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SUGGESTIONS FOR SIMPLIFICATION OF CRIMINAL PROCEDURE*

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AT this time when we have under consideration a proposal for simplification of procedure in order to facilitate the trial or hearing of civil cases,[1] it may be significant to some degree that no similar proposal has been made in relation to the procedural machinery for trial of criminal cases.

For the vast majority of our number, simplification of civil procedure would affect only a portion of our work.[2]

It may be that reform of civil procedure enlists the greater degree of attention because so much thereof is promoted and fostered by the bar organizations, many of whose most active members devote themselves exclusively to matters civil in nature.

I am not prepared to chart a well-defined course for reform of criminal procedure. Nevertheless, it may very well be that we as a profession, particularly we as members of the judiciary, would be remiss if we should fail to make any exploration whatsoever

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[1] Prior to the Judicial Association's meeting, the West Virginia State Bar had completed its poll of attorneys on the question of adoption of Rules of Civil Procedure for West Virginia, patterned largely on the Federal Rules of Civil Procedure. The vote of the attorneys was on a ratio of approximately five to one in favor of adoption of the Rules. Adoption and promulgation of the Rules are within the province of the Supreme Court of Appeals of West Virginia.

[2] Most of the state courts exercise both civil and criminal jurisdiction. W. VA. CONST. art. VIII, § 12.

of the possibility of keeping reforms in the one branch of jurisdiction abreast of the reforms in the other.[3]

In an exploration of such possibility, three avenues readily suggest themselves: (a) legislation; (b) constitutional revision; and (c) judicial construction.

LEGISLATION

Perhaps it was at least partially because of a study and recommendation made by our group that the legislature in 1955 amended *West Virginia Code,* 62-3-6, to dispense with the necessity of keeping a jury together except in relation to capital offenses.[4] I have no doubt that we have all found this to be a salutary statutory revision, saving annoyance to the court, unnecessary inconvenience to jurors, and, at the same time, bringing about a very considerable saving to the taxpayer; and all this without interfering with the administration of justice either from the standpoint of the accused or of the state.

I mention this one matter because it may serve as one isolated, comparatively minor example of what might perhaps be done for improvement of criminal procedure if we will but give the subject some study and seek to arrive at some concerted action.

Code, 62-3-3, provides for the only exception to the rule of four strikes to each side in a jury case.[5] It provides that in a felony case the defense shall have six strikes and the accused two. This has been criticized upon many occasions and many suggestions have been made to make the rule uniform in all types of cases. There is no sound reason for the distinction. No doubt all of us who preside over trials of felony cases have noted that the unfortunate result is that the six best, most competent jurors are generally struck by the defense.

Code, 62-3-2, provides that "A person indicted for felony shall be personally present during the trial therefor." It is held that the trial commences with the arraignment and plea and continues until final judgment. It is held further that the accused must be present at every step of the trial.

[3] By order of December 26, 1944, the Supreme Court of the United States had adopted Rules of Criminal Procedure for the District Courts of the United States.

[4] W. Va. Acts 1955, c. 98.

[5] See W. VA. CODE c. 56, art. 6, § 12 (Michie 1955).

In the case of *State v. Martin*,[6] it is stated:

> ". . . The purpose of the statute is to preserve inviolate for an accused person his *right and privilege* of seeing and hearing what transpires at his trial . . ."

That is, the statute is held to embody a statement of a "right and privilege" of the accused. The *Martin* case resulted in a reversal of the conviction and sentence in the trial court because of defendant's brief and inconsequential absence. In the opinion nine previous decisions are cited which resulted in similar reversals.

We would all agree that the defendant should have the *right* to be present throughout his trial. But it is a right and privilege which defendant should have the right to waive to some extent, and the statute should so provide. If he elects to be absent during some small portion of the trial at which he is represented by his counsel, there should be no reversal in the absence of a showing of prejudice. The rule is entirely statutory, though perhaps declaratory of the common law. No doubt proper language could be found for a relaxation of the rule without destroying any basic rights of the accused.[7]

Code, 52-2-4, provides that fifteen grand jurors shall constitute a quorum. But, as I construe the statute, and as I understond it is generally construed by the judges, vacancies can not be filled until court convenes and it is determined whether or not at least fifteen are in attendance. And this is true even though we may know in advance that we will not have a quorum, because of death, removal from the jurisdiction, or for other cause. Therefore, a delay is often occasioned while we summon special jury commissioners and fill the vacancies.

This, I feel, could be remedied either by making specific provision for filling such vacancies before the day the grand jury is summoned to convene; or by providing that a number less than fifteen shall constitute a quorum.

