CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Notre Dame Law School: NDLScholarship

Notre Dame Law Review

Volume 1 | Issue 2 Article 1

12-1-1925

Our Antiquated Criminal Procedure

Lenn J. Oare

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

 Part of the Law Commons

Recommended Citation
Lenn J. Oare, *Our Antiquated Criminal Procedure*, 1 Notre Dame L. Rev. 35 (1925).
Available at: http://scholarship.law.nd.edu/ndlr/vol1/iss2/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE NOTRE DAME LAWYER
A Monthly Law Review
"Law is the perfection of human reason"

Volume I DECEMBER 1925 Number 2

OUR ANTIQUATED CRIMINAL PROCEDURE

By LENN J. OARE, A. M., LL. M.

Our administration of criminal justice is a reproach to the intelligence of a civilized country. In the trial of criminal cases we are applying antiquated rules of procedure, which have no life or vitality to cope with present social requirements. Most of our rules of criminal procedure had their origin in the 17th Century in England, and are as ill adapted to our present economy as the stage coach is to our present transportation problems.

Nearly every session of an American legislature defines new crimes or modifies existing definitions, thus casting an additional burden upon the machinery with which these new laws are to be administered, but the machinery itself grows more and more antiquated and inefficient. It is the procedural law we fail to modernize and it has now become so ineffective in the performance of its duties that we can well say that it is a disgrace to civilization.

When our present rules of procedure first came into existence, they probably were well adapted to the exigencies of the social life of our English forefathers. Social life was then less complex and less intricate; criminal offenses known to the law were fewer and more readily defined; and the simpler folk of that age were more influenced by formalism and occult religious manifestations than by human reasoning. In such an age it is easy to account for the trial by ordeal, by battle, and by compurgation.

In these barbaric trials, God was supposed to be the judge and to directly adjudicate the guilt or innocence of the accused. The tribunal was concerned only with formalities and did not attempt to discover facts and determine by the process of mind

and reason whether the accused was guilty or innocent. God, supposedly, in the exercise of His supernatural powers, made the flames ineffective as against the innocent, would avert the blow of the guilty, and would smite down the perjurer and false-swearer. Barbaric methods, they were to be sure, as viewed by our superior intelligence; but, nevertheless, for the age, they probably served their purpose. They at least instilled the fear of God in those inclined to violate the laws of society.

This is but a peep into the shadow-lands from whence are derived our present-day system of criminal procedure. This explains, in a measure, its formalism, its lack of intelligent application, and its complete lack of adaptation to the social problems of this, the 20th Century.

Lawyers seldom attempt to justify the rules of criminal procedure; they often know nothing of the causes that brought these rules into existence; they do know that they are rules of the game, justified by precedent, and as such are sacrosanct to one who enters the legal arena.

And, so, in the trial of a criminal case, we are bound to antiquated and fossilized rules of procedure. We consider these rules as ends in themselves, to be preserved at all hazards, and not as mere means to an end, the determination of the question of the innocence or guilt of the defendant. We have cast these rules into a system of formalism which we strive to perfect rather than to use the rules of procedure as a means for the intelligent enforcement of our substantive law. Daily, judges and lawyers are spending a large part of their time wrangling and philosophizing about abstract and technical rules of procedure as though it were more important to preserve the rules of the game than to determine the one question before the tribunal for its ultimate decision, the guilt or innocence of the accused. Justice, if secured at all, must emerge from this cloud of formalism and technicality and probably with more certainty than in the ancient Anglo-Saxon trial by ordeal.

The trial of a criminal case should be a common-sense effort to determine the ultimate facts and not a mere forensic combat of wits. The court room should be a laboratory for analysis and the ascertainment of truth and not merely an arena where a combat is staged according to fixed rules where both

combat and rules have little to do with the ascertainment of defendants' guilt or innocence.

No one would advocate a dispensation of all rules of procedure. Rules are necessary, else the trial of a criminal case would be little better than procedure by a mob. But those rules should be sensible and be adapted to an orderly disposition of criminal cases. If the rules conduce to a fair trial to both the State and the accused, they should be preserved. If they prevent such a fair trial, then there is no reason for their existence.

To discuss adequately the various rules and test each on the basis of its efficiency would require volumes, and the space allotted to this article will permit a bare mention of a few of the rules considered as antiquated and subversive of the due administration of our criminal laws, and then only by way of illustration.

Many criminals go unpunished by reason of highly technical rules with reference to indictments, technical rules which have nothing whatever to do with substantial rights of the defendants and which are protective of the guilty rather than the innocent. The function of the indictment is to advise the defendant as to the nature of the crime with which he is charged. In addition to initiating the prosecution of the defendant, it serves two purposes: the first and primary purpose, that he may be prepared to meet the charge with witnesses; and the second and secondary purpose that he might, if vindicated, not be again charged with the same offense. To this extent the indictment is important to prevent the unjust punishment for crimes actual or supposed, or merely fabricated, without assigning any reason therefor, as was frequently practiced under the tyrannous Kings of England. To protect such tyranny, however, does not require the use of formal and complex allegations in the indictment. Simple and direct language will serve all useful purposes. Yet, our indictments are daily tested by antiquated rules to determine whether they are couched in language of sufficient technicality, and in such formal garb as to meet with the most exacting demands of our Anglo-Saxon forefathers.

