THE EVOLUTION OF OUR CRIMINAL PROCEDURE

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Criminal procedure in this country is passing through its age of unreason.

Our forbears were a grim and hasty folk "readier to ban than to bless," who had to fight hard and endure much for their scanty possessions in the Northland. They accordingly brought down into west-over-the-sea, the Viking name for England, an exaggerated regard for property and a contempt for human life. This is reflected in their laws. Under them a man's life was not worth more than two shillings nor as much as a sheep, a pig, or a hay-stack. On April 21, 1824, at Bury St. Edmunds, Thomas Wright and Robert Bradnum, both aged 26, were hung for stealing a live, fat pig. In 1833, a little boy nine years of age pushed a stick through a broken window and pulled out some bright-colored paints worth two pence. He was condemned to death for burglary. On April 25, 1839, William Cattermole was hanged at Ipswich for setting fire to a stack of hay. Cutting down a young tree, impersonating a pensioner, stealing linen left out to bleach, defacing a county bridge, and two hundred and nineteen other offenses were punishable by death until 1837.

The procedure was as harsh as the laws. Indictments were drawn in a language which the accused could not read, and frequently he did not know with what crime he was charged until the day of his trial. He was not allowed to testify in his own behalf. His witnesses were not allowed to be sworn and their evidence naturally had but little weight. If accused of treason or felony, his counsel could not even address the jury. When, in spite of such tremendous odds, an accused man had enough ability and natural eloquence to combat successfully the able lawyers for the crown, and persuade a jury to acquit him, the members of this jury might be fined and imprisoned. This happened in the case of Sir Nicholas Throckmorton, who was prosecuted for high treason in 1554. Single-handed against a hostile judge and the best lawyers in England, he fought for his life and won. The jury who acquitted him were

severely punished. This was fatal to his brother who was tried later and who on the same evidence was convicted by another jury which had heard of the fate of the first. If the accused was convicted of murder, he had no right of appeal. If acquitted, the crown might take an appeal. The Norcott trials in 1628 showed the horrible injustice of such a system. In that year a woman named Jane Norcott was found lying in her bed with her throat cut while a bloody knife was found sticking in the floor. Her mother, sister and brother-in-law, who slept in an outer room, testified at the inquest that no stranger came in during the night to the best of their knowledge. On the strength of this statement, they were suspected of murder. The first coroner's jury brought in a verdict of suicide. This was not satisfactory to the court at assizes and after thirty days, the body was disinterred and a second inquest held. On this inquest, a verdict of murder was found against the defendants and they were tried at Hertford before a petit jury and acquitted. The judge was dissatisfied with this verdict and accordingly recommended that the infant child of the dead woman should be made plaintiff in an appeal of murder against its father, grandmother, aunt and uncle and the appeal was tried accordingly. Before a second trial, the four defendants were compelled each of them to touch the dead body and witnesses testified "that when the four accused laid their hands on the corpse, the brow of the dead which before was a livid and carrion color, sweat. That the sweat ran down in drops on the face, and that the corpse opened one of its eyes and shut it again repeating this three times, and likewise thrust out the ring finger three times and pulled it in again and that the finger dropped blood on the grass." On this evidence, the defendants were convicted and hanged.

The punishments were as bloody and as barbarous as the procedure. In cases of treason the convicted man was partially hanged, cut down and disemboweled and while still alive his entrails were burned before his eyes. Women guilty of the murder of their husbands were burned at the stake. Coiners were boiled alive. Suicides were buried at crossroads with a great stake driven through the heart.

In this welter of blood and punishment, with all the odds against an accused, the judges began to insist upon the observance of every technicality. Precedents and principles were evolved which had the force of actual statutes. The crew of a vessel were hung for the murder of their captain whose body could not be found. They pro-

tested their innocence to the last. Later the supposed victim came back, alive and well. A woman and her two sons were hanged for the murder of a farmer on the confession of one of the sons who claimed that the body had been secreted. The day after the hanging, the farmer arrived home. From these and similar cases arose the rule in regard to the *corpus delicti*, which obtains today, that either the death or the wrongful act must be proved by direct evidence. No man can be convicted on circumstantial evidence as to both.

Chief Justice Fortescue, when traveling the western circuit in England, in the seventeenth century, saw a woman condemned and burned for the murder of her husband. At the next assizes he heard a servant confess the murder. The judge's horror-stricken comment became part of the common law from that day. "One would much rather that twenty guilty persons should escape the punishment of death," he wrote, "than that one innocent person should be executed."

