



1-1-1928

Editorials

Notre Dame Law Review Editors

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Recommended Citation

Notre Dame Law Review Editors, *Editorials*, 3 Notre Dame L. Rev. 46 (1928).

Available at: <http://scholarship.law.nd.edu/ndlr/vol3/iss3/4>

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THE NOTRE DAME LAWYER

A Monthly Law Review

"Law is the perfection of human reason"

SUBSCRIPTION PRICE, \$2.00 PER YEAR: BY MAIL, \$2.50. 35 CENTS AN ISSUE

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CROWDED CRIMINAL COURTS

With each succeeding day we hear more and more concerning the crowded conditions of the courts of this country. Working at top speed they seem unable to keep pace with the demands that are made upon them. Meanwhile reformers cast about seeking means whereby the pressure may be relieved. We are told that the crowded conditions so alarming to our fellowmen are due to an over-docketing of criminal cases, for in civil matters the courts seem to be able to keep their heads above the tide. Unfortunately this is not so true with regard to the criminal side of the docket. What are the causes for this?

In connection with this subject it appears that there are political lessons to be learned from the law of real estate. From time immemorial the owner of property has been said to have the right "to enjoy his own land in the state and condition in

which nature has placed it, and also to use it in such manner as he thinks fit subject always to this: that if his mode of using it does damage to his neighbor he must make compensation." (*Bonomi v. Backhouse*, Exchequer Chamber 1859.)

The only limitation placed upon one's use of his own property therefore is the similar right of his neighbor to use that to which he, the neighbor, has title. "*Sic utere tuo ut alienum non laedas*". Right is thus balanced against right. Originally this was the situation with reference to all of the "rights of man",—liberty as well as property. Thus we might paraphrase the above quotation and say that every man has, or should have, "the right to enjoy his own liberty in the state and condition in which nature (or the Creator) has placed it; and also that he may use it in such manner as he thinks fit subject always to this: that if his mode of enjoying his liberty does damage to, or restrains, the equal liberty of his neighbor, he must make compensation."

This is the rule that prevails in the law of Torts. One is not liable in damages for his eccentricities no matter how crude and unreasonable they may appear to be, unless his actions are the proximate cause of damage to his neighbor. If this happens the injured party must sue,—as he must in a real property case, and the burden is upon the plaintiff to make a case.

How vastly different is the course of criminal procedure! In the law of crimes right is no longer balanced against right (as it was prior to 1880). The injured party does not institute the proceeding. In many cases there is no injured party at all and the prosecution must rely upon professional witnesses,—policemen, and in some instances, spies,—to make its case. We wonder if the unsatisfactory condition of criminal practice today is not due largely to the fact that it has departed from the logical arrangement that obtains in the law of Property, Contracts and Torts?

EXPERT TESTIMONY

It has been some time since those in the field of jurisprudence discovered the advisability of calling experts in various matters to testify in pending cases; in fact the practice has been in use long enough to allow the legal profession ample opportunity to make certain discoveries about the discovery.

The theory of the calling of such witnesses was, and should be, to supply that knowledge in which the court or the jury would ordinarily be lacking. If this be the end in view, it would not be far amiss to mention that the experts have not always succeeded in serving the purpose for which they were called. In examining of the transcript of a case recently the writer found that there was a collection of men, evidently experts at being experts, testifying for each side. It would seem from their testimony that the gentlemen contradicted one another. At best their effect upon the jury was not very enlightening.

Several reasons for the occurrence, which is by no means an infrequent one, present themselves at this time. First, it has been stated, that since the experts are called upon to answer hypothetical questions named by the side calling them, it is quite easy for the query to be so worded as to fit in with the contentions of that party litigant. When the opposition calls its staff of experts this assenting to hypothetical questions is again enacted. The result is that the jurors often find themselves worse in the end than they were before receiving the aid from the professional men, for before this proceeding they may have formed some clear, if non-expert concepts, dealing with the matter. Perhaps some would object to that, but after listening to a steady stream of professional jargon on both sides given by men who are sometimes more impressed with impressing members of their own profession or clientele than in presenting the matter clearly and concisely to the jury, it is a lucky venireman who can be certain of the point upon which so much expert light has been thrown, presumably for his benefit.

That this is the all-too-common procedure is recognized not only by the bar but by the papers. Anomalous as it may seem, the editorial writers have not found as great fault with the medical profession whose members have taken such an active part in this practice, as they have with the lawyer who relies upon the representations of the medical man. But that is neither here nor there. The fact is, no matter how prevalent the custom may be, it does not seem to be the most logical method.

Since the basis for the proceeding is to arrive at the truth, why would it not be competent for the court to have the duty

of questioning the experts who come before it? This might be arranged much in the same manner that charges to the jury are given. Allow each counsel to frame hypothetical questions and the court to frame several; then allow the attorneys to meet and object to any prejudicial matter that might appear, the judge finally ruling on the objections and submitting what the court considers the better form to the expert.

Or perhaps a better method would be to empower the court itself to call experts to be paid by the state. This body of men who would not be interested in the outcome of the case could then either testify or at the court's discretion investigate the facts of the case and decide the fact involved. This fact would then be presented to the regular panel in the court's charge as a settled matter. Admittedly you are taking a matter of fact from the regular jury, but would it not be better to have it decided by another,—a professional jury?