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Charles S. Potts

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SUGGESTED CHANGES IN OUR CRIMINAL PROCEDURE*

Charles S. Potts†

I. AS TO THE LAW OF ARRESTS

THE Anglo-American law of arrest took shape in England some three hundred years ago, and has been only slightly changed since that time. It badly needs overhauling. A few obvious changes are here suggested for consideration.

1. *All misdemeanors in officer's presence.* Peace officers should be allowed to arrest without warrant for all misdemeanors committed in their presence or within their view, whether or not a breach of the peace is involved.¹ It seems quite absurd to require a peace officer to stand idly by while a misdemeanor that happens not to involve a breach of peace is committed in his presence.

2. *Summons in lieu of arrest.* In case of an arrest for a misdemeanor the officer should be allowed to give the defendant, if a resident of the county, an appearance ticket or summons, as is now done in cases of traffic violations, rather than to haul him off to police headquarters to make bond.² An adequate penalty should be provided for his failure to appear at the time and place named.

3. *Resisting a known officer unlawful.* It should be unlawful for a citizen to resist a known officer, whether the arrest be wrongful or not. This is the rule in cases of wrongful seizure of property under a writ of attachment or of sequestration.³ The respective

* The writer has been assisted in the preparation of this article by a grant from the Carnegie Fund for the Advancement of Teaching.

† Dean Emeritus, School of Law, Southern Methodist University.

¹ ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947) 18-21; AM. L. INST. CODE CRIM. PROC. § 21; *Uniform Arrest Act*, § 6 [the entire Act is set out in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 316, 343, 345 (1942)]; Waite, *The Law of Arrest*, 24 Tex. L. Rev. 279, 305 (1946); Potts, *The Law of Arrest*, 1 Baylor L. Rev. 397, 400-402 (1949).

² ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947) 31-33, 131; FED. RULES CRIM. PROC. Rule 4(a); AM. L. INST. CODE CRIM. PROC. §§ 12-16; Potts, *The Law of Arrest*, 1 Baylor L. Rev. 406-408 (1949).

³ *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482 (1836); *Witherspoon v. State*, 42 Tex. Crim. Rep. 532, 61 S. W. 396 (1901); *State v. Selengut*, 38 R. I. 302, 95 Atl. 503 (1915); Waite, *The Law of Arrest*, 24 Tex. L. Rev. 279, 305 (1946); Potts, *The Law of Arrest*, 1 Baylor L. Rev. 397, 405 (1949).

rights involved in an arrest cannot be adjudicated instantly at the point of a pistol in the hands of the arrestee.

4. *Officer need not have warrant.* The arresting officer should not be required to have the warrant of arrest in his possession as the law now requires. It should be sufficient for him to state to the defendant that a warrant has been issued and will be shown to him at a convenient time and place.⁴ A very large number of arrests in cities are now made by officers in police cars, alerted by radio, who must act speedily and without the possibility of securing warrants.

5. *Abuse of prisoners by officer.* Some means should be devised for securing the proper enforcement of our statutes enacted to protect prisoners from abuse at the hands of peace officers and jailors. TEXAS PENAL CODE (Vernon, 1948), art. 1176, which has been on the statute books many decades, provides for a heavy fine and jail sentence for any officer who shall wilfully prevent any prisoner from consulting or communicating with his attorney. In 1923 the legislature went further and provided for a fine not to exceed \$1000, and imprisonment not to exceed one year in jail, and, within the discretion of the jury, permanent disqualification from holding public office, for any officer who should thereafter "torture, torment, or punish" any prisoner in his custody "for the purpose of making him confess to any knowledge of the commission of any offense against the laws of this state."⁵

It is common knowledge that these statutes are frequently violated, but apparently only one criminal case against a public officer has reached the Court of Criminal Appeals. That case, against a captain of detectives in Houston, was reversed because it was brought in the county court when it should have been brought in the district court, as involving "official misconduct."⁶

Nearly a score of Texas cases, where confessions were secured by "third degree" methods and were wrongfully admitted in evi-

⁴ See FED. RULES OF CRIM. PROC. Rule 4(e); Am. L. Inst. Code Crim. Proc. § 24; *Uniform Arrest Act*, § 8; Potts, *The Law of Arrest*, 1 *Baylor L. Rev.* 397, 402 (1949).

⁵ TEX. PEN. CODE (Vernon, 1948) art. 1157.

