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Editorial

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EDITORIAL COMMENT.

Meeting of the American Institute of Criminal Law and Criminology.

The second annual meeting of the American Institute of Criminal Law and Criminology will be held at the New Willard Hotel, Washington, D. C., on Saturday, October 1, in connection with the

International Prison Congress, which meets in Washington at the same time. Judge W. H. De Lacy of the Washington Juvenile Court is chairman of the local committee on reception which will provide for the entertainment of delegates. On Saturday evening at seven o'clock there will be a dinner at the New Willard. The work of the Institute during the past year has been carried on mainly through committees appointed at the Chicago meeting in June of last year and has consisted principally of the preparation of reports on topics selected by the Institute for special investigation. Bulletin No. 1, containing a program of the work outlined for the year, was published in the May number of the JOURNAL. Bulletin No. 2, being a report of a committee to prepare a system for recording data concerning criminals, was published in the July number, and the reports of the committees on translations of European treatises on criminology, on criminal statistics and on probation, parole, pardon and indeterminate sentences are published in this number. Reports of committees on drugs and intoxicants, on organization of courts, and on criminal procedure are yet to be published. It is expected that these reports will be discussed at the forthcoming meeting of the Institute and the program for another year's work mapped out. Dean Lawson and Professor Keedy, who have been in England for some time making a study of English methods of criminal procedure, are expected to report the results of their investigations at the same time. Meanwhile the JOURNAL has been established so that the Institute now has an organ through which its cause may be promoted and the public reached. J. W. G.

THE SIGNIFICANCE OF THE INTERNATIONAL PRISON CONGRESS.

The meeting of the International Prison Congress in Washington in October will bring together for the first time in America representatives of the different professions which come in contact with criminals and with the administration of the penal code, lawyers, legislators, administrators of institutions, educators and leaders of preventive and constructive philanthropy. The criminal law is tested under the hands of prison managers and those who follow the life of offenders and who study the very beginnings of crime in children and youth. A discussion carried on by such men cannot fail to be fruitful in thought and practice.

The journey of inspection and the discussion preceding the Congress will afford an admirable opportunity for intimate conversation and the exchange of views between the representatives of different

nations, races and systems. This will also give an opportunity for explanation in answer to questions. It is always unfortunate for people to discuss methods and institutions without first having a chance to correct their errors by asking questions of men who know.

Even the methods of the Congress will tend to improve future conferences in some points. Too generally the speakers in our American conferences are obliged to debate reports and papers which never came to their notice before the meeting. It is impossible to give a conclusive and satisfactory discussion to papers which one has never seen. This Congress publishes all its papers before it meets so that those who come together can be prepared with a deliberate statement and have time to look up their facts.

The problems are, all of them, American, but they are also so stated that they are of interest to men of all nations, China and Japan as well as Belgium, Austria and the South American republics. Certainly no better opportunity has ever been given in our country of stimulating intelligent interest in the problems of criminality. In the July number of the JOURNAL we published the program of the forthcoming Congress. C. R. H.

THE BILL TO REFORM THE PROCEDURE OF THE FEDERAL COURTS.

In the May number of the JOURNAL we commented upon the bill before Congress at the recent session to provide certain reforms in the procedure of the Federal courts. The passage of the bill was ably advocated by a committee of the American Bar Association, which had unanimously indorsed the bill at its last annual meeting and it was strongly supported by President Taft. The bill was favorably reported by the sub-committee of the judiciary committee, to which it was referred, but the report was made so late in the session that no opportunity was afforded for considering it. We are informed by the chairman of the sub-committee, however, that the bill will be taken up early in the next session and that the prospects for favorable action are encouraging. At a meeting held in New York on June 1 of the special committee of the American Bar Association to suggest remedies and formulate proposed laws, to prevent delay and unnecessary cost in litigation, and the committee on uniform legislation of the National Civic Federation, a plan of coöperative effort to promote the passage of this legislation was agreed upon and it is to be hoped that Congress may be induced to act favorably and thus set an example for the states to follow, as it has done in various other fields of legislation. J. W. G.