Since the accused could not testify himself at all nor his witnesses be sworn, the judges put the burden on the prosecution of proving entirely every detail of its case, unhelped by presumption or probability. This, they reasoned, was the least they could do for men who were not allowed to defend themselves. Out of this practice grew the presumption of the innocence of a person accused of a crime. This presumption is not based on any logic and has been adopted arbitrarily. Human experience shows that usually things asserted are so. The percentage of falsehood is inconsiderable. All human society is built on belief. The mere fact that a charge has been made against a man would naturally put the burden on him to disprove it. Yet in all English-speaking countries, an accused is presumed to be innocent. This presumption attaches from the beginning and follows him through each stage of the proceedings. He may be found guilty by a committing magistrate and a grand jury, yet he comes to trial a presumably innocent man. He may be convicted by a judge and jury, yet his case must be argued in one, two, and sometimes three courts of appeal as if he were innocent in spite of the fact that at least twenty-seven men have found him to be guilty. This is not so on the continent of Europe. There a man accused of a crime must overcome the presumption which naturally attaches to the accusation. He would not be accused if he were not guilty is the natural reasoning. Today, in addition to this presumption of innocence which is protection enough, we are still conducting our

criminal courts under out-worn technicalities which were devised to save innocent men but which now are used only to shield guilty ones and which have been abolished in England, the country where they originated, for over thirty years. A few instances taken at random from the digests will illustrate the truth of this assertion.

In Texas not long ago, a man was tried and convicted of robbery. There was no question either as to his guilt or as to the fairness of his trial. On appeal it appeared that the indictment specified the crime as having been committed in the town of Groveton, Texas, omitting the name of the county. In spite of the fact that there was only one Groveton in the state of Texas and that no question in regard to the indictment was raised at the time of the trial, the case was reversed. The same thing happened in Massachusetts. A man was convicted of burglary in Westminster, Worcester County, Massachusetts. The name of the county appeared at the head of the indictment, but later on was omitted, being simply referred to as "said county." On appeal the judgment of conviction was reversed.

In many states the letter of the law has been invoked to save convicted criminals, said letter being one that was omitted from the indictment. In Alabama a murderer gained a new trial because a copying clerk left out the letter "l" in the word "malice." In North Carolina another murderer was saved because the letter "a" was left out of the word "breast." In West Virginia a horse-thief was released because the indictment ended in the words "against the peace and dignity of the state of *W.* Virginia," instead of "against the peace and dignity of the state of *West* Virginia."

In Missouri a criminal convicted of a revolting crime against an orphan child was released by the supreme court because the word "the" was omitted by a copying clerk in copying the words "against the peace and dignity of the state."

In Missouri, Leo Judd was sentenced to imprisonment for two years for illegal registration under the name of Charles Cohn. On appeal the case was reversed because the name "Cohn" was in the last part of the indictment spelled "Cohen." In Delaware a man was arrested for stealing a pair of shoes. During the trial, it appeared that both shoes were for the same foot. The case was dismissed because the stolen shoes did not constitute a "pair."

In another state a criminal was convicted of the larceny of a

certain number of eggs. On appeal the judgment was reversed because, said the learned judge, "there is nothing in the indictment to show what kind of eggs these were." "They might," went on the imaginative judge, "have been adders' eggs in which case there could be no property rights in them and the defendant could not have been guilty of larceny."

The supreme court of California held that the indictment which set forth an assault by means of a heavy stick was fatally defective because the means of injury were not described with sufficient precision. The masterly reasoning of the supreme court of California is worth quoting:

> Describing a stick as heavy imparts no certain information. The term is relative. A stick which in the hands of a boy or feeble person would be considered heavy, in the hands of a robust person would be deemed light. Aside from the use of the term "heavy," there is no description in the information as to the definite weight, strength or size of the stick, or other characteristics showing that it was a means likely to produce great bodily injury.

All of the above cases are instances where technicalities which were formerly needed as helps against overwhelming odds, have been retained although now the odds are all against the prosecution. The wonder now is not that so many guilty men escape, but that under our present system any guilty men are ever convicted. Where they have money enough to employ the most able counsel and to take advantage of every delay and technicality available, they practically never are convicted, as in the Thaw case. There a man was guilty of a cowardly and deliberate murder of a prominent citizen under circumstances which brought the attention of the world to the occurrence. In spite of his crime, he escaped safe and unsound into an asylum. As this article is being written, he is now on the point of obtaining his liberty even from that nominal restraint. To quote from the argument of Mr. Jerome, the district attorney who tried his case: "This trial has left a trail of ignominy, disgrace, filth and scandal behind it that has been absolutely appalling." Such a record would not have been possible in England with its commonsense procedure.

In Atlanta, Eugene H. Grace has just died from a gunshot wound which he claimed was received from his wife who, according to his story, shot him while he was asleep to recover his insurance and who refused to send for a doctor when he awoke in agony with

a bullet wound near his spine. On the trial, he was not permitted to testify against her, since, under the laws of Georgia, a man cannot testify against his wife even if she has attempted to murder him.

As a reaction against the lack of the right of appeal to a prisoner, a convicted criminal now has practically an unlimited right of appeal. This involves interminable delays. On March 24, 1910, Albert Wolter killed Ruth Wheeler, a fifteen-year-old child, in New York. He was convicted of murder in the first degree. On April 22, 1910, an appeal was taken and execution delayed thereby until January 29, 1912. In the same state, the Patrick case took two years and three months, the Smith murder case, a month less than four years, and the Sexton homicide trial two months less than three years. By-products of this failure of our criminal procedure have been the murder of 131,940 people in twenty years and the conviction of 1.3 per cent of the murderers, 3413 lynchings in about the last quarter century and the institution of "third degree" methods with prisoners in most of our large cities.