⁶ *Simpson v. State*, 138 *Tex. Crim. Rep.* 622, 137 *S. W. 2d* 1035 (1940).

dence, are summarized in an article recently published by the present writer.⁷

II. SUGGESTED CHANGES AS TO BAIL

1. *Money bail.* A deposit of money or of United States bonds, or of state or municipal bonds of equal value, should be accepted in lieu of a bail bond.⁸

2. "*Jumping bail*" should be made a penal offense. In Texas and many other states bail is a constitutional right in all cases except where "the offense is capital and the proof is evident."⁹ Under this constitutional provision a person charged with a non-capital felony, where the proof is *not* evident is entitled to be released on bail, regardless of the number and gravity of the crimes of which he previously may have been convicted, and also regardless of the number of times he has forfeited bail in this or other states. Two possible remedies for this situation suggest themselves: (a) to amend the constitution so as to authorize judges and justices of the peace, in the exercise of a sound judicial discretion, to deny bail to persons who have in the past wilfully forfeited bail; or (b) to make wilfully forfeiting bail a grave penal offense.

3. *Crimes committed by persons on bail.* The penalty to be assessed for any crime committed while the defendant is out on bail might very properly be increased, possibly even doubled. This would tend to put a check on professional criminals who have their bondsmen get them out of jail speedily and go right on with their malefactions.

4. *More speedy systems of forfeiting bail.* The present system

⁷ Potts, *The Preliminary Examination and the Third Degree*, 2 Baylor Law Rev. 131, 150 (1950). For illustrations of the sort of third degree abuses here referred to see the following federal and Texas cases: *Wan v. United States*, 266 U. S. 1 (1924); *Williams v. State*, 88 Tex. Crim. Rep. 87, 225 S. W. 177 (1920); *Sigler v. State*, 139 Tex. Crim. Rep. 167, 139 S. W. 2d 277 (1940); *White v. State*, 139 Tex. Crim. Rep. 660, 128 S. W. 2d 51 (1939), *rev'd*, 310 U. S. 530 (1940); *Ward v. State*, 144 Tex. Crim. Rep. 444, 158 S. W. 2d 516 (1941), *rev'd*, 316 U. S. 547 (1942); *Cavazos v. State*, 143 Tex. Crim. Rep. 564, 160 S. W. 2d 260 (1942).

⁸ AM. L. INST. CODE CRIM. PROC. § 87.

⁹ TEX. CONST. ART I, § 11.

of forfeiting bail should be abolished and a more expeditious and effective one put in use. In the federal courts, if the defendant fails to appear when his case is called for trial, judgment forfeiting bail is immediately entered. A "show-cause" order is then issued to defendant and his sureties, commanding defendant and his sureties to come in within ten days or two weeks, and show cause, if any they have, why the forfeiture should be set aside. At the expiration of the period fixed in the order, if the defendant and his sureties do not come in and show good cause for his failure to appear for his trial, the forfeiture becomes final and execution is promptly issued to collect the bond.¹⁰ In our state courts the hearing on the forfeiture is, by statute, put off to the next term of court, three months or six months later, and the judgment of forfeiture is rarely made permanent, and more rarely still is the judgment finally collected.

5. *Professional bondsmen.* Persons desiring to write bail bonds as a business should first be required to secure a permit to do so from the State Department of Insurance, after a showing of good character and of financial responsibility, as is now required of persons and corporations wishing to write fidelity bonds.

III. WAIVING INDICTMENT AND TRIAL BY JURY

1. *Waiving indictment in felony cases.* Many persons arrested for serious crimes are unable to make bond. Even if they are innocent, they must, under existing statutes, remain in jail until the impaneling of the next grand jury, which may be as far off as three months in the populous counties, or as much as six months in the smaller counties. It would, therefore, be a great boon to such persons to permit them to waive indictment by the grand jury and stand trial at once on information filed by the district attorney.

About three-fourths of the states now permit all persons to waive the formality of indictment and secure a trial as soon as possible on information filed by the district attorney.¹¹

¹⁰ FED. RULES CRIM. PROC. Rule 46(f).

¹¹ AM. L. INST. CODE OF CRIM. PROC. § 113.

The American Law Institute's rule on waiving indictment reads as follows:

"Section 113. *Prosecution by information or indictment.* All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or by information."