President Taft on the Obligations of Lawyers to the Public.

In an address before the students of the Ohio Northern University early in June, President Taft took occasion to criticize in trenchant language the members of the bar for the lengths to which many of them go in taking advantage of technicalities and in resorting to other more reprehensible "tricks of the trade" to win their cases. He deplored the fact that the ethical and professional standards of the bar as a whole are not as high as they should be and that the sense of obligation which lawyers feel as officers of the court and as public servants is entirely too light. The President said no one could have a profounder admiration for the legal profession than he had, yet it must be recognized that the administration of justice in this country has suffered grievously from the intensity with which lawyers have served their clients and the lightness of the obligation which they have felt to the court and to the public. "The unscrupulous means to which counsel frequently resort in the defense of the interest of their clients," he said, "was often the occasion for popular resentment and had much to do with the disgraceful condition in which the administration of the criminal law now finds itself." "The awakened moral conscience of the country," the President concluded, "can find no better object for its influence than in making lawyers understand that their obligation to their clients is only to see that their clients' legal rights are protected, and that they need not and ought not to lose their own identity as officers of the law in the cause of their clients and recklessly resort to every expedient to win the case. I believe that there is no escape from the evil tendencies to which I have referred except by inducing the bar to cleanse itself of those who in the interests of their clients forget their obligations as attorneys to the court and their duties as citizens." J. W. G.

A Technicality Plea Overruled.

An illustration of the lengths to which some lawyers go in their efforts to have their clients freed upon technicalities which have no relation to the merits of the case was afforded in the recent trial of Lee O'Neill Browne in Chicago upon the charge of bribery in connection with the election of Senator Lorimer. In this case an effort was made by counsel to secure the release of the accused on a writ of habeas corpus on the ground that no criminal offense was committed against the laws of Illinois because the joint assembly which chooses a United States Senator is not the legislature of the state but a creation of the Federal government. Consequently when a member

of the legislature enters such an assembly for the purpose of assisting in the election of a senator he ceases to be a member of the legislature and becomes an agent of the Federal government and is not therefore amenable to the laws of the state against bribery. That such an argument should be addressed to a court in the face of the constitutional prescription that senators of the United States shall be chosen by the state legislatures is a good illustration of the reliance which lawyers who have cases without merits place upon technicalities, and of the lightness with which, as President Taft remarks, they regard their obligations to society. Of course the presiding judge, being a man of common sense and desiring to see the case disposed of upon its merits, did not allow himself to be carried away by such sophistry and therefore denied the petition. But the affair is characteristic of the extent to which technicalities are relied upon in our criminal procedure and in some jurisdictions the plea might have been sustained as a good and valid one. J. W. G.

Lessons of the Thaw and Hyde Cases.

The Hyde case, which was recently concluded in Kansas City, like the Thaw case in New York, has again served to focus public opinion on the need of reform in our methods of conducting criminal trials, especially where expert testimony is the main reliance of the defense or the prosecution. The effect in both cases was to diminish rather than to increase popular respect for existing methods. The Kansas City *Star* recently entered a vigorous protest against the tactics employed by the lawyers in the Hyde case to shut out the truth and expressed disgust with our criminal procedure as it was followed in this notorious case. "At a moderate estimate," says the *Star*, "the jurors in the Hyde trial heard the phrase 'incompetent, irrelevant and immaterial' five thousand times. It was used fourteen times in twenty minutes in one afternoon. Each time it was offered as an objection to something which the lawyer believed to be competent, relevant and material—or he would not have objected to it." Again the *Star* remarks that "the whole procedure of a criminal trial like that of Dr. Hyde is essentially dishonest. It is hard for the people of a community to have genuine respect for legal administration which works to the suppression of facts and the evasion of law. Disrespect for the administration of law in the courts of law creates disrespect for law itself." It is precisely the last-mentioned effect of such trials upon the public mind that really constitutes the serious side of the situation. Ordinarily the break-

