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A. H. Reid

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Results of a Year's Work.

A. H. REID.

I am glad to report some substantial and tangible progress in practical results of the past year's work of the Wisconsin Branch of the American Institute of Criminal Law and Criminology. Your committees of investigation and study who reported at our last annual conference held here in Milwaukee a year ago were, in the main, very definite and specific in their recommendations for legislation. By resolution adopted at the last conference, the president was directed, with the advice of the Councilors, to appoint a Legislative Committee whose duty it would be to urge upon the Legislature of 1911 the measures which the Wisconsin Branch had definitely recommended. Such committee was appointed with Judge E. Ray Stevens as chairman and practically every member of the committee responded by an oral and personal presentation of his views to the committees of the Legislature to whom the proposed measures were referred. As a result of the recommendations of the Wisconsin Branch of the Institute and of the efforts of their Legislative Committee, there have been placed upon the Wisconsin statute books the following enactments for the betterment of criminal procedure and of methods of dealing with criminals:

First: Chapter 187, Laws of 1911, which enables the taking of a writ of error on behalf of the state in criminal cases in every instance except where the defendant has been acquitted by verdict of the jury and which requires that every objection to a prosecution which may be raised by motion to quash, demurrer, plea in abatement, or special plea in bar, or to the validity or constitutionality of a statute, shall be raised before a jury is empanelled or testimony taken, or be deemed waived, unless the court, in its discretion, on application of the defendant and on a waiver by him of any jeopardy already attached, permit the objection to be made at a later stage. This makes it practically impossible for the accused to escape on any technicality and without a trial on the merits.

Second: Chapter 221, Laws of 1911, which so amends the statute relating to the trial of insanity as to require the issue of insanity and the issue of "Not Guilty," to be tried and determined together by the some jury, and so as to provide that in case the accused be found insane

[1]President's address before the Wisconsin branch of the Institute, Milwaukee, November, 1911.

and for that reason not responsible for the alleged offense, the jury shall return a verdict of "not guilty because insane," and that in such case the accused shall be committed by the court to one of the state hospitals for the insane, there to be detained and treated until he shall be discharged according to law, and that no such person shall be discharged until he shall, upon re-examination, be found sane, and in addition thereto, found not likely to have such a recurrence of insanity as might result in acts, which, but for insanity, would constitute crimes. This is believed to greatly simplify the procedure and to do much to prevent the escape from detention and confinement through the avenue of a plea of insanity, of those who ought not so to escape.

Third: Chapter 348, Laws of 1911, which authorizes the accused to consent to a trial by a jury of less than twelve men. This prevents such a reversal of a conviction as occurred in *Jennings vs. the State,* 134 Wis. 307, where the defendant in open court consented to the submission of the case to a jury of eleven, by reason of the enforced absence of the twelfth man, and after conviction repudiated his stipulation and sued out a writ of error. This will likewise, in most instances, avoid the necessity, in case of a juror in a criminal case becoming ill, or being otherwise unable to proceed, of discharging the jury and beginning the trial anew. It is believed that this statute, together with the enlightened holdings by our Supreme Court in respect to other matters of waiver by defendant, has placed the defendant in every criminal case where he can no longer stand as if not responsible for his acts in the course of his trial and cannot after experimenting with verdict of the jury, repudiate his stipulations and waivers expressly or impliedly made in the course of trial, as an infant may repudiate his contracts for luxuries, and thereupon secure reversal of a righteous conviction on the ground that he could not waive his constitutional rights.

Fourth: By Chapter 460 of Laws of 1911, upon the recommendation of this Institute, the age limits of minors included within the class designated as delinquent children were raised from sixteen years, for both sexes, up to eighteen years in the case of girls, and seventeen years in the case of boys, thus bringing within the jurisdiction of the Juvenile Court more juvenile offenders, who, it is believed, may be saved from a life of crime by due supervision; and,

Fifth: By Chapter 585 of the Laws of 1911 upon the recommendation of this Institute, the first steps were taken by the Legislature of this state to provide for a reformatory for female offenders.

It is believed that these enactments mark real progress in the administration of criminal law in this state.