The federal rule on waiving indictment is very similar. It follows:

"Rule 7(b). *Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised as to the nature of the charge and of his rights, waives in open court prosecution by indictment."¹²

2. *Waiving trial by jury.* There seems to be no reason why the defendant in felony cases as well as misdemeanor cases should not be permitted to waive trial by jury, under proper safeguards. Waiving trial by jury is permitted in a large part of the Anglo-American world—in England, in Canada, in our federal courts, and in twenty of our states.¹³ Wherever tried for any length of time, trial by judges without juries has proven to be popular with defendants, as well as a great saver of time and money. In England about 85 percent of indictable offenses are tried without jury. In Maryland and Connecticut the percentages of waivers are nearly as high.

In Maryland, former Supreme Court Justice Carroll T. Bond some years ago declared that two criminal courts were able to keep completely abreast of their dockets in Baltimore, then a city of 800,000. Continuing he said:

¹² The drafting commission offered the following comment on Rule 7b: "Opportunity to waive indictment and to consent to prosecution by information will be a substantial aid to defendants, especially those who, because of inability to give bail, are incarcerated pending action of the grand jury, but desire to plead guilty. . . . In many districts where the grand jury meets infrequently a defendant unable to give bail and desiring to plead guilty is compelled to spend many days, and sometimes many weeks, and even months, in jail before he can begin the service of his sentence, whatever it may be, awaiting the action of a grand jury."

¹³ Handley, *Some Observations on Waiver of Jury Trial in Felony Cases*, 1 Tex. L. & Leg. 45-54 (1947); see also Johnson, *Waiver of Indictment in Texas*, 1 Tex. L. & Leg. 22 (1947); Potts, *Waiver of Indictment in Felony Cases*, 3 Southwestern L. J. 437 (1949).

"At times there is not enough unfinished business for two courts, and one is able to keep up with the work. It is ordinarily possible to give trials without any delay beyond such time as may be needed for preparation, and there are times when the court seems too close on the heels of the grand jury, when the court is prepared to give trial on the day after indictment.

"For some years now, only one jury panel has been kept in attendance upon two criminal courts, and, even so, the jurymen spend much of their time sitting aside as spectators.

"Of the 1500 criminal cases docketed during the four months of the January (1925) term of the Criminal Court of Baltimore city, all except 177, mostly those last docketed, were disposed of before the final day of the term. Unquestionably this comparatively rapid disposal of business is due to the prevalence of trials without jury."¹⁴

In Texas we have long had a statute permitting the waiver of trial by jury in misdemeanor cases.¹⁵ Also, in non-capital cases where the defendant pleads guilty, he may waive a jury and be tried by the judge.¹⁶ These statutes have been upheld by our Court of Criminal Appeals.¹⁷ In view of these holdings it seems clear that there is no constitutional barrier in the way of repealing Article 11 of the Code of Criminal Procedure, first enacted in 1856, which declares that the defendant "may waive any right secured to him by law, except the right of trial by jury in a felony case." That statute was passed as a concession to the conservatives of that day, but the experience of a hundred years has demonstrated in this state and elsewhere that there is much to be gained by allowing defendants to waive their right to trial by jury under proper safeguards. It is believed that such a change in our law would aid us greatly in keeping up with our over-crowded dockets

¹⁴ Bond, *The Maryland Practice of Trying Criminal Cases by Judges alone, without Juries*, 11 A.B.A.J. 699-703 (1925).

In a letter to the present writer, dated Sept. 28, 1950, Chief Justice Allyn L. Brown, of the Supreme Court of Connecticut, gives figures showing that the situation in that state in regard to waiving trial by jury is approximately the same as in Maryland, as shown in Judge Bond's article.

¹⁵ TEX. CODE CRIM. PROC. (Vernon, 1948) art. 518; *Moore v. State*, 22 Tex. Ct. App. 117, 2 S. W. 634 (1886).

¹⁶ TEX. CODE CRIM. PROC. (Vernon, 1948) arts. 10a and 12.

¹⁷ *McMillan v. State*, 122 Tex. Crim. Rep. 583, 57 S. W. 2d 125 (1933); *Bolton v. State*, 123 Tex. Crim. Rep. 543, 59 S. W. 2d 833 (1933).

in our large cities, especially if we can improve the quality of our judges by removing them from the political mire in which they now flounder.

3. *Repeal of Article 687 of our Code of Criminal Procedure.*

A slight statutory change might be made that would prevent a goodly number of mistrials in felony cases every year. Reference is here made to the situation when one or more jurors die during the course of the trial, or are otherwise unable to continue to serve. Under our existing law, the discharge of a juror abruptly ends the trial, and the case must be reset and retried.