In the state of Virginia it is provided that a grand jury shall be composed of not less than five nor more than seven persons, at least four of whom shall concur before there may be an indictment.[8]

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[6] 120 W. Va. 229, 231, 197 S.E. 727, 728 (1938), italics supplied. See also LEE, THE CRIMINAL TRIAL IN THE VIRGINIAS 90 (2d ed. 1940).

[7] See comment on State v. Martin and other West Virginia cases in 45 W. VA. L.Q. 82 (1938). See also 23 C.J.S. § 975 (1942).

[8] See VA. CODE §§ 19-125, 19-132 (Michie 1950).

Perhaps a number considerably less than fifteen or sixteen would be adequate in any event.

Our only provision for amendment of an indictment is found in *Code,* 62-2-10. It relates only to a misnomer of the accused. The state of Virginia makes far more liberal provisions for amendment of indictments, so long as the amendment "does not change the nature of the offense."[9] Perhaps many perplexing questions, much delay or even grave miscarriages of justice might be avoided without sacrificing basic rights of the accused if proper consideration were given to statutory revision in this respect.

Constitutional Provisions

In the light of the current measures looking toward a revision of our state constitution, it might be appropriate for the legal profession to appraise that document with a view of determining whether or not by proper revision the trial of criminal cases may be facilitated without at the same time doing violence to basic rights of accused persons.

In this connection the provision of our state constitution which I have heard referred to most often is article III, section 4 which provides:

> ". . . No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury. . . ."

In other words, it is provided that a felony charge can not be tried, and the accused can not plead either guilty or not guilty, "unless on presentment or indictment of a grand jury." So often we encounter persons accused of felony who want to plead forthwith, but they must await the convening of a grand jury. The accused may be in jail meantime. It may be his intention to plead guilty, and it may be the intention of the court to release him upon probation. Were it not for this constitutional provision, there may be occasions when a grand jury may be dispensed with completely, particularly in the less populous counties.

This provision has been eliminated from the constitution of the state of Virginia. A statute of that state provides for trial upon presentment or indictment by a grand jury; and proceeds as follows:

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[9] *Id.* §§ 19-149, 19-150 and 19-151.

". . . unless such person, by writing signed by such person before the court having jurisdiction to try such felony, or before the judge of such court in vacation, shall have waived such indictment or presentment, in which event he may be tried on a warrant or information. . . ."[10]

In this respect I feel that our criminal procedure could be simplified and improved if proper provision were made for such waiver and for trial upon an information.

Without recommendation I here point out that the constitution of the state of Virginia provides for a jury of fewer than twelve in all cases except upon felony charges; and also that one accused of a felony may waive a jury trial and submit his case for trial before the court in lieu of a jury.[11]

Without going into detail, I would like to suggest a revision of the constitution of this state to limit the power of the governor indiscriminately and capriciously "to grant reprieves and pardons after conviction."[12] At least there might be provision for a previous study and investigation of the case, by the attorney general, by the West Virginia Board of Probation and Parole or in some other manner. An experience I had in this connection during the waning hours of a governor's term of office was most unfortunate.

In my own personal, humble judgment, the constitutional provision which is most distorted and which causes the most frequent miscarriages of justice without affecting in substance the basic rights of the accused is the simple provision that "the accused shall be fully and plainly informed of the character and cause of the accusation."[13]

I believe that I comprehend and appreciate reasonably the historical background for this constitutional provision, as well as the evil of a much earlier day it was designed to correct and avoid. I have not the slightest quarrel with the proposition that an accused individual should not be haled into court for trial upon a criminal charge without adequate previous knowledge and information as to the essential nature of the charge.

But I do sincerely feel that technical rules upon which courts are required to operate in this later period have to an unnecessary

[10] *Id.* § 19-136.
[11] *Id.* §§ 19-166, 19-167 and 19-168, and annotations thereto. See also Annotation, 51 A.L.R.2d 1346 (1957).
[12] W. VA. CONST. art. VII, § 11.
[13] *Id.* art. III, § 14.

and regrettable degree abandoned substance in the pursuit of empty form.

How often have we experienced counsel for an accused coming before the court by demurrer and asserting for instance: "May it please the court, my client is indicted for drunken driving, but the indictment does not advise him of the nature and cause of the accusation." The inconsistency in this respect is analogous to that of the proverbial verdict of the jury: "We, the jury, find the man who stole the horse not guilty."

As a matter of actuality, we find that the accused himself is fully advised. If he needs further information, he may require a bill of particulars.[14] But the difficulty is rather that the attorney himself is not advised in the esoteric language known and spoken only by members of the legal profession. I shall refer further to this question in the subsequent portion of these remarks.

