. 296.

¹²⁰Sec. 39.

¹²¹Sec. 35.

the offense in the general way before described, no variance between the allegations identifying the transaction contained in the indictment or bill of particulars whether amended or not, and the evidence shall be ground for acquittal, but the court is given full power at any time to amend so to conform the allegations to the evidence.¹²² As in the case of a defect in the indictment, if the defendant, in the opinion of the court has been "misled and prejudiced in his defense upon the merits" by such variance, the court is given power to postpone the trial.¹²³ So, too, no objection on the score of variance after verdict will be sustained unless prejudice in defending upon the merits and a failure of justice are affirmatively shown.¹²⁴

These three procedures, then, furnish a source from which we can draw in a recasting of the present rules relating to the indictment. As between the English act and the other two, the operative principle of the latter seems to commend itself for adoption. The general charge, with its minimum requirements, supplemented by specification in the indictment itself or in a bill of particulars, is not only the more flexible procedure of the two, but is one which is admirably adapted to meet the demands of constitutional definition.

That we could constitutionally go as far as Massachusetts seems undeniable, for as has been seen, the provision in the Massachusetts Bill of Rights appears a more formidable obstacle than our own. If the plan adopted complies with the requirement that the defendant shall have the charge described to him "fully, plainly, substantially and formally," as has been repeatedly decided by the Supreme Judicial Court,¹²⁵ it should certainly not offend the requirement that he be informed of the "nature and cause of the accusation." And in circumscribing the boundaries of that description to which the defendant is entitled as a matter of constitutional right, the cases before mentioned, and, particularly *People v. Brady*, would seem to augur our ability to go considerably further than Massachusetts has ventured.

A statute, allowing amendments to the indictment would be a valuable adjunct. The constitutional question here involved, however, is one that demands an independent consideration. But, judging by the current of decision in other states, a statute could be validly passed providing, at least, for the cure by amendment of variance in matters of description not touching the essence of the charge either

¹²²Sec. 38.

¹²³Sec. 38.

¹²⁴Sec. 39.

¹²⁵*Commonwealth v. Snell*, 189 Mass. 12; *Commonwealth v. Sinclair*, 195 Mass. 100; *Commonwealth v. Farmer*, 218 Mass. 507.

before or at the trial.¹²⁶ Once we trenched on the domain of substance, however, the absence of prejudice to the defendant would probably not be regarded as a sufficient reason for supporting the statute.¹²⁷ And while it is possible that a statute allowing amendment of the indictment to the extent contemplated in the draft act would be approved, it is quite clear that, without a constitutional amendment, we should be compelled to forego any such comprehensive provision as that of the new English act.

Improvement of criminal pleading thus finds its chief task in renovation of the rules relating to the accusation. But it ought not to stop there. If the requirement of reasonable notice should obtain in favor of the accused, it should also obtain, within limits, at least, in favor of the State. Under the existing practice in Illinois, which permits any defense in bar to be shown under the plea of not guilty, there is no such thing as notice, reasonable or otherwise, of the defense which the State is called upon to meet. To begin with, the common law rule requiring *former conviction* or *acquittal* to be the subject of a special plea, should be restored in principle. The defense of *insanity* at the time of the offense ought to be specially stated. This is already required in a number of jurisdictions. As appears from the statutory provisions collected in the report of Committee B of the American Institute of Criminal Law and Criminology for 1911,¹²⁸ New York, Alabama, Louisiana and Washington all demand that the State be given notice of an intended defense of insanity. Consistently with the recommendation that the State be exempted from negating an exception to the *statute of limitations*, this defense should also be specially pleaded. *Self defense* should be similarly treated. And finally, the guilty defendant should be withdrawn from the shelter of that classic bulwark—the defense of *alibi*—by requiring that if an accused proposes to show that he was not present at the scene of the crime he must apprise the State to that effect. If the indictment does not state the time of the offense, this information can be obtained by applying for a bill of particulars. The suggestions as to self defense and alibi come from the criminal procedure of Scotland, in which these defenses, as well as the defense of insanity at the time of the offense, or that the accused was asleep at the time of the offense, or

¹²⁶ Bishop, *New Criminal Procedure*, s. 96, *et seq.*; 22 Cyc. 434, *et seq.*; 1 Encyc. Pl. & Pr. 695 *et seq.*

¹²⁷ See *State v. Startup*, 39 N. J. L. 423.