Now, the constitution-makers of 1875 foresaw this contingency and in their wisdom provided that when such a situation should arise, the trial should continue without interruption and the remaining jurors, if not fewer than nine in number, should have authority to render the verdict.¹⁸ The leaders in the Convention felt so strongly on the subject that they provided in the constitution that the new procedure should go into effect at once upon the ratification of the constitution. However, they further provided that "the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict." At the next session of the legislature, that body abolished the Constitutional Convention's plan by passing a law that reappears as Article 687 of the present Code of Criminal Procedure. This article declares that "not less than twelve jurors can render and return a verdict in a felony case."¹⁹

This article forces the defendant to submit to trial by a jury of twelve, even though he might prefer to be tried by the judge, and, as pointed out above, it forces the judge to declare a mistrial even though both the state and the defendant may be willing, or even eager, to finish the trial with the remaining jurors.

¹⁸ TEX. CONST. ART. 5, § 13.

¹⁹ Before this act became effective one *murder* case had been decided by an eleven-man jury, and their verdict was upheld by the Court of Appeals. *Ray v. State*, 4 Tex. Ct. App. 450 (1878). Another case, involving a verdict in a *civil* case returned by a vote of ten jurors to two, was upheld by the Supreme Court of Texas. *Bowen v. Davis*, 48 Tex. 101 (1877).

This unfortunate situation can be met in one of three ways: (1) by outright repeal of Article 687, which would automatically restore the Constitutional Convention's plan; or (2) by providing for the impaneling, at the beginning of the trial of one or two alternate jurors who should sit and hear the evidence but would not participate in reaching the verdict, unless a regular juror or two should have to be discharged;²⁰ and (3) by providing by statute that if a juror should be discharged, the attorneys for the State and the defendant might, in open court, enter into an agreement to proceed to a verdict by the remaining jurors.²¹

The Supreme Court of the United States has held that waiving trial by jury does not deny due process or equal protection.²²

IV. SELECTING THE GRAND JURY

1. *Avoiding race-discrimination.* The jury commissioners in the counties should be required to see that different racial groups are represented on the panel from which the grand jurors are to be selected. This representation should be approximately in proportion to their numbers in the county. Racial groups too small to have a member selected each year, might have a grand juror on alternate years or even less often.

2. *Challenging grand jurors after impanelment.* It might also be desirable to permit a person, whose alleged crime is committed after the grand jury has been impaneled, to challenge for good cause shown not to exceed three grand jurors, if he wishes to do so, and to have the remaining members pass on his case, the challenged grand jurors to absent themselves only during the consideration of the challenger's case. It is believed that the foregoing changes would obviate such racial appeals to the United States Supreme Court as are referred to in the note.²³

²⁰ See Churchill, *Alternate Jurors—A Remedy for Felony Mistrials?* 1 Tex. L. & Leg. 80 (1947).

²¹ For recent data on states that waive trial by jury, see Handley, *Some Observations on Waiver of Jury Trial in Criminal Cases*, 1 Tex. L. & Leg. 45 (1947).

²² Patton v. U. S., 281 U. S. 276 (1930); see also FED. RULES CRIM. PROC. Rule 23.

²³ Carter v. Texas, 177 U. S. 442 (1900); Akin v. Texas, 325 U. S. 9 (1944); Pierre v. Louisiana, 306 U. S. 354 (1939).

V. SELECTING THE TRIAL JURY

1. *The special venire in capital cases.* This institution seems to serve no useful purpose, but raises a great many vexatious problems, and results in more delay than any other single cause. In our larger counties the number of men summoned on special venire has grown larger and larger until now three hundred to five hundred are frequently called.

On a few occasions in recent years a capital case has been set to begin on the same Monday morning in each of the two criminal district courts of Dallas County. On such occasions as many as seven hundred to a thousand men—farmers, businessmen, laborers—may be summoned to appear as jurors, an army of men larger than that commanded by General Sam Houston when he won our independence at the battle of San Jacinto. But the large numbers summoned is not the worst of it. Before the process of questioning the prospective jurors can begin, the court may have to sit for hours listening to arguments by the attorneys on motions for continuance, motions to change the venue, and motions to quash the indictment.

Finally, the slow process of testing the qualifications of the prospective jurors begins, each man being brought in, sworn, and examined separately for half an hour to an hour and a half. During all this time the remaining scores of jurors fill the vacant rooms and corridors in the court house, or, in decent weather, loiter on the lawn, growing more and more restive and disgusted as the weary process grinds to a close toward the end of the week. For most of them, several days, or even a whole week has gone, and they have nothing to show for it. Tired and disgusted they furnish fertile soil for the seeds of Communism.

Now, most of this loss of time and tempers could be avoided by the adoption of a few non-radical changes:

1. All preliminary motions should be heard by the judge and disposed of *before* the day set for the trial on the merits. This would enable the court to begin the process of impaneling the jury as soon as the court opens for business on Monday morning.

2. *The jurors should be examined as to their qualifications in a group, as is now done in this state in non-capital cases, and as is done in all cases in the federal courts.*^{23a}

3. *The trial judge should be given the authority either to question prospective jurors himself, affording counsel an opportunity to suggest additional questions, or to permit counsel to do the questioning if done fairly and with reasonable dispatch. The former is the better method, for it is always difficult to choke off zealous counsel and to confine questioning to essential matters.*

The adoption of these simple measures would, it is believed, not only greatly reduce the time required for qualifying the jurors, but would also largely reduce the number of prospective jurors that would be needed. This writer is firmly convinced that in capital cases the number of prospective jurors that would need to be summoned could be reduced to one-third of the number now summoned, and that the time for impaneling the jury could be reduced to one-fifth that now consumed.

These estimates are based on the answers to a questionnaire that the writer sent to judges and district attorneys in a number of our larger counties, and to the federal judges in Texas. Their answers show that the process of selecting the jury in capital cases in the *state* courts averages about 3 days and sometimes requires a week or longer, while the required time for selecting the jury in non-capital cases averages about 2 hours. In the *federal* courts, where there are no special venires, it rarely, if ever, requires longer than two hours to select a jury, and sometimes requires not more than ten to fifteen minutes.

2. *Present machinery wholly inadequate.* Our present criminal machinery is wholly inadequate in our larger counties. Four years ago in Dallas County two or three thousand felony indictments and misdemeanor cases were dismissed at one time; and now, in spite of the very earnest efforts of our two criminal district courts, and of a number of out-of-county district judges who have been sent in to assist the local courts, there is, according to press re-

^{23a} This practice is permitted but not favored by our Court of Criminal Appeals. See Stout, *The Examination of Prospective Jurors in Capital Cases*, 29 Tex. L. Rev. 34, 35 (1950).

ports, a back-log of some 1,500 felony cases waiting to be tried. Our two criminal district courts are able to try felony cases at the rate of only three or four per *week*, but felonies are being committed in this county of 600,000 people at the rate of five or six per *day*. So we are falling further behind every day.

It is believed that conditions in Dallas County are not materially different from those in the other populous counties of the state. And the evil is cumulative. The longer trials are delayed the more certain criminals are that they will never be punished, and the more certain they are that they will never be punished, the more vigorously they ply their nefarious business. Very stern and vigorous measures are needed until we can re-establish respect for law and order among ordinarily decent people, as well as among professional criminals.²⁴

VI. SEPARATING THE FUNCTIONS OF JUDGE AND JURY

1. *Fixing the penalty.* The jury should determine the guilt, the judge should assess the penalty. In Texas, however, we have made the mistake of placing upon the jury these two contradictory duties to be performed at one and the same time—the duty of deciding whether the defendant has in fact committed the crime charged, and the duty of deciding what penalty should be assessed against him. The former function requires that the minds of the jurors shall not be prejudiced against the defendant by proof of his former crimes and delinquencies. The latter function, that of deciding what punishment or restraint should be placed upon him, can only be intelligently performed by a person or group of persons who know as much as possible about his past. Hence, the jury should never have been charged with the duty of fixing the penalty.

The separation of the function of finding guilt from the function of fixing the penalty, as here suggested, exists in practically

²⁴ A step in the direction of getting rid of the special venire was taken in 1949, when the legislature provided that in any county having a city of 231,500 population, or over, a district judge might refuse to order a special venire when as many as 100 jurors had been summoned for the week in which the capital case had been set. Tex. Acts 1949, 51st Leg. p. 1372, c. 623, § 1.

all Anglo-American jurisdictions, including about forty states of this country. In several of the ten states where this double duty is placed on the jury, it is limited to cases involving the death penalty. In the other forty states and in all other English-speaking countries the jury determines the question of guilt, and the judge assesses the penalty.

2. *Repeal of the Suspended Sentence Law.* In view of the foregoing fundamental principle, it is submitted that the Suspended Sentence Law of 1913 should be repealed. In 1935 the people of Texas adopted an amendment to the constitution authorizing the legislature to enact a modern probation statute. Such a statute was passed in 1947.²⁵ This act authorized the trial judge to release convicted persons on probation, upon such conditions as he might see fit to prescribe. There seems to be no reason to keep the old law on the statute books any longer.

