

Some Aspects of Arraignment

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an estoppel against the government if there has been misconduct on the part of its officers.

Entrapment by officers approaches impropriety only when the innocent are affected. It may seem undignified for officers of law enforcement agencies to resort to deceit and trickery in order to apprehend criminals, but because of the surreptitious conduct of lawbreakers, entrapment may in many instances be the only practical means to bring them to justice. The law abiding are in no danger because of such practices, as long as the defense of entrapment exists, for courts will not as a matter of good policy sanction a conviction where a person, not justly an object of suspicion, is through undue temptation or pressure by an officer induced to become a criminal.³⁴ The law does not frown upon the entrapment of a criminal, but upon the seduction of the innocent by its officers to commit crime.³⁵

SOME ASPECTS OF ARRAIGNMENT

Discussing arraignment Blackstone said, "To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment,"¹ and Lord Coke said, "The arraignment of the prisoner is to take order that he appear and, for the certainty of the person, to hold up his hand, and to plead a sufficient plea to the indictment or other record."²

Arraignment at common law involved a formal ceremony which consisted of four parts.³ (1) The defendant was called to the bar by name and ordered to hold up his hand. (2) The indictment was read to him distinctly so that he might clearly understand the charge being brought against him.⁴ (3) It was then demanded of the defendant whether he was guilty or not guilty of the crime for which he stood indicted. (4) The plea generally being "not guilty" he was asked in which manner he wished to be tried, by ordeal or by jury.

The modern practice is, in all essential particulars, the calling of the prisoner, his identification as the person charged, the question addressed to him personally whether he is guilty or not guilty of the charge contained

³⁴ See *Weathers v. United States*, 126 F. 2d 118 (C.A. 5th, 1942).

³⁵ *Kott v. United States*, 163 F. 2d 983 (C.A. 5th, 1947).

¹ 4 Bl. Comm. 317 (2d ed., 1769).

² Co. Litt. 558*

³ Perkins, *Criminal Law and Procedure*, c. X, § 3 (1952).

⁴ During the early days of the common law all courtroom proceedings were conducted in Latin but the reading of the indictment to the accused was in the vernacular. "There was no thought of giving him a copy [of the indictment] because usually he would not have been able to read it." *Ibid.* at 734.

in the indictment, which is either read to him or a copy thereof furnished to him either at the time of arraignment or previously.⁵

At early common law the prosecution was required to adhere strictly to the procedural steps involved in the formal arraignment ceremony. Any deviation or omission in the arraignment procedure, however trivial, was considered a fatal error, which, in most cases, resulted in complete exoneration of the defendant. Technical objections in regard to the sufficiency or absence of the arraignment were seized upon by those judges whose consciences balked at the thought of sentencing a man to the gallows for the commission of one of the numerous offenses punishable by death.⁶ Perhaps the most important factor which persuaded the courts to require strict compliance with the procedural steps was the practically complete inability of the accused to defend himself adequately against a criminal charge.⁷

The reasons for the rigidity and sternness of the common law courts in dealing with arraignment are now no longer as persuasive as they were during the era of their inception. With the increase in substantive personal rights, the decrease in the number of indictable offenses, and the decline of capital punishment, objections as to the sufficiency of the arraignment came to be treated with less consideration than they were formerly. In the United States "due process of law" gradually emerged. Technicalities, fine distinctions and subtleties of the law lost their prominence. The important question became "Have the procedural and substantive elements of 'due process' been complied with?" The concern of the courts centered on the judicial process as a whole to determine if, from the time of arraignment to the time of conviction and sentence, the conduction of the proceedings had operated to deny the accused those *basic* rights afforded him by the law. Thus under modern law it is possible that a criminal conviction stand as valid although formal arraignment was lacking in some respect or even non-existent.

⁵ Ex parte Jeffcoat, 109 Fla. 207, 208, 146 So. 827, 828 (1933).

⁶ "The English criminal laws may truly be characterised as written in blood. When Blackstone wrote his commentaries, there were one hundred and sixty different kinds of felonies, for the commission of which the offenders expiated their crimes on the gallows. Stealing the value of one shilling was a capital offense." McKinney v. The People, 7 Ill. 540, 549 (1845).

⁷ "When the individual, accused of a capital crime, was arrested he was immured in a dungeon . . . cut off from free intercourse with his friends. . . . On his trial for any of the numerous offenses denominated felony, he was not allowed the aid of counsel in his defence. He was not even allowed witnesses to prove his innocence. And when . . . the Courts permitted the witnesses to be heard on the part of the accused, yet they were not sworn, and the consequence was that their evidence was not considered by the jury as entitled to as much credence as the witnesses on the part of the government." McKinney v. The People, 7 Ill. 540, 549 (1845). Consult Garland v. State of Washington, 232 U.S. 642, 646 (1914).