The indictment today owes its verbiage and elaborate formation to its historical origin. As suggested by the trial ordeal, primitive jurisprudence was characterized by cant and formal-

ism. When formalism and ceremony constituted the trial and divine providence pronounced the judgment, it would be expected that such formalism and ceremony would be the most elaborate. In the early development of our common law this formalism was given a great degree of fixity and permanence by reason of the fact that legal documents were prepared in the Latin language; and long after the Latin ceased to be the language of the law, the old Latin forms were copied generally without knowledge of their meaning, but always as necessary form.

England has discarded the ancient criminal procedure and it is now sufficient in the practice of that country for the indictment to name the offense committed and the time and the place.

In fact, the constitution of the United States very aptly connotes the essential requirements of an indictment in these words: "in all criminal prosecutions, the accused shall enjoy the right to * * * * be informed of the nature and cause of the accusation." This much is required to prevent tyranny; anything more becomes a burden upon the machinery of criminal justice.

Practically all the states have adopted simplified codes of criminal procedure, with the result, contrary to expectation, that criminal procedure in those states has become not more simple but more complex. The courts, imbued with the traditions of the dead past and schooled in the technicalities of the common law, hesitate to adopt the new and discard the old. They are bound fast to precedent and consider the code as a mere modification of the common law which is preserved in all its technical formalities except where by force of statute ancient rules are abrogated. The result is that complexity is made more complex. To accomplish results, we must discard the old completely and build up a new system freed from the cant and formalism of past ages.

A large number of the decisions of our Appellate Courts in criminal cases are based upon technical rules with reference to indictments. A few that are not only interesting but almost amusing might appropriately be mentioned.

In one case a man had been charged with the theft of a Smith and *Weston* revolver, was tried by a jury and found guilty. He appealed his case to the Supreme Court of his state, and the court

found that whereas he was charged with the theft of a Smith and *Weston* revolver, in truth and in fact, according to the evidence, he stole a Smith and *Wesson* revolver, and therefore reversed the case, although under the statute of that state it is unnecessary to specifically describe the property stolen. In other words, if the indictment had merely described the property stolen as a revolver,it would have have been sufficient and there would have been no variance between the indictment and the proof. Can any one say that the defendant in this case was prejudiced in any manner whatsoever by the misdescription in the indictment? Or, that the defendant went to trial under misapprehension as to what he was being charged with stealing? Or, could it be possible defendant had stolen so many revolvers he didn't know just exactly which one he was charged with stealing in this particular indictment?

In another decision by this same court, where as I have said, an exact description of property stolen, is not necessary, and where a specific statute exists that it is sufficient to describe money of any kind simply as money, it was held that the judgment of conviction must be reversed for failure to prove that the money stolen was "lawful money of the United States", as alleged in the indictment.

The failure to give an exact description could not endanger the life or liberty of an innocent man, but insistence upon such a technical rule furnishes the guilty with easy means of escape from just punishment.

Space will admit of but one more example. One Court held that when one was found guilty of murder, the cause must be reversed because the indictment charged that the defendant used more than one means in perpetrating the homicide, whereas, the evidence established that death was caused by one of the means singly. That is to say, if the indictment charges homicide by means of beating and poison, and it be shown that death ensued by reason of poison only, the beating not being fatal, the conviction of the defendant is erroneous. This is not mere technicality but pure twaddle.

So it is not only with the indictment, but throughout the trial of criminal cases—useless and antiquated technicalities, with reference to changes of venue, empaneling the jury, the evidence, the verdict, the sentence, and finally the appeal.

Yes, if Justice does emerge in the trial of the case, there is the appeal to the supreme court, where cases are often reversed for technical reasons far removed from anything that has to do with the substantial rights of the defendant. When the cases are reversed, Father Time has probably closed the mouths of the principal witnesses—they probably will be scattered or beyond the jurisdiction of the court, where by reason of another technical rule, their depositions cannot be taken, and thus a retrial cannot be had. New law enforcement agents have probably displaced the old, and have no interest in a case filed away in a dusty pigeon hole by their predecessors. The defendant is free, and during all the time has plied his trade of criminality.

Is there any wonder the public complains of the law's delay and the inefficiency of our administration of criminal laws? Can there be any wonder that our noble profession has lost, in a large measure, its former prestige and the respect of the public?

The fact is, our administration of criminal laws is antiquated and ill adapted, and is in the words of Chief Justice Taft "A disgrace to civilization."