Four other recommendations were made by this branch of the In-

stitute to the Legislature which were not adopted and acted upon. They were:

First: A recommendation that there be stricken from the Constitution the provision that no person shall be compelled in any criminal case to be a witness against himself. This was embodied in a resolution introduced in the Senate, was fully argued by our legislature committee before the Senate Committee and afterwards passed by the required two-thirds majority of the Senate, but it failed in the Assembly of the full two-thirds majority. I believe that it only requires a proper presentation of this proposition to an intelligent legislator and a little consideration on his part to convince him that a retention of that provision in the Constitution merely unnecessarily and unjustifiably provides a hiding place for crime and improperly hampers the prosecution. I firmly believe that this recommendation should be renewed to the next Legislature and that favorable action can be secured Accompanying this recommendation and as a sort of alternative we recommended that Section 4071 of the Statutes should be amended so as to permit the prosecuting attorney to comment to the jury on the fact that the accused did not take the stand as a witness, in every case in which the accused should refuse to testify. This undoubtedly would have been acted upon by the Legislature had it not been that the Senate adopted the other recommendation and therefore deemed this one unnecessary and so killed the proposed measure.

Second: A recommendation aimed at the abuses in the use of expert opinion evidence in insanity cases. We recommended that experts who should be permitted to give opinion evidence in such cases should be selected only from a body of accredited alienists to be designated by the Governor and that such selection should be made in a non-partisan manner and the compensation of alienists serving should be paid only out of the public treasury, thus avoiding so far as practicable partisan bias and the giving in evidence of rash opinions and vagrant theories induced by private retainer and large compensation. The object to be attained met with approval of those members of the Legislature who gave it consideration, but because the Legislative Committee of this Institute felt doubt and hesitation concerning whether the proposed measure had been as fully considered and as wisely framed as it might the committee did not finally urge the enactment by the last Legislature. That subject is one reported on for consideration at this Conference by one of our committees, and no doubt we will now be the better prepared to recommend some definite legislation.

Third: A recommendation that the statutes relating to changes of venue secured by the mere filing of an affidavit of prejudice should be so

amended as to prevent abuses by those who are unscrupulous enough to secure a continuance or otherwise block immediate trial by the filing of a reckless and unfounded affidavit. Our recommendation was for a total repeal of the statute, and perhaps was too radical, at any rate it did not meet the approval of the Legislature. It cannot be doubted that grave abuses have been indulged in under this statute and that some amendment is necessary to prevent such abuses and that we should be prepared to propose to the next Legislature an amendment that will prevent such abuses while at the same time preserving to the accused the right to a strictly impartial presiding judge.

It is thus seen that a majority of the most important recommendations of this Institute have been accepted by our State Legislature and that the balance of our recommendations are in a fair way to be also accepted when more carefully worked out.

We also called and conducted in February last a notable conference of trial judges and heads of State penal and reformatory institutions for the purpose of considering problems connected with the sentencing of criminals and with the use of probation and parole. It is believed this conference had a large educational value, and brought courts into closer touch with State institutions.

In passing I cannot refrain from noticing another marked advance in the administration of the law, both civil and criminal, in Wisconsin, as to which I believe this Institute has exercised some influence. The Legislature of 1909 enacted Section 3072m of the Statute providing that error in the course of trial shall be disregarded unless in the opinion of the court to which application for relief is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the applicant. This statute has been given by the Wisconsin courts a broad, liberal and wise interpretation, with the result that it can now be said truthfully that it is impossible that a guilty person may escape punishment or secure a new trial upon any mere technicality. This strengthening by our Supreme Court of its previous marked tendencies to disregard technical error, aided by this new statute expressing the will of the people through the Legislature, has put Wisconsin far to the fore as a leader in a broad-minded and efficient administration of laws, both civil and criminal.

I have examined the decisions of our Supreme Court in all criminal cases reported in the last five published volumes of the Wisconsin Reports covering the period from November, 1909, to April, 1911. Out of the twenty-six criminal cases therein reported there was but one reversal of a conviction and that was for a fundamental misinstruction of the jury; and there was one order of a trial court sustaining a demurrer to

an indictment set aside and the indictment sustained. All other judgments of the trial courts were affirmed. In the cases thus considered the Supreme Court had frequent occasion to note and disregard technical errors and to apply the now well established rule that a judgment should not be reversed for errors in the absence of its reasonably appearing as an inference of fact that the party seeking reversal was prejudiced thereby, in that had the error not occurred, the result as to him might within reasonable probabilities have been more favorable. The decisions in *Hack vs. The State,* 141 Wis.; *Oborn vs. The State,* 143 Wis., and *Hedger vs. The State,* 144 Wis., and others of like tenor establish a new epoch in the administration of criminal law in this state. It is most enheartening to read these words of our Chief Justice in *Hack vs. The State*: "It is believed that this Court has uniformly attempted to disregard mere formal errors and technical objections not affecting any substantial right and to adhere to the spirit of the law which giveth life, rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made. In this line the court is glad to welcome legislative assistance and approval. By Section 3072m of the statutes, it is provided that no judgment, civil or criminal, shall be set aside or new trial granted for any error in admission of evidence, direction of the jury or any error in pleading or procedure unless it shall appear that the error complained of has affected the substantial rights of the party complaining. How much this adds to the provisions of Section 2829 which have been on the statute books since 1858 is not entirely clear. It at least shows the legislative intent to specifically apply the law to criminal actions. Its terms are clear and will unquestionably assist the court in its effort to do substantial justice in all actions, either civil or criminal, without regard to immaterial errors or inconsequential defects. This court will loyally stand by this law and will earnestly endeavor to administer it so as to do equal and exact justice so far as human efforts can accomplish that end."