But, since the three-fold purpose of arraignment “. . . is to establish the identity of the accused, inform him of the charge against him and give him an opportunity to plead,”⁸ it is in itself an element of “due process.”⁹ Thus, in evaluating objections as to arraignment, the primary determination would seem to be concerned with whether or not the accused has been deprived of a basic right.

As stated previously, the obtaining of the defendant's plea was one of the several functions the arraignment performed. However the arraignment and the plea have been said to be separate and distinct parts of the entire proceeding.¹⁰ The importance of the plea is at once apparent for without the plea there is no issue put before the court and therefore none to be tried. Much confusion is generated by the courts in their vague interchanging of the terms “arraignment” and “plea.” In *Parkinson v. People*,¹¹ it was said, “The arraignment and the plea of the defendant should be the first step in the progress of the trial upon the indictment for a felony. They are essential to the formation of an issue. . . .”¹²

Courts have held that arraignment is necessary for the conviction of a felony.¹³ Thus, a felony conviction has been reversed where the record did not show that the accused was arraigned.¹⁴ Some authorities, in emphasizing substance rather than form, have held that arraignment is not necessarily essential to a conviction, where its omission is not prejudicial to the defendant's interests.¹⁵ The change in the federal rule exemplifies this transition which has diminished the procedural formalities of arraignment. In *Crain v. United States*,¹⁶ the defendant was convicted of fraud. The record of the trial did not show an arraignment or plea. The

⁸ *State v. Trabbold*, 91 A. 2d 537, 538 (Del., 1952).

⁹ “. . . due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court, . . .” *Crain v. United States*, 162 U.S. 625, 645 (1896).

¹⁰ *Jackson v. Commonwealth*, 60 Va. 656 (1870).

¹¹ 135 Ill. 401, 25 N.E. 764 (1890).

¹² *Ibid.*, at 402, 764.

¹³ *Thomas v. State*, 255 Ala. 632 (53 So. 2d 340) (1951); *White v. People*, 79 Colo. 261, 245 Pac. 349 (1926); *Shannon v. State*, 89 Fla. 64, 102 So. 829 (1925); *Pritchard v. State*, 190 Ind. 49, 127 N.E. 545 (1920); *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917).

¹⁴ *Harris v. U.S.*, 4 Okla. Crim. Rep. 317, 111 Pac. 982 (1910); *State v. Forner*, 75 Kan. 423, 89 Pac. 674 (1907); *Parkinson v. People*, 135 Ill. 401, 25 N.E. 764 (1890); *Sanders v. State*, 85 Ind. 318 (1882).

¹⁵ *State v. Mitchell*, 237 Mo. 212, 140 S.W. 887 (1911); *Hobbs v. State*, 86 Ark. 360, 111 S.W. 264 (1908).

¹⁶ 162 U.S. 625 (1896).

accused, however, did not object to the lack of arraignment and proceeded with the trial. The government's argument was predicated upon section 1025 of the Revised Statutes of the United States which provided in effect that no indictment should be deemed insufficient nor should the trial, judgment or other proceedings ". . . be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."¹⁷ The court, however, said:

We are of opinion that the Rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance . . . and due process of law requires that the accused plead, or be ordered to plead.¹⁸

Later, in *Garland v. Washington*,¹⁹ which overuled the *Crain* case, the Supreme Court held that the want of formal arraignment did not deprive the accused of any substantial rights and where the trial was fair and not conducted in any manner prejudicial to the accused there was no denial of due process of law. After deciding that a waiver ought to be conclusively implied where the parties proceeded as if the defendant had been duly arraigned, as if a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until the record was before the court for review, the Supreme Court said:

. . . the technical enforcement of formal rights in criminal procedure sustained in the *Crain* Case is no longer required in the prosecution of offenses under present systems of law. . . .²⁰

Most of the courts who have departed from the indispensability of formal arraignment have done so in conjunction with statutes which in general provide that the trial, judgment, or the proceeding should not be affected by reason of any technical errors which have not affected the substantial rights of the accused. By these statutes courts are given the authority to determine whether or not a failure to take certain steps has prejudiced the defendant and thus constitute reversible error.²¹ Hence, to challenge a criminal conviction under present law on the grounds of inadequacy or absence of arraignment, primary emphasis should be devoted to an examination of the statute on arraignment, if one exists, to determine if the particular crime charged requires arraignment, then to ascertain if the accused waived such right or *could* waive such right.

¹⁷ *Ibid.*, at 637.

¹⁹ 232 U.S. 642 (1913).

¹⁸ *Ibid.* at 645.

²⁰ *Ibid.*, at 646.