down of justice in an individual case is not a particularly serious matter to society as a whole because the perfect administration of the criminal law under all circumstances is not to be expected, but when the miscarriages become so common and so notorious as to bring the machinery of the criminal law into general disrepute and to create widespread disrespect for the law itself, a very grave situation is presented. Few things do more to undermine popular respect for the law and impair confidence in the instrumentalities for its administration than such farcical performances as those enacted in the Thaw and Hyde cases. They are not creditable to the bench and bar and are unworthy of the high standard of civilization that we have attained in so many other fields of endeavor. J. W. G.

The Federal Parole Law.

Under an act passed at the recent session of Congress any offender against the United States who is serving a sentence of more than one year in a Federal penitentiary or prison, and whose conduct in the institution has been satisfactory, may be released on parole after the expiration of one-third of his original sentence, minus his time earned under the commutation law. Each of the Federal penitentiaries (located at Atlanta, Ga., Leavenworth, Kan., and McNeil Island, Wash., respectively) is to have a board of parole composed of the superintendent of prisons of the Department of Justice, and the warden and the physician of the penitentiary. State institutions having Federal prisoners shall have, as occasion requires, a separate parole board made up of the Federal superintendent of prisons and such officers of the institution as the Attorney-General shall designate. It is provided, however, that the Federal prisoners confined in any reformatory institution having a local parole system shall be eligible to parole in the same manner as though they had been committed by state courts. Each board of parole, subject to the approval of the Attorney-General, shall establish rules and regulations of procedure, and prescribe the conditions under which each prisoner shall be released. The board of parole of each of the Federal penitentiaries shall appoint a parole officer at a salary not exceeding $1,500, and also may designate United States marshals to act as parole officers.

With the exception of the boys in the National Training School for Boys, no Federal prisoners have heretofore been admitted to parole. Many of the 2,500 or more Federal prisoners now in confinement and covered by this law are deserving of parole. The sen-

tences imposed by Federal courts are not infrequently severe, and in the past the only way of mitigating such sentences has been through the commutation law and the clemency of the President. The passage of this law, therefore, marks a distinct advance in the administration of criminal justice by the national government.

The organization and application of a Federal parole system are difficult problems, especially because of the wide distribution of the institutions, and of the places in which the prisoners are convicted and to which they wish to return while on parole. The establishment of a single parole board for all Federal prisoners or for all Federal institutions would be impracticable and expensive. Those who promoted this legislation were probably right in their opinion that by making the Federal superintendent of prisons (whose other duties require him to visit occasionally the government penitentiaries) a member of each board, and by requiring the actions of each board to receive the approval of the Attorney-General before becoming operative, a reasonable degree of uniformity can be secured in standards and methods. During the consideration of the bill it was proposed that the membership of each parole board should include a Federal judge or district attorney, and in some instances private citizens. Time will decide whether the make-up of the parole boards, as provided in the law, is the best possible. It would seem that the right to appoint private citizens or officials other than those named in the law on the Federal parole boards of local institutions might strengthen these boards and increase the likelihood of their working in harmony with public opinion.

The utilization of state parole systems for Federal inmates of state reformatories seems commendable in so far as the parole work of the various states is well developed and wisely administered. This feature of the law seems intended, however, for only temporary purposes, since extensions to the Federal institutions, now in process of building and under contemplation, are expected to provide before long for the transfer to Federal institutions of practically all Federal prisoners except the misdemeanants who are sentenced to jails for less than one year and who are not embraced within the provisions of this law.

The parole system, as a system, is of doubtful value unless great care and discretion are exercised in the selection of persons paroled. The Federal parole boards will in all probability receive numerous petitions for the parole of particular prisoners, like exbank officials, who formerly occupied positions of trust in their respective communities. When the parole board sits at a considerable

distance from the scene of the crime, and is made up of persons who are not familiar with the past history of the prisoner and of the circumstances of his offense, it will be especially difficult for the board to judge how truly such petitions represent public opinion, and to determine the proper course of action.

The parole system as a system is of doubtful value, also, unless the oversight provided for those on parole is at once close, observant, friendly and effective. It will be difficult for the single parole officer attached to each penitentiary to keep properly informed concerning the conduct and condition of the persons under his surveillance, or to give them much substantial aid in the way of securing employment for them, controlling their habits and associates, and improving their home surroundings. Parole oversight, in order to secure the results desired, must be strongly personal, and the parole officer should work in a reasonably limited territory with which he is pretty well acquainted. It will be difficult for a parole officer to fulfil these requirements if his cases are scattered through a number of states. The law provides that the work of the three traveling parole officers for the three Federal penitentiaries may be supplemented by the assistance of United States marshals, but it is doubtful whether United States marshals as a rule possess an aptitude and special skill for parole work. It seems unfortunate that the law does not authorize the appointment of other persons, including volunteer private citizens, as parole officers. Under proper direction and control by the Department of Justice the use of carefully selected volunteer resident officers might, in many cases, be a very valuable adjunct to the parole service. A. W. T.

Expert Testimony.

In the current more or less general attitude of criticism toward laws and legal proceedings one of the conspicuous points of attention is the subject of expert testimony in trials. The growing complexity of our social life and the increasing specialization in knowledge and endeavor render necessary a larger measure of reliance upon experts in all fields. This is of course true in law as in other institutions and that there should be some cause for dissatisfaction is perhaps not surprising. Most of the dissatisfaction with expert testimony, however, relates to medical evidence in two classes of cases, criminal trials involving the question of a person's sanity and personal injury cases. Expert witnesses testify in numerous cases upon all sorts of scientific and special subjects with little, if any, dissatisfaction either

as to the substance or the methods of producing their testimony at the trial except in the two classes of cases mentioned.

Perhaps the most frequent objections made are that expert witnesses are partisan and that often experts do not agree in their testimony on the scientific points involved. It has been suggested in this connection that some provision for official experts be made by law, such as the appointment of a number of official experts to be paid by the state from whom those to testify at any particular trial might be selected; the theory being that this would secure impartial experts. It may well be questioned, however, whether such provisions would be wise. The implication is that the real evil is the venality of some experts, but if this exists to any great degree, it is obvious that the provision suggested would offer greater inducements and increased opportunity for venality; nor could this be obviated, at least while all official appointments remain as sensitive to political influences as they are at present. Any limitation on the right of a party to offer such testimony as he may think sustains his cause should be adopted only on clear proof of its necessity. A witness of no particular reputation might have valuable expert knowledge along certain lines.

But venality does not necessarily follow from the partisanship of witnesses or the fact that they differ in their opinions. The complaint against partisanship is really based on the idea that the scientific questions involved should be decided by experts and not resolved by the jury, that they should be essentially judges rather than witnesses. It is perhaps natural that the expert should believe that he is better qualified than the jury to pass judgment on scientific questions, but this does not accord with the theory of legal proof. Unless we are prepared to abolish trial by jury altogether it should be insisted upon that the expert is a witness and nothing but a witness, and that the one peculiar principle of the law of expert testimony, namely, that the witness may not give an opinion on the very fact at issue in the case; that is, that he may not draw inferences of fact from the testimony or pass upon the correctness of the testimony of other witnesses, be strictly observed. The complaint that experts differ in their opinions would seem to be based on the erroneous idea that there can be no disagreement among scientists about scientific facts or theories. There are, of course, certain principles of science that are all but universally accepted by the common opinion of scientific men, but these are few. There is wide divergence of view and constant change with regard to the theories of every science and perhaps especially that of medicine. There would be no progress if

that were not so. And when we come to the observation of any particular set of phenomena or the interpretation of their significance, science does not know and never will know any magical formula which will prevent men erring in their judgments. The best opportunity of reaching a correct conclusion as to a scientific or any other fact is the presentation of opposing views and the subjection of them to critical analysis.

It may perhaps be worth while to suggest that so far as cause for dissatisfaction exists the remedy may and must be found in higher standards of professional ability and ethics, both in the legal and medical professions, rather than in legislation of any character. The legal profession has recently been paying some attention to the subject of professional ethics, as is shown by the codes of ethics adopted by many bar associations. While these may not be of much value in themselves they at least stir up thought and attention to these subjects. A similar stirring up of attention in the medical profession might be of equal benefit. But does it not seem probable that the factor which more than any other has contributed to the dissatisfaction with expert testimony is the lack of ability in the legal profession to intelligently present and deal with this species of evidence? Is it not a fact that too frequently in a case involving scientific questions the attorney is trying to get before the jury evidence which he himself does not clearly understand? Does he not usually go to the examination room with a few half-baked ideas hastily imparted by the expert on whom he relies, set the expert to talking and trust to luck that something favorable to his contention will develop? There seems to be too much reason to believe that careful and adequate preparation of the facts of cases involving scientific questions is the exception rather than the rule, and that there is a general lack of a feeling of responsibility in the profession for such preparation. The lawyer tries to shoulder it on the expert. It is certainly as much the duty of counsel to master the facts with which he has to deal in cases involving scientific questions as in other cases. If this duty were always performed with ability and fidelity would not the cause for a large part of the dissatisfaction with expert testimony be removed? Certainly this factor should not be overlooked in any discussion of the subject. E. L.

JUDGE GEMMILL'S VIEWS ON CRIME AND PUNISHMENT.

In the July, 1910, number of the JOURNAL appeared a most interesting article by Judge William N. Gemmill of Chicago upon the subject of crime and its punishment in Chicago. The conclusions

of a municipal judge in a metropolitan center are always of special interest, and are pretty generally accepted as the product of a considerable first-hand experience and ripe deliberation.

One is a bit disconcerted to find, however, in the midst of so much that is interesting a statement that "sociologists, given this data (i. e., facts regarding the criminal's ears, color and shape of the eyes, height of brow, form of head, etc.), will tell you to a certainty what will be the prisoner's conduct in the future, and what will be the conduct of all his progeny, even to the third and fourth generations."

Of course, this is but a playful dig on Judge Gemmill's part at what he undoubtedly feels to be a too positive standpoint taken by some who set much store upon physical stigmata, and we would not question too closely whether it will not thus strike everyone who reads the statement. But passing on to a number of other statements, we cannot feel quite so confident that they are intentional exaggerations, or that they will be so regarded.

Judge Gemmill advocates the certainty of punishment as the most effective way of reducing crime. "No fact is more demonstrable than that the punishments prescribed by the criminal code are greater preventives of crime and wrongdoing than all the churches, schoolhouses and reform organizations in the land." "Criminal statistics clearly prove that crimes have increased or decreased just in the proportion that the punishments therefor have been swift and sure."

Without questioning the proposition that the law's delay may lessen the fear of punishment, we can regret that perhaps the necessary space limitations of Judge Gemmill's article prevented the presentation of such criminal statistics as would clearly prove these theses. Indeed, the absence of statistics is frequently to be regretted in the Judge's article, and one is often forced to believe that his conclusions, although stated in the form of quite broad generalizations, are probably based largely upon Chicago experiences and figures.

For instance: "The habitual taking of strong drink into a man's system is certain to result in his becoming a drunkard, a vagabond and an outcast." Now, while in the opinion of many persons this might be a consummation devoutly to be wished, cold facts may even show, elsewhere than in Chicago, that while the habitual use of strong drink frequently results in eventual disease and death, the devotees of liquor manage often, and perhaps generally, to escape the alcoholic ward, the hobo camp, the almshouse and the potter's field, and even die in their own beds in their own homes. In short, the generalization seems too broad.

Should we not also question, perhaps, the statement that "today housebreaking in the night time is almost unknown?" As these words are penned there comes from a suburb of Chicago an account

of the death of a railroad president, fatally shot in his own home at 1:30 in the morning by an alleged burglar. Whether this was actually a murder or a suicide in this special case, the event was, according to the daily press, "the climax to a reign of crime that has driven the residents of the North Shore almost to desperation."

Indeed, as we read on, we cannot help desiring to see the statistics upon which the writer of the article has based the generalization that "the counterfeiter has gone," and it suggests itself that a careful study should be made of a number of American cities to discover the confirmation of the rather startling statement that "homicides are usually committed by men and women who had hitherto been useful and law-abiding citizens." We do not say that this is not a fact, but we feel that for general information such facts should be accompanied by such tabulated statistics as would enable readers to enter thoroughly into the study of this very interesting field of research.

The problem of drunkenness and its treatment is given considerable space in Judge Gemmill's paper. Drunkenness in Massachusetts is stated in the article to be constantly upon the increase, notwithstanding the parole (i. e., probation) law of that state, "more than three times as many people being sent to prison in Massachusetts for drunkenness as are sent to prison in Illinois for the same offense, although the population of Illinois is twice that of Massachusetts."

Elsewhere in the article, however, we find that perhaps the bases of comparison between the two states are not so alike as to justify in all particulars the comparison. For what does Chicago, according to the article, do with its "drunks?" Judge Gemmill states that "the police of this city (Chicago) never arrest anyone upon the charge of drunkenness who is not helplessly drunk." Yet "of 75,000 persons brought into the criminal courts of Chicago each year, a large per cent are arrested for drunkenness." And as to treatment, Judge Gemmill writes: "Out of over 5,000 cases of drunkenness heard by me, not over 100 have been fined, and these were upon the verge of delirium tremens and needed immediate care." This seems to indicate that they received imprisonment in default of ability to pay their fine, for, of course, delirium tremens is not alleviated by the payment of a fine. The article does not give figures showing the total commitments for drunkenness, and we seem obliged to draw our inferences from the statement that "nine out of ten of the men and women who get drunk and are arrested for it, and are compelled to sleep off their drunks in the police station, have been punished sufficiently and will never repeat the offense. . . ." "What has been my practice," continues the writer of the article, "in this regard, I am sure has been the general practice of nearly all of the judges of the Municipal Court. The story, often repeated, that drunkards are sent

to prison and their wives and children are left to starve, is untrue. So far as I have been able to learn, not a single drunkard has been sent to jail during the last year and a half who had a family dependent upon him, unless it was done at the instance of the wife or the members of the family and for their protection."

Massachusetts, on the other hand, arrests thousands of intoxicated persons who obviously in Illinois, or at least in Chicago, would be left at liberty. Hence, it is perhaps not quite accurate to cite the Bay State as having three times as many criminals in her prisons as has the state of Illinois, when a large proportion of these "criminals" in Massachusetts are committed for intoxication, which Judge Gemmill does not in Illinois look upon in most instances as a crime deserving punishment by imprisonment.

In short, increase or decrease in crime cannot, it would seem, be accurately measured by the number of arrests or of convictions alone, nor by the number of criminals confined in the correctional institutions of a state. The Golden Rule policy of Cleveland, or the Chicago method of court procedure described by Judge Gemmill reduces greatly the number of imprisonments for drunkenness, that offense figuring highest of all in the list of the causes of commitment in the penal institutions of the United States, according to the special census of 1904.

We ought hardly to overlook, in this connection, one other statement in the article, namely, that "California has a larger percentage of criminal population that any other state in the Union, and Massachusetts ranks third in crime." Our attention has been called by a letter to the fact that the statement becomes misleading when out of its context, for in the same report from which the above statement seems to have been taken, it is said of these ratios that they do not for an instant permit of deductions in regard to the comparative state of criminality in these communities, as the ratios are determined largely by the use of the term sentence in dealing with minor offenders.