JUDICIAL CONSTRUCTION

That there is a fairly wide range of permissible flexibility in judicial pronouncement by appellate courts is so clear that the proposition need not be belabored. The recent decision of the Supreme Court of the United States relative to segregation is a case in point.[15]

The Supreme Court of Appeals of this state not infrequently exercises this right. For instance, in the recent case of *State v. Bragg*,[16] by a three-two decision the court changed a procedural principle in a criminal case by the specific disavowal of numerous previous decisions.

This field of permissive flexibility, in my judgment, clothes our profession with a peculiar facility for keeping procedure for trial of criminal cases abreast of the age in which a man-made satellite encircles the globe at the rate of 18,000 miles per hour.

In the case of *Lovings v. Norfolk & W. Ry.*,[17] Judge McWhorter said, "'It is better to be right than to be consistent with the errors

[14] W. VA. CODE c. 56, art. 4, § 19 (Michie 1950). The statute applies to criminal and civil cases. State v. Lewis, 69 W. Va. 472, 72 S.E. 475 (1911), and State v. Jarrett, 119 W. Va. 432, 194 S.E. 1 (1937).

[15] Brown v. Board of Education, 347 U.S. 483, 38 A.L.R.2d 1180 (1954).

[16] 140 W. Va. 585, 87 S.E.2d 689 (1955).

[17] 47 W. Va. 582, 590, 35 S.E. 962, 965 (1900).

of a hundred years.'" In *Town of Weston v. Ralston,*[18] Judge Brannon said, "No legal principle is ever settled until it is settled right."

While our opportunity and responsibility as a profession are in this respect great, I seriously doubt that we keep apace with the public thinking or with the remedial tendency of our legislative branch.

For instance, as late as the year 1930, in the case of *State v. Robison,*[19] it was held that an indictment was fatally defective to the extent that it merely alleged the theft of $3,500.00. It was held to be a violation of the constitutional rights of the accused in the absence of an allegation of the number, kind, and denominations of the several pieces of money, and an allegation disclosing whether gold, silver or copper. Judge Hatcher, in his dissenting opinion, quotes Justice Holmes as follows:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[20]

Under this and similar decisions, it was sufficient in the alternative to allege that the denominations and kind of the money were to the grand jurors unknown. How enlightening it would have been to the accused to have had a new and reformed indictment advising him that the nature and denominations of the money were "to the grand jurors unknown!"

The point I make here is that we left it to the legislative branch to relieve us from that ridiculous situation which survived from ancient times. It can not be replied that the courts were lacking in constitutional authority to make the change; because, if an indictment omitting such detailed description of the money is violative of the constitutional rights of the accused, then it follows that the remedial statute itself is unconstitutional.

The legislative branch has charted a course for us in setting out in detail what defects shall not invalidate an indictment.[21] The

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[18] 48 W. Va. 170, 180, 36 S.E. 446, 450 (1900).

[19] 109 W. Va. 561, 155 S.E. 649 (1930).

[20] *Id.* at 565, 155 S.E. at 650. See Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 468-69 (1897).

[21] W. VA. CODE c. 62, art. 2, § 10 (Michie 1955).

legislative branch also sets forth in detail "defects cured by verdict," by use of the following rather comprehensive language:

> "Judgment in any criminal case, after verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case."[22]

In the more recent case of *State ex rel. Cain v. Skeen*,[23] it appeared that the accused had been indicted in the circuit court of Wirt County upon a charge of statutory rape, and, upon his plea of guilty, he was sentenced to confinement in the penitentiary. Upon direct proceedings for a writ of habeas corpus, it was held (although the opinion states that it is contrary to the weight of authority) that the indictment was void and a nullity, and consequently his plea and sentence were void and a nullity, because the indictment to which he entered his plea of guilty failed to allege his age. How enlightening it would have been to appraise the accused of his age! How beneficial to him in making his defense, or entering his plea! How the "character and cause of the accusation" would have been elucidated thereby!