It is likewise encouraging to read the words of Justice Marshall in *Oborn vs. The State* to the effect that "An examination of the cited cases will show that no limit has yet been found in this court to the competency of an accused person in a criminal case to waive irregularities or rights except the single instance, one of disability, in a capital case to waive the right of trial by twelve jurors." We already know that this one single instance of disability has been removed by our last Legislature.

In this connection it is most gratifying to know that of the nine definite recommendations formulated by the American Institute's Com-

mittee of Criminal Procedure nearly all that are applicable to this State have already in substantial form gone into effect in Wisconsin.

While we may thus justly plume ourselves upon the taking of front rank by our state in these lines we must not think for a moment that the work has all been accomplished. The reports of our investigating committees for consideration at this Conference and the exercise of ordinary observation by those engaged in dealing with criminals will tell us that our science of criminal law and criminology is yet young.

I desire to invite your attention for a few moments to what I regard as one glaring fault in our system of penology, partly perhaps in administration, but mainly in the law itself. It concerns the recidivist, who, like the poor we have always with us.

I am indebted to our present warden of the State Prison for a complete and very scientific classification of the prison population on August 1, 1911, and for detailed information concerning the record of some of the recidivists there then confined.

He reports that of a total of 708 prisoners confined on that day, 180 or a trifle more than 25 per cent had previously to their last conviction, been convicted one or more times of felony and that nearly half of these, or to be accurate, 11.6 per cent of the whole prison population had been previously convicted of a felony two or more times. This took no account of convictions of misdemeanors such as petty larcenies of which I have no doubt there were many. Nineteen of these recidivists have each been convicted of felonies five or more times. One burglar had been convicted eleven times of burglaries and larcenies and finally was convicted of rape and is now serving a long term sentence therefor. One prisoner had been convicted ten times, and several as many as seven or eight times—all being of felonies. What a source of worry and fear to peace loving people and of great expense to the public, these recidivists have been! It is to be noted that these criminals are each confirmed in a specific line of crime—usually growing out of acquisitiveness—a disposition to live by purloining the fruits of other's labor, resulting in burglary, larceny, forgery, or some allied crime; and that a confirmed disposition to commit such offenses is capable of early discovery in the subject. Of the 180 recidivists reported, 133, or nearly three-quarters, were of this class. As samples let us note prisoner No. 8256, who began life with six years in the Industrial School and followed this up with seven convictions for larceny, one for burglary, one for receiving stolen property and finally with one for rape; and prisoner No. 8387, who has a record of eight convictions for burglary and three for larceny, finally ended up with a conviction for rape; and prisoner No. 9378, beginning with life at the Industrial School and having six successive convictions

for burglary. Turning now to the reports of the House of Correction at Milwaukee, where so many who commit misdemeanors are incarcerated, we find that in 1909, of a total of 2,860 who were committed to that institution 47 per cent had been convicted two or more times and 30 per cent three or more times. Practically the same percentages hold good for the year 1906 when a total of 2,464 were committed. Of course this includes a great many drunks and disorderlies—about half of the total number, I believe—and they are more the victims of depraved appetites than of criminal instincts, but in the more serious offenses the recidivist occurs quite as often in the House of Correction as in the State Prison, or more often. In one respect the records of the House of Correction are more striking, not to say appalling. In 1909, 500 of those committed had been convicted five or more times, fifty had been convicted twenty-five or more times and twenty had been convicted over fifty times. Substantially the same proportions hold good for the year 1906. I think I need not enlarge upon such statistics, but let me add that these percentages do not represent in the true proportion the importance of the recidivists. For those now in penal institutions will generally recur in later statistics of the same institutions, and will be the source of future troubles and expenses whereas the first offender generally will not. Nearly all of us have come into contact at some time or other with the confirmed recidivist. If you will extend your research somewhat further I suggest you read the well written article on "The Fire Fiends" in the "Outlook" of October 28th last. The immense losses by fire caused in the large cities by that class of recidivists known as pyromaniacs are there set out in striking terms.