²¹ *United States v. Malloy*, 31 Fed. 19 (C.C. Mo., 1887); *Hudson v. State*, 117 Ga. 704, 45 S.E. 66 (1903); *State v. Straub*, 16 Wash. 113, 47 Pac. 227 (1896); *Hayden v. State*, 55 Ark. 342, 18 S.W. 239 (1892); *People v. McHale*, 39 N.Y. 758, 15 N.Y. Supp. 496 (1891); *Allyn v. State*, 21 Neb. 593, 33 N.W. 212 (1887); *State v. Greene*, 66 Iowa 11, 23 N.W. 154 (1885); *Territory v. Shipley*, 4 Mont. 468, 2 Pac. 313 (1882).

There is a conflict among the courts as to whether arraignment is necessary in cases of misdemeanors. The modern tendency is toward relaxing the ancient rules of criminal procedure in cases of misdemeanors and lesser degrees of felonies.²² According to some jurisdictions however, an arraignment is necessary even in cases of misdemeanors.²³

By the weight of authority it is held that the right of the accused to be arraigned may be waived; however, the accused must realize the nature of the charge against him and must be given a full and fair opportunity to defend himself.²⁴ A few decisions hold that arraignment cannot be waived in capital cases.²⁵ Other jurisdictions recognize a waiver of arraignment but hold that the plea is indispensable.²⁶

A waiver of arraignment may be either express or implied. An express waiver must be made in open court.²⁷ Generally, the voluntary entry of a plea by the accused and the participation in the trial without objection to the want of arraignment constitute an implied waiver.²⁸ Other states have held that the accused must announce himself as ready to proceed with the trial and then participate in the trial without objection before a waiver of arraignment is established.²⁹ The filing of a demurrer or a special plea,³⁰ or the entering into an agreement that the case be tried on a certain date have been held to constitute a waiver of arraignment.³¹

²² *Kelly v. State*, 37 Ohio App. 524, 174 N.E. 596 (1930); *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914); *State v. Forner*, 75 Kan. 423, 89 Pac. 674 (1907).

²³ *State v. Moss*, 164 Mo. App. 379, 144 S.W. 1109 (1912); *State v. Hamshaw*, 61 Wash. 390, 112 Pac. 379 (1910); *State v. Barr*, 7 Pa. 340, 79 Atl. 730 (1909); *Washington v. State*, 93 Miss. 270, 46 So. 539 (1908).

²⁴ *Padgett v. State*, 117 Fla. 644, 157 So. 186 (1934); *State v. Robinett*, 312 Mo. 635, 281 S.W. 29 (1926); *State v. O'Kelley*, 258 Mo. 345, 167 S.W. 980 (1914); *People v. Munson*, 83 N.Y. Misc. 308, 144 N.Y. Supp. 1081 (1913); *Hack v. State*, 141 Wis. 346, 124 N.W. 492 (1910); *Bishoff v. Commonwealth*, 123 Ky. 340, 96 S.W. 538 (1906); *State v. Masberry*, 113 La. 651, 37 So. 545 (1904); *State v. Brock*, 61 S.C. 141, 39 S.E. 359 (1901); *Jones v. Territory*, 5 Okla. 536, 49 Pac. 934 (1897); *State v. Strarb*, 16 Wash. 111, 47 Pac. 227 (1896); *Hayden v. State*, 55 Ark. 342, 185 S.W. 239 (1892); *State v. Hayes*, 67 Iowa 27, 24 N.W. 575 (1885).

²⁵ *Davis v. State*, 70 Tex. Crim. 563, 158 S.W. 283 (1913); *Hack v. State*, 141 Wis. 340, 124 N.W. 492 (1910).

²⁶ *State v. Brennan*, 83 N.J.L. 12, 84 Atl. 1066 (1912); *Hendrickson v. Commonwealth*, 23 Ky. L. Rep. 1191, 64 S.W. 954 (1901).

²⁷ *Bishoff v. Commonwealth*, 123 Ky. 340, 96 S.W. 538 (1906).

²⁸ *Polomskey v. State*, 221 Ind. 6, 46 N.E. 2d 201 (1943); *State v. Rasberry*, 113 La. 651, 37 So. 545 (1904); *State v. Weeden*, 133 Mo. 70, 34 S.W. 473 (1896); *Ransom v. State*, 49 Ark. 176, 4 S.W. 658 (1887).

²⁹ *State v. Glave*, 51 Kan. 330, 33 Pac. 8 (1893); *Spicer v. People*, 11 Ill. App. 294 (1882).

³⁰ *Kincade v. State*, 14 Ga. App. 544, 81 S.E. 910 (1914).

³¹ *State v. Thompson*, 95 Iowa 464, 64 N.W. 419 (1895).