The worst feature of the old law is that it presents in the most aggravated form the objection urged in the preceding section, that is, the combining of two wholly inconsistent duties in the jury, to be performed by them at one and the same time. To determine the question of guilt, all evidence of the defendant's past crimes should be rigidly excluded from the jury. To determine whether the sentence should be suspended, all evidence of past crimes and misdemeanors and other misconduct, should be presented to them to enable them to make a reasonably accurate judgment as to whether the defendant might make good if given another chance.

Where these two functions are separated, as they are everywhere but in Texas, the jury can intelligently perform its rightful function of determining whether the defendant is guilty of the particular crime as charged in the indictment. Then, after the jury is discharged, the trial judge can take his time for studying the defendant's record, as disclosed by the reports of probation officers and by the records of the various bureaus of criminal identification, state and national. He can then, in the light of all

²⁵ Tex. Acts 1947, 50th Leg., p. 1049, c. 452; TEX. CODE CRIM. PROC. (Vernon, 1948) art. 781b.

available data, decide whether or not the defendant should be sent to prison or should be released on probation. When the jury grants a suspended sentence, it is a shot in the dark by men wholly without experience in such matters. When the judge grants probation, it is a deliberate choice, based not only on all available information, but on the judge's years of experience and observation of the results obtained in other cases that he has handled.

Not only is that true, but the judge can lay down reasonable conditions for the probationer to observe, and can follow them up and see that they are enforced. On the other hand, the jury cannot lay down and enforce conditions, for the obvious reason that the jury ceases to exist as a body the moment it is discharged. The defendant is given a slap on the wrist and set at large until again arrested and convicted of a serious crime. Under the probation law the judge, through probation officers, can keep him under surveillance for many months or even years.

For these reasons it is clear that the Suspended Sentence Law should be replaced and the new probation law, with such amendments as may be found necessary, should be made use of by all judges.²⁶

VII. SHORTENING AND SIMPLIFYING THE INDICTMENT

1. *The Common Sense Indictment Act.* The common law form of indictment, which was used in Texas from 1836 to 1881, was one of the most weird and fantastic legal instruments ever devised by the fertile brain of the mediaeval draftsman.²⁷ This form of indictment was used in Texas for nearly half a century. In 1881 the Legislature of Texas stepped far out in front of the procession when, under the leadership of Judge W. K. Homan, a Christian minister, who was serving as state senator from Burleson County, it adopted the Common Sense Indictment Law.²⁸ This

²⁶ For an early criticism of the Suspended Sentence Law, see the present writer's article, *The Suspended Sentence and Adult Probation*, 1 Tex. L. Rev. 188 (1923).

²⁷ For an excellent example of it see *Barrington v. State*, 198 Mo. 23, 36, 95 S. W. 238 (1906); Potts, *New Rules of Criminal Procedure—A Suggestion*, 23 Tex. L. Rev. 214, 225 n. 30.

law sought to make an indictment understandable to a person of ordinary intelligence.

This act accomplished a great deal in shortening and simplifying the indictment, even though five of the twenty-seven forms it prescribed were held unconstitutional. Since Homan's day, most of the Anglo-American jurisdictions have caught up with us, and some have far outstripped us.

In this later progressive movement England took the lead by enacting the Indictment Act of 1915.²⁹ Fifteen years later, in 1930, the American Law Institute, after five years of labor by a group of leading American authorities on Criminal Law and Procedure,³⁰ and the expenditure of more than \$150,000, issued its model Code of Criminal Procedure, which has been adopted in part in many states of the union, and, practically without change, in Arizona. Finally, on March 21, 1946, the Supreme Court of the United States, put in full force and effect its Rules of Criminal Procedure for the lower federal courts.³¹

For purposes of comparison there are set out on p. 452 in parallel columns the forms of indictment for theft of a horse now in use in Texas, in the courts of the United States, in England, and the form prescribed by the American Law Institute Code.

These changes in the codes of criminal procedure throughout the world point to a great change in public opinion in regard to law enforcement. As a result, the present writer is of the opinion that if the Common Sense Indictment Law were re-enacted at this time it would meet with a very different reception from what it received in 1881. He therefore makes two suggestions for the consideration of the next legislature.

1. *No reversals for formal errors.* He suggests that the legislature enact a law in something like the following language:

²⁸ Tex. Acts 1881, c. 57, p. 60, carried forward in the Code of Criminal Procedure of 1895 as arts. 448 to 464, and re-appearing as CODE OF CRIM. PROC. (1925) arts. 405 to 412.