¹²⁸ Journal of Criminal Law and Criminology, 3, 890; 4 *id.* 67.

that the crime was committed by another person named, must be specially notified to the prosecution.¹²⁹

So far as the defenses of former jeopardy and statute of limitations are concerned, it would seem more in accord with sound principle to make these the subject of special pleas, as were former acquittal and conviction under the common law practice. Notice of the other defenses mentioned, viz.: Insanity, self-defense and alibi should more appropriately come by way of a written specification under the plea of not guilty, as is now the rule in New York with reference to insanity. But the allegations of every such plea or notice should be tested not by the common law rule of certainty applicable to pleas, but by the same criterion as that which should be applied to the accusation; that is to say, reasonable notice to the opposite party. The degree of explicitness entailed by the test will vary with the defense. In the case of former jeopardy an indication of the former proceedings upon which the defendant relies would in most instances suffice. A plea of the statute of limitations would sufficiently show the defense by a statement that more than the statutory period has elapsed since the commission of the crime. Insanity and self-defense would require no more than a brief indication that these defenses were to be relied on. In the case of alibi, however, the usefulness of the notice would largely depend upon the defendant stating where he was at the time of the offense. While requiring this might at first sight make it appear that we were holding the defendant to a greater degree of specification than the State, there is here ample reason for insisting that he furnish the information in question, for the defendant, if any one, absolutely knows where he was and what he was doing when the crime was being committed. There is a wide difference between specification here and specification, for example, of the manner and means of a murder. In the Scottish practice notice of self-defense is accordingly in general terms, while the notice of alibi states particularly where and in whose company the accused was on the occasion of the offense.¹³⁰

Pleas and notices of this character should be amendable in furtherance of justice on substantially the same terms as the indictment or bill of particulars under the indictment ought to be, so that no fault in their structure shall serve to prejudice the defendant. If such an amendment made at the trial would prejudicially surprise the State,

¹²⁹Renton and Brown, *Criminal Procedure according to the Law of Scotland*, p. 73; Macdonald, *Criminal Law of Scotland*, 3 ed., p. 424.

¹³⁰Renton and Brown, *op. cit.*, p. 319.

trial would preserve the balance of fairness between the State and the accused.

By the requirement of notice in such cases, and possibly in other instances, we place the State on an approximately equal basis with the then, a provision enabling the court, in that event, to postpone the defendant in respect to advance knowledge of their mutual contentions. Such a thing, to take the most obvious example as a manufactured alibi, will be difficult of accomplishment, for the State upon being notified can immediately take steps to inquire into the truth of the defendant's statement. And, with proper safeguards as to amendment, there is nothing in such a requirement that will lessen in any degree the protection which the law accords, and ought to accord, to an innocent defendant.

For the reform of criminal pleading, as a whole, the data which have thus been reviewed plainly mark the direction which our efforts should take. With their aid may be constructed a system which, retaining the solid virtues of the existing one, will strip it of all that constituted a reproach to our common sense. When we come into possession of such a system, reinforced, as it should be, by those modifications so urgently needed in other departments of our criminal procedure, we shall be able to say, as does a noted English barrister with reference to the new English act: "If hereafter a man who is proved by the evidence to be guilty is acquitted, the law will not be to blame, but the blame will rest with the judge or jury, or both."¹³¹

¹³¹Sir Harry B. Poland, Introduction to *The Indictments Act*, 1915, ed. Cohen, p. 2.