Subsequently in one of the counties of my own circuit we had before us a man we considered away from home until he was securely lodged in the penitentiary. There was a similar disposition of his case in my court and, by like procedure, the doors of the penitentiary were opened for his release. And all this, because, forsooth, we failed to apprise the defendant of his age.[24]

In the case of *State v. Musgrave*, in which the accused was convicted of murder here in Monongalia County and sentenced to life imprisonment, and in which there was a reversal, Judge Brannon, in his dissent, states:

> ". . . If we could say there was any misstep in a matter of law in this long trial, it is one of very immaterial character, weighing not a feather in the trial, utterly inadequate to justify the reversal of a long, laborous trial bearing to us the face of having been full, patient and fair. The scope of harmless error is, in these days widening. Courts do not nowadays, even in grave trials, reverse such trials for trivial errors, evidently not affecting them; so light, and plainly playing so unimportant a part, as not to be appreciably influential or prejudicial. In days

[22] *Id.* c. 62, art. 2, § 11.
[23] 137 W. Va. 806, 74 S.E.2d 413 (1953).
[24] State v. Coiner, 98 S.E.2d 1 (W. Va. 1957).

gone by, technicalities and rigid procedure sprang up and were enforced to defend accused parties against the demand of monarchic power for conviction, and they then answered, 'Good purpose;' but in this country there is not the same need of them, as the danger now is that the guilty will go free, and something is necessary to protect the public against crime."[25]

In his dissenting opinion in the case of *State v. Stollings*, Judge Fox points out how often and how frequently, by divided courts, we have switched our position on the question of disjunctive pleading in indictments, and refers to the majority opinion as follows:

". . . Eloquent, even lyrical, phrases are used to picture our legal rights, whether they be inherent under our system of government, or assured by the Constitution and Bill of Rights. With that position, and the spirit which prompts it, I do not disagree. But I would like to hear some voice raised in behalf of the law-abiding people of the State, to whom crime is abhorrent, and who expect law-enforcement agencies of the State, in all its subdivisions and departments, to protect them. I would like to hear some one speak for the conscientious and honest law enforcement officers who, in their line of duty, are hampered and impeded in their work by unreasonable rules to which men resort when accused of crime, and which rules are, in my opinion, too often recognized by the courts. I would give every accused person a fair trial. He is entitled to that and no more. He is not entitled to be coddled, nor, if gulity, to have freedom awarded to him by a court on some excuse which cannot be related to the realities of the situation presented."[26]

We give lip service in this state to a recognition of the doctrine of harmless error in criminal cases. But it seems to me that such rule is applied with baseless liberality in favor of the accused.

Professor Wigmore, in the second edition of his well known work on *Evidence*, in dealing with the doctrine of harmless error and related questions, has much to say, a small portion of which is as follows:

". . . the maudlin sentimentality of judges in criminal cases must cease. Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable. But the exultation of technicalities of every sort merely because they are raised on behalf of an accused person is a different and reprehensible thing. All the sentiment is thrown to weight the scales for the criminal—that is, not for the mere accused,

[25] 43 W. Va. 672, 710, 28 S.E. 813, 828 (1897).
[26] 128 W. Va. 483, 494, 37 S.E.2d 98, 102-3 (1946).

> who may be assumed innocent, but for the man who upon the record plainly appears to be the villain that the jury have pronounced him to be. We have long since passed the period (as a modern judge has pointed out) 'when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty.' The dignity, the truth, and the lofty inspiration of great constitutional principles are frittered away and degraded. While on the one hand certain fundamental ideals of political liberty have come to be lightly questioned as impracticable or cynically ignored as obsolete, on the other hand the constitutional safeguards of procedure and evidence are invoked with such fatuous philanthropy and such misplaced magnanimity that their respect is lowered and their true purposes are defeated. 'I do not understand,' protested a great judicial interpreter of the organic law, 'that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any other; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct.' Yet they seem to make it their business. A false sentiment misapplies their energies. This they must unlearn. The epoch of governmental oppression has passed away; the epoch of individualistic anarchy has taken its place. They must learn the lesson of transferring the emphasis of their sympathies,—a lesson more than once read to them by the voices of their own fellow-members of the judiciary."[27]

I realize, of course, that we are a government of law, and not of men. That being so, no doubt it is inevitable that, in the application of such laws, there shall always be some unfortunate results which do not accord with good judgment, common sense and justice. But I do feel that, whenever or wherever the law leads us to an unjust or ridiculous result, we should not accept it with complete resignation and complacency as something unavoidable. Rather every such unfortunate result should be regarded by our profession as a challenge to an endeavor to correct and refine the machinery under which our criminal courts must operate in the discharge of our solemn responsibility to the public.

In any event, may we never see the dawning of the day when we, as lawyers and as judges shall become slaves to the abstract rules under which we operate to the extent that we shall fail to appreciate that our job is to deal with human beings and their difficulties, and with actual, real, concrete situations.[28]

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[27] 1 WIGMORE, EVIDENCE 210 (2d ed. 1923). See also 1 WIGMORE, EVIDENCE § 21 (3d ed. 1940).

[28] See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142 *et seq.* (1921).