²⁹ The Indictment Act 1915, 5 & 6 Geo. V, c. 90.

³⁰ AM. LAW INST. CODE CRIM. PROC. (1930).

³¹ 5 F.R.D 573-672.

No information or indictment for any offense shall be held insufficient because it does not contain any formal opening or concluding statement, or because it fails to show to what district court the indictment was presented.

Under this statute the following simple indictment would be good:

The grand jurors of Dallas County charge that, on May 10th, 1950, in Dallas County, John Doe stole, or did steal, one horse, the property of Richard Roe.

John Smith, Foreman.

The appellate court judicially knows that the grand jury of Dallas County, when it acts as a grand jury, does so "in the name and by the authority of the State of Texas." It also judicially knows that the committing of any crime is "against the peace and dignity of the State." Hence these formal matters should not be required to be stated in the indictment, nor should it be reversible error to fail to name the court to which the indictment was returned.

It is also clear that the statements found in our present indictments concerning the impaneling and swearing of the grand jury are wholly useless. An indictment containing such averments is no more exempt from attack than one omitting them, if in fact the grand jury was not properly impaneled. Nor is there any value whatever in including in the indictment a statement to the effect that the grand jury was impaneled for the purpose of inquiring into the violations of law "within the body of said county." The duties of the grand jury are prescribed by the Constitution and statutes of the State and need not be recited in any indictment.

2. *A suggested constitutional amendment.* The second suggestion the writer offers on this subject is that the substance of the foregoing proposed statute be embodied in an amendment to the constitution to be submitted to the people for ratification—this, merely as a matter of insurance against the possibility that the Court of Criminal Appeals might hold the proposed statute unconstitutional.

FORMS OF INDICTMENT FOR THEFT OF A HORSE

TEXAS FORM

State of Texas v. John Doe
 In the name and by the authority of
 the State of Texas: The Grand Jurors,
 duly selected, organized and impaneled
 as such for the County of Dallas, State
 of Texas, at the spring term, A. D. 1950,
 of the District Court for said County,
 upon their oaths present in and to said
 Court that on or about the tenth day of
 May, A. D. 1950, in the County and State
 aforesaid John Doe did unlawfully and
 fraudulently take from the possession of
 Richard Roe a horse, the same then and
 there being the corporal personal prop-
 erty of and belonging to the said Rich-
 ard Roe, without the consent of the said
 Richard Roe, and with the intent then
 and there on the part of the said John
 Doe to deprive the said Richard Roe of
 the value of the same and to appropriate
 the said horse to the use and benefit of
 him the said John Doe; against the peace
 and dignity of the State.¹

FEDERAL FORM

United States of America v.
 John Doe

The grand jury charges:

On or about the tenth day of
 May, 1950, within the grounds of
 Fort Sam Houston, in San An-
 tonio, Texas, a military reserva-
 tion under the exclusive jurisdic-
 tion of the United States, John
 Doe did steal a horse, the property
 of Richard Roe.²

ENGLISH FORM

The King v. John Doe

Statement of Offense:

Theft of a horse.

Particulars of Offense:

John Doe, on the
 tenth day of May, 1950,
 in the County of Lon-
 don, did steal a horse,
 the property of Rich-
 ard Roe.³

A.L.I. FORM

State of X
 v. John Doe

The grand jurors
 of the County of Y,
 State of X, charge
 that on or about the
 tenth day of May,
 1950, John Doe stole
 from Richard Roe
 one horse.⁴

¹ WHITE, FORMS FOR INDICTMENT, p. 631, Form 1539.

² FEDERAL RULES OF CRIMINAL PROCEDURE, 5 F.R.D. 573-633.

³ Law Reports (1915) Stat. c. 90, pp. 315 *et seq.*

⁴ Am. L. Inst. Code Crim. Proc. § 157, pp. 82-84.

VIII. CONFERRING THE RULE-MAKING POWER ON THE SUPREME COURT

During the last thirty or forty years there has been a growing movement away from legislature-made rules of court procedure. Many states, possibly a majority of our states, have decided that the best results are obtained when rules of procedure are made by the courts themselves, assisted by a commission composed of outstanding lawyers, trial judges, criminal prosecutors, defense attorneys, law teachers, and representatives of the press.

The State of Texas adopted this plan in 1939 in establishing the present rules of procedure in the civil courts.³² It is believed that the same method should be used in modernizing and simplifying the rules of criminal procedure.