A prison population at any time may be with some confidence classified into two general divisions; those who may be reasonably expected never again to return to prison life and those who will almost certainly offend again and return. These two classes demand radically different treatment for the protection of society, but the laws of Wisconsin provide for practically no difference. It is true that we have statutes permitting the charging in the information or indictment that the accused has been previously a convict and thereby the penalties applicable to the offense charged become greatly enlarged, but I recall but one or two occasions when this course was pursued. The Court, too, may impose a maximum instead of a lower punishment. But under our constitution excusing an accused from giving evidence against himself, the accused may and generally does prevent identification and discovery of his criminal record and the prosecutor and court have no facts to act upon. Usually the confirmed criminal is treated little, if any, differently from the first offender, unless the first offender be eligible to the reformatory.

The result is that the confirmed criminal is a constant source of heavy expense, of much trouble and of more or less fear to the public. He serves his sentence and goes forth to commit some fresh offense. It becomes a game to him to see how long he can purloin his living or indulge his mania and escape being caught. His depredations put into motion the expensive machinery of the law for his capture, trial and reincarceration. He is a menace to law abiding people until he is again within the prison walls and at no stage is there any prospect that he will ever be anything but a menace or a prisoner. He is a source of heavy expense to the public for protection against him, for his recapture, retrial, and re-imprisonment. It seems perfectly apparent that we are pursuing a short sighted policy in regard to him. The writer on the Fire Fiends in the Outlook says that "within five years one western state has convicted fourty-four pyromaniacs of arson. Not long ago a defective lad of sixteen in Massachusetts confessed that he had entirely destroyed seven buildings. During 1908 a young boy in Rochester, N. Y., set twelve buildings on fire. Most of those persons will doubtless be freed after a few years, to play again a losing game with their besetting temptation. Cases might be multiplied almost indefinitely to prove that neither confinement nor anyhing else can cure pyromania." The writer goes on to say that, "to support a defective in one of the New York charitable institutions costs $167.20 per year. On the other hand, it has been estimated that one certain family of feeble-minded persons that has been allowed at large has cost New York State more than has been spent for the building and maintenace of the Custodial Asylum at Newark, since it was first established"; and this takes no account of the loss of life produced. In my judgment when it can be determined as to any criminal that his reformation is impossible or at that it is a remote possibility, and that can, no doubt, be determined generally as early as the third conviction for a felony, he should be kept in control thenceforth for life in some form or other, either in some custodial institution or on parol, and be made to be as nearly self-supporting as possible, and society should be thus completely protected from the menace of his further offending and from the great expense of his successive captures, prosecutions and re-incarcerations.

This paper is already over long, but at the risk of becoming a bore I am going to suggest some things by way of remedy. New York attempted to meet the problem of enacting in 1907 a law that any person convicted the fourth time of a felony should be sentenced to state prison for life, but after serving a term equal to the maximum penalty prescribed for the offense of which he was convicted, less the usual commu-

tation for good conduct, may be paroled. He cannot, however, be discharged.

This would seem, at first sight, to be a step in the right direction, but in reality it has amounted to nothing. The Superintendent of Prisons in New York says: "Although in force two years only two prisoners, sentenced under the provisions of this law, have been received at the prisons, but during the last year 103 prisoners were received who should have been so sentenced; 89 of them have definite sentences, the shortest being one year, the longest, 41 years; 35 are for less than three years and only thirteen are for more than five years."

The difficulty is not far to seek. The prosecution and the courts must have some means of obtaining before sentence is pronounced, the criminal record of the accused or of learning that he has no criminal record. If the officers do not know the prisoner, and it is exceedingly seldom that they do know a recidivist, and the prisoner chooses to conceal his identity and gives an assumed name, as the recidivist almost always does, the State is balked. With the constitutional immunity from obligation to give any evidence against himself the accused can refuse to be shaven, measured and photographed—or, in other words, Bertilloned. Without these aids identification bureaus are helpless. The criminal record can be obtained only after the prisoner is convicted, sentenced and incarcerated.

We need, therefore, three things. First, a constitutional and legal method of obtaining the criminal record of every offender before the sentence is pronounced; second, a requirement that, unless the prisoner's history is already known to the court, his history shall be ascertained before sentencing; and, third, laws providing that the recidivist shall be permanently detained in some custodial institution without unnecessary punishment but under such circumstances as will make him self-supporting if practicable, and not be allowed his general liberty except under parol and supervision of the State Board of Parol.

It is evident that the first cannot be obtained without the constitutional amendment which for many reasons we urged upon the last Legislature, withdrawing the immunity of an accused from obligation to give evidence against himself. I think we should again urge this upon the next Legislature, and that the case of the recidivist should have our careful study and should be the subject of further recommendations from this Institute.