In Illinois, furnishing the defendant with a copy of the indictment has replaced the common law custom of reading the indictment to him.³² However, this statutory requirement has been held to be merely directory and failure to provide the accused with a copy of the indictment does not constitute reversible error unless the defendant demands a copy.³³

While arraignment and plea have been held indispensable to a conviction in Illinois,³⁴ the ancient formalities are no longer in use.³⁵ In discussing the essentials of an arraignment, in Illinois, to meet the due process clause of the Fourteenth Amendment, it was held in *People v. Terry*³⁶ that due process of law did not require the adoption of any particular technical form of procedure, so long as it appears on the record that the defendant had ample notice of the charge and sufficient opportunity to defend himself adequately.

Arraignment is not essential for misdemeanors in Illinois.³⁷ However, the absence of a plea from the record, even in misdemeanor cases, constitutes reversible error since the plea formulates the issue in all criminal proceedings.³⁸

Whether or not the plea may be waived has not been explicitly decided in Illinois. In the early case of *Hoskins v. People*,³⁹ where the defendant formally waived the arraignment but did not plead to the indictment, the court held that the waiver of arraignment would not be deemed as waiving the plea. A vigorous dissenting opinion contended that a waiver of arraignment should constitute a waiver of the plea, and that mere formal irregularities should not impede the enforcement of the criminal code. In *Spicer v. People*,⁴⁰ the defendant was not arraigned and did not plead to the indictment. However, the defendant announced himself as

³² Ill. Rev. Stat. (1951), c. 38, § 729. "Every person charged with treason, murder or other felonious crimes, shall be furnished, previous to his arraignment, with a copy of the indictment, and a list of the jurors and witnesses. In all other cases he shall, at his request or the request of his counsel, be furnished with a copy of the indictment and a list of the jurors and witnesses."

³³ *People v. O'Hara*, 384 Ill. 511, 51 N.E. 2d 700 (1943).

³⁴ *Hoskins v. People*, 84 Ill. 87 (1876); *Yundt v. People*, 65 Ill. 372 (1872); *Johnson v. People*, 22 Ill. 314 (1859).

³⁵ "The mention of the prisoner's presence in court and that he was called upon to the indictment, shows sufficiently an arraignment under our practice." *Fitzpatrick v. People*, 98 Ill. 259, 260 (1881).

³⁶ 366 Ill. 520, 9 N.E. 2d 322 (1937).

³⁷ "In prosecutions for misdemeanors the practice is to allow the plea of not guilty to be entered without arraignment. But without this plea being entered there is nothing to be tried." *People v. Ezell*, 155 Ill. App. 298, 303 (1910).

³⁸ *People v. Shoffner*, 400 Ill. 174, 79 N.E. 2d 200 (1948); *Parkinson v. People*, 135 Ill. 401, 25 N.E. 764 (1890); *Hoskins v. People*, 84 Ill. 87 (1876); *Yundt v. People*, 65 Ill. 372 (1872); *Johnson v. People*, 22 Ill. 314 (1859).

³⁹ 84 Ill. 87 (1876).

⁴⁰ 11 Ill. App. 294 (1882).

ready for trial. It was held that such announcement in effect constituted a plea. However, in *Miller v. People*,⁴¹ where the accused voluntarily proceeded with the trial without being arraigned or entering a plea the court held that the conviction was a nullity. In spite of the similarity to the *Spicer* case, the court ignored the state's argument that the voluntary proceeding with the trial was tantamount to a plea.

The law in regard to arraignment has changed gradually. The reasons for the strictness of the common law in this area have disappeared. Substantive personal rights, once unknown, have been made available to those accused of crimes. Certainly criminal proceedings should not be affected by reason of technical errors in procedure which have not substantially prejudiced those basic rights of the accused afforded by present-day law. Such would be inconsistent with due administration of justice and fatal to efficient enforcement of the criminal code.

LESSOR'S LIABILITY UNDER DRAM SHOP ACT

The Illinois Dram Shop Act is a statute which, under certain conditions, imposes joint and several liability upon the tavern keeper and lessor of land used for the sale of intoxicating liquor. The Act is not a new one, having been enacted originally by the Illinois legislature in the nineteenth century. This comment is concerned with the lessor's, or land owner's, liability under the Act.

At common law, there was no remedy for injuries incident to intoxication resulting from the sale of liquor, either on the theory that there was a direct wrong or on the ground that there was negligence in the sale.¹ The Illinois legislature created a right of action by enacting the Dram Shop Act, or Civil Damage Act, as it is sometimes known. This Act gives a right of action for injuries resulting from the sale of intoxicating liquor against the owner of premises who knowingly permits the use of his property for such sale, and subjects the premises so used to a lien for the payment of a judgment recovered against the lessee-tavern keeper.²

⁴¹ 47 Ill. App. 472 (1893).

¹ *Schroder v. Crawford*, 94 Ill. 357 (1880).

² Ill. Rev. Stat. (1951) c. 43, § 135. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling