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Origin and Effect of Technicality upon American Criminal Procedure

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THE ORIGIN AND EFFECT OF TECHNICALITY UPON AMERICAN CRIMINAL PROCEDURE

By LARRY O'CONNOR

"While science, commerce and learning ride on through the years on steeds of flame, the law drags itself along on broken wings."[1] This observation by Judge Marcus Kavanaugh aptly expresses the condition of criminal procedure in the United States.

The veneration which our bench and bar show to the often absurdly technical rules inherited from English Common Law furnishes many examples which would be amusing were it not for their effect in fostering crime. Let us notice the operation of the technicality in our appellate courts. In reading these cases bear in mind that before the appeal, a jury of twelve men had declared the accused to be, beyond a reasonable doubt, guilty of the offense charged.

The supreme tribunal of Arkansas in a recent case held that a witness called to testify is presumed to be of good character, hence no proof of it is necessary. But out of abundant caution on the part of the prosecution this presumption is fortified by evidence. The witness is thus shown to be exactly what the law presumes him to be. Result—the case is reversed for the commission of this grave and prejudicial error.[2]

One Goldberg was indicted in fifty counts for the illegal sale of liquor. In forty nine of the counts his name was spelled correctly, in one of them it was spelled Holdberg. He was convicted on all fifty counts, and moved in arrest of judgment. The motion was denied in the trial court. The Supreme Court of Illinois held—the names not being "idem sonans", the holding must be reversed "in toto".[3]

In Rhode Island, a man convicted of carrying brass knuckles "on or about" his person must go free even though they found the brass knuckles on him. The indictment should have charged "on and about" his person.

The New Jersey courts say that if a conviction be had on

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1 The Criminal and His Allies. Page 176.
2 Lockett vs State (ARK. 1918) 207 S. W. 55:
3 People vs Goldberg (Ill. 1919) 122 N. E. 53.

several counts, but the clerk neglects to record a plea to one of them, the defendant must have a new trial.[4]

In Indiana a man stole a Smith and Wesson revolver but the indictment called it a "Smith and Weston" revolver. Therefore his conviction was set aside.[5]

A Georgian was charged with having stolen a hog with a clip off the right ear and a slit in the left ear; when as a matter of fact, all he had done was to steal a hog with a clip off the left ear and a slit in the right ear. The higher court reversed the conviction.[6]

Many more cases of a similar nature could be recounted but these furnish an idea of how the technicality operates to delay and in many instances to defeat justice.

The Attorney General of Illinois in his official report for 1927 lists two hundred eight cases as having been affirmed or reversed during the two preceeding years. Of these one hundred eight were affirmed and the appalling number of ninety-two reversed. Thus we see in Illinois that the criminal has almost an even chance of having his conviction reversed upon appeal.

Most criminals in our large cities have ample means with which to defray the cost of appeals. With the chances for success so greatly in their favor, is it not likely that they will avail themselves of this opportunity of delaying, and in many instances defeating the hand of justice? Recent investigations have shown that many bands of law-breakers have a sinking fund laid aside to be applied in procuring the best available legal talent in their defense.

The reversal and remanding of the case against the criminal furnishes a delay of from eight months to two years. When the case then comes up for rehearing adverse witnesses have died or disappeared, or have forgotten their testimony, or they have been bought or frightened off. It is rare indeed that a new trial produces a second conviction.

Even a worse misfortune follows. These decisions establish a rule binding on the lower courts from which kindred rules will develop. It may be said that for every one of these upper court reversals forty or fifty other miscarriages of justice fol-

4 State vs Brennan 83 N. J. L. 12, 13:
5 Morgan vs State 61 Ind. 447.
6 Robertson vs State 97 Ga. 206.

low in the lower courts. Trial judges with an eye upon their record hesitate to rule against the defendant on a technical point for fear they will be reversed upon appeal.

With a picture of present conditions in mind an observer is led to wonder in what manner these technicalities originated. A discussion of their origin will therefore be interesting.

As late as 1770 the law of England provided one hundred sixty-four capital felonies. Crimes which at present carry a penalty of a few dollars fine were at that time punishable by death.

While Parliament continued to increase the number of crimes which led to the scaffold, the savagery of the law defeated itself. The people of England grew to pity the hapless offenders who were sent to their doom for some minor offense. The rebellion against cruelty took form in the shape of a humane conspiracy between judges and lawyers in the form of practice and procedure to defeat the law and to acquit the prisoner. If every hair's breadth of form were not put upon the scales, if any hair's breadth of divergence from the established precedents were visible, then, no matter how guilty the accused, he must go free.

More than seventy five years ago, however, England revised both her substantive and adjective law. At present treason and murder are the only capital offenses. Now their courts, operating under modern rules of procedure, mete out swift and sure justice. It is interesting to note that immediately after this change the wave of crime in England began to ebb and that Great Britain to-day is one of the most law abiding nations on earth.

The United States is then, retaining a system of criminal procedure which has long since been discarded by the country in which it originated. In our progressive land it is indeed strange to find courts bound and shakeled by a system of procedure made to suit a less enlightened era.

And yet to some extent there is an existing parallel between modern American conditions and those which prompted the invention of the legal technicality in England so many years ago. To be sure we do not here have one hundrede and sixty-four capital felonies (in some states capital punishment has been abolished altogether), but our courts do arraign and attempt to punish

citizens for the breach of myriads of regulatory statutes, the violation of which entails no injury to any citizen's property. Some one of these "conduct" laws is violated by practically every citizen at least once a day. Without compensation, and in the same spirit that animated the English judges and lawyers in the old capital punishment days, American lawyers press the technicality as a means of preventing the levying of a punishment which they, the accused and in some case the judge himself, feel to be unjustifiable.

Unfortunately, the technicalities that are pressed in the cases involving merely regulatory laws are likewise citable in the cases where the defendant is accused of the gravest offenses against the person and property of his neighbor. The misfortune for America lies in the lack of judicial and legislative discrimination between real offenses against the person or property (such as murder, assault, larceny, rape, etc.) and the fictitious offenses against the legislative interpretation of the moral and social code (prohibition, blue laws, gambling, immorality, etc.). When we adopt a system of "swift and sure" punishment through the abolition of the technicality we should make sure that only real offense against person and property are made subject to it.

The solution and eradication of the present crime wave lies not in passing more laws in restriction of man's personal liberty but in reorganizing and revising our codes of criminal procedure so that the "real" laws now in force may be adequately enforced.