In 1948 a special committee of the State Bar of Texas, in recommending this procedure stated its advantages as follows:

“(1) Most authorities agree that adopting rules of procedure should be a judicial rather than a legislative function, and can be more expertly done by the highest court than by the Legislature; (2) that tribunal, more than any other body or group, will be able to provide effective safeguards for protecting the constitutional rights of citizens; and (3) such method provides a means for constant improvement of our procedure in the future. It is the method now successfully used by most of the states and by the Federal Government.”

The State Bar committee in its report noted that the reason for suggesting the Supreme Court as the agency for revising the rules rather than the Court of Criminal Appeals was that the rule-making power is vested by the state constitution (Art. V, § 25) in the Supreme Court. The report was adopted by an overwhelming vote of the members present at the Houston meeting. In making this recommendation, the bar committee added:

“It is to be assumed that in this matter the Supreme Court would very largely look to and be guided by the suggestions of the Court of Criminal Appeals. There is no reason to anticipate difficulty here, be-

³² Tex. Acts 1939, c. 25, p. 201.

cause the comity between these two courts has long been a matter of record and judicial history. All rules so adopted would, of course, be subject to the power of the Legislature to amend or repeal."³³

IX. REMOVING OUR JUDGES FROM POLITICS

Perhaps the most baneful influence to which our judiciary is subjected results from our method of selecting our judges by popular election, and for short terms of office. Some of the resulting evils may here be briefly mentioned:

1. Many of the ablest attorneys are wholly unwilling to resort to the methods of campaigning that seem to be necessary to secure nomination and election.

2. In the larger counties the outlay of money and time to secure election is very large. For example, in Dallas County the filing fee to get one's name on the primary election ballot is \$1,500. To mail a postal card to each voter in the county adds another thousand or more dollars. The use of road signs, newspaper advertisements, circulars and the like, adds other thousands.

3. The successful candidate frequently goes into office under heavy obligations to political workers and large contributors—obligations that are hard for the ordinary mortal to forget when the interests of such supporters arise in his court.

4. It is also very difficult for the judge on the bench to forget that he will wish to be a candidate again in two or four years, and that a strict hewing to the line in his rulings may offend a politically powerful litigant or an influential attorney, or group of attorneys, who could easily induce some ambitious young lawyer to become a candidate against him. Even if the judge felt sure of his ability to win re-election, it costs a lot of money to make the race. Even the judges on the supreme court are not free from political harassment, and we here in Texas have just witnessed the spectacle of several members of our highest court having

³³ For a recent discussion of the subject of court-made rules of procedure see George G. Potts, *Reform of Criminal Procedure—Judicial or Legislative Problem?* 1 *Tex. L. & Leg.* 6 (1947) and authorities cited in note 3. This article was reprinted in 10 *Tex. Bar Jour.* 460 (1947).

to spend much time, money, and energy to keep from having their judicial careers cut short by defeat at the polls. It is quite probable that the stress and strain of the campaign and the humiliation resulting from his defeat caused, or at least contributed to, the untimely death of a member of the court whose prior record was good but who had not been on the supreme court long enough to show the people of the state what he could do.

Two feasible ways are open to us for getting our courts out of politics:

1. *Appointment by the executive* with, or without, ratification by the Senate. This method has been used with success, time out of mind, in England and in her overseas dominions. It has also been used in our Federal Government from the beginning, and in a number of our older states.

2. *The Missouri Plan*, which the State Bar of Texas has approved. This plan was briefly explained by Judge James M. Douglas, of the Supreme Court of Missouri, in an address before the State Bar of Texas in 1948. The following brief quotation from his address sets out the main features of the plan:

“Judges are nominated by commissions consisting both of laymen and lawyers. Names of three competent, qualified nominees are submitted to the Governor. He selects one of them. The new judge serves for one year, then goes on a ballot in the next election without political designation. The people have thus had a chance to see him in action, and to judge his record. They go to the polls and simply answer one question: Shall Judge Blank of the Blank Court be retained in office? Yes or No? If retained he then serves a full term before he is again subject to be voted on. If he is turned out, a new appointee is selected in the same manner.

“Thus, the wisdom of a nominating committee, the responsibility of a Governor, and the will of the people are combined in providing an improved judiciary.”³⁴

It is believed that the adoption of either of the two methods of selecting our trial and our appellate judges would within a few

³⁴ Tex. L. Rev. Bar Ass'n Number, 1948, p. 72.

years bring about a vast improvement in the quality of our judges, and in the speed and certainty of their administration of justice in the courts.

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