It may be fairly stated, however, that this nonsense age of criminal procedure is passing. We are now going through a transition period of sentiment. In Pennsylvania, practically no prisoners serve their sentence out. They are always either pardoned or paroled. In fact the Board of Pardons of Pennsylvania frees so many prisoners every year, that it has been suggested that it be renamed "the court of general jail delivery" instead of the court of oyer and terminer which now possesses that title. Its most recent performance was the release of one McMahon who had deliberately shot and killed a man and whose attempt to pose as a hero was ended by a sentence to ten years' imprisonment. He was released after serving two years and five months. In September, 1913, two prisoners named Haight and Jordan were paroled from the Eastern Penitentiary of Pennsylvania. A few weeks later they committed burglary in New Jersey and have since broken jail and escaped.

In South Carolina, Governor Blease, the advocate of lynch law, up to July 10, 1913, had pardoned 721 convicts and just before Thanksgiving freed 100 more.

Governor Patterson of Tennessee pardoned 956 criminals, and 152 of them were murderers. In New York, Haines, who was guilty of a particularly cold-blooded murder has been pardoned, and is now writing reminiscences of his murder for the yellow journals.

Eight years ago in one of our central cities, a man committed murder and was sentenced to be hung. Such a flood of sentimental appeals poured down upon the governor that his sentence was commuted. Six years later he was pardoned. Six months after his pardon, this criminal murdered a man who had befriended him, his friend's wife and three children in order that he might rob his house of $200.

There are indications, however, that the age of common sense in criminal procedure has dawned in this country.

The criminal court of appeals of Oklahoma was asked to set aside an indictment because of the omission of the word "the," and wrote in part as follows:

> We know there are respectable authorities holding to the contrary, but this court will not follow any precedents unless we know and approve the reasons upon which they are based. It matters not how numerous they may have been or how eminent the court by which they are prosecuted. Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice so that the innocent may find it to be a refuge of defense and protection and so that the guilty may be convicted and taught that it is exceedingly serious and dangerous to violate the laws of this state.

Wisconsin has been added to the judicial "white list" by the recent case of Hack *vs.* the State. In that decision the supreme court of Wisconsin over-ruled a number of its former decisions, refused to follow the supreme court of the United States and held that a defendant, by remaining silent, waived his right to arraignment and plea. The court wrote in part as follows:

> Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court will at once give him and then when he has had his trial and the issue has gone against him, should he be heard to say there was an error because he was not given his right? Should he be allowed to play his game with loaded dice?

Again in New York, whose murder trials have been notorious for delay a new light has shone. Anyone who can remember the Molineaux trial, the Fleming trial, the Nan Patterson trial, the Patrick trial, the Barbieri trial and a score of others, will recall that weeks were spent in selecting a jury. In the recent trial of Police

Lieutenant Becker, Recorder Goff took charge of the trial in the same way that an English judge does, and in almost a day brought about a revolutionary reform not only in the selection of a jury within two days, but also by his refusal to permit delays, evasions and petty technicalities.

The supreme court of the United States in the case of James H. Holt, who was sentenced to imprisonment for life for manslaughter, has recently held that no criminal case should be reversed on account of technical errors committed during the trial unless it appears that they affected the merits of the case. This is in line with the statute which the American Bar Association has been trying to have passed as a federal statute for the last six years and which holds as follows:

> No judgment shall be set aside or reversed or a new trial granted by any court of the United States in any case civil or criminal on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has injuriously affected the substantial rights of the parties.

Again and again this measure comes up to Congress with the whole weight of the American bar back of it. Each time that conservative and courteous body grants elaborate hearings, treats the committee of the American Bar Association having the matter in charge with the utmost courtesy (the writer speaks with knowledge as a member of one of them) and—smothers the measure in committee or side-tracks it. When that measure is finally passed, common sense will be statutory.

Another indication of better times is the organization of municipal courts. In Chicago, Buffalo, Washington, and finally Philadelphia these courts have been established on common-sense principles and with common-sense ideals. As to what they mean to a community in their criminal jurisdiction can best appear by a quotation from a letter from Judge Harry Olson, the chief justice of the municipal court of Chicago to this writer in regard to the work of the Chicago municipal court:

> During the past three years our court has entered final judgments in 197,324 criminal and quasi-criminal cases. Eighty per cent of them were disposed of within twenty-four hours of the arrest. There were sixty-eight

appeals and writs of error and only 44 per cent of them were reversed. Here is a striking illustration of speed and finality in the administration of criminal justice in a great city.

In the last analysis, the matter of common sense in our procedure and the reform of existing abuses is a matter of the personal equation. We do not need new laws nearly so much as we need new men who here and there have the courage of their convictions and who are brave enough and wise enough to break away from out-worn precedents and to establish new ones.