Journal of Criminal Law and Criminology

Volume 3 | Issue 1 Article 3

1912

Report of the Committee of the Kansas Bar Association on Crimes and Criminal Procedure

William E. Higgins

REPORT OF THE COMMITTEE OF THE KANSAS BAR ASSOCIATION ON CRIMES AND CRIMINAL PROCEDURE.[1]

WILLIAM E. HIGGINS.

By way of introduction, your committee states that it has been the understanding of its members that the committee was not appointed merely to formulate measures that would change present laws but to suggest such changes as may be necessary. Legislation without improvement is to be condemned. The desire to write new laws upon the statute books is not sufficient excuse for change. Therefore, at the beginning of the task the committee felt that it should investigate rather than suggest amendments based on mere defects or current criticism. To this end, the field was divided into two general parts:

1. The criminal law prior to the time of punishment.
2. The proper treatment of convicted persons.

Turning to the first, the committee divides the field into the following miscarriages of justice due to,

1. Criminal procedure.
2. The organization of courts.
3. The definition of crimes.
4. The human agencies employed to ascertain the guilt or innocence of the accused.

Preliminary to its report, the committee wishes to state some matters that are apparent to every well informed lawyer in the state of Kansas and that should be made known to every citizen.

This state adopted a code of criminal procedure and a Crimes Act in 1868, and in the code of procedure there were several measures which have abolished the technical requirements of the common law indictment. Among these changes may be mentioned the information by which charges may be brought promptly and speedily against offenders; the provision for amendment of the information; the requirement that the charge against the accused must be stated in simple and concise language.

[1]A revision of the report presented in January, 1911, to which is added the report rendered in January, 1912. The committees of 1911 and 1912 were composed respectively of the following named gentlemen: William E. Higgins, chairman; J. C. Ruppenthal, and William Osmond; William E. Higgins, chairman; J. C. Ruppenthal, and John Dawson. The committee of 1912 has not yet completed its investigations, has been continued, and will report further in 1913.

Paragraph 6685 of the general statutes of Kansas, 1909, is as follows:

"6685. Indictment sufficient. No. 100. The indictment or information is sufficient if it appear therefrom:

"First. That the indictment was found by the grand jury of the county in which the court is held, or the information presented by the prosecuting attorney of the county in which the court is held.

"Second. That the defendant is named or described in an indictment as a person whose name is unknown to the grand jurors, or, in an information, by the prosecuting attorney.

"Third. That the offense was committed within the jurisdiction of the court, or is triable therein.

"Fourth. That the offense charged is clearly set forth, in plain and concise language, without repetition. And,

"Fifth. That the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case."

Paragraph 6686 is as follows:

"6686. Not quashed, when. No. 110. No indictment or information may be quashed or set aside for any of the following defects:

"First. For a mistake in the name of the court or county in the title thereof.

"Second. For the want of an allegation of the time or place of any material fact, when the venue and time have once been stated in the indictment or information.

"Third. That dates and numbers are represented by figures.

"Fourth. For an omission of any of the following allegations, viz.: 'With force and arms,' 'contrary to the form of the statute,' or, 'against the peace and dignity of the state of Kansas.'

"Fifth. For an omission to allege that the grand jurors were impaneled, sworn or charged.

"Sixth. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. Nor,

"Seventh. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

These provisions have for forty-two years prevented the abuses in procedure which have been advertised in the current public prints as examples of "absurd and mischievous consequences of the highly technical character of the criminal procedure of this country." The attention of the citizens of Kansas is called to the fact that, whatever other mistakes have been made by our courts, the criminal procedure of Kansas is free from the consequences of the omission of the word "the" from the indictment, or of the failure to conclude the information with the words "contrary to the peace and dignity of the state." Your committee believes, however, that many of our citizens accept the current criticisms of criminal procedure in general as applicable to the procedure of this

state. We therefore suggest that it is the duty of every member of this association to use his efforts to see that this erroneous belief is corrected.

In order to ascertain the condition of the criminal practice, the committee sent out two circular letters. The first was directed to the judges and prosecuting attorneys of the state and read as follows:

"DELAYS IN PROCEDURE."

"The answers to the following questions need not be confined to this paper, as it is desired to obtain such information as you may offer on each question.

"1. Please state all the different means in your experience by which prosecutions in criminal cases have been delayed in Kansas.

"2. Please suggest how each delay stated by you may be prevented by law, and yet preserve to the accused a fair trial.

"3. In your experience is much of the delay due to the leniency of the trial magistrate or the prosecuting attorney?

"4. If you answer the above question in the affirmative, what remedy do you propose besides a change of officials?

"5. Can the time lost by appeal or proceedings in error be shortened and yet preserve the rights of the accused?

"6. If so, how?

"7. In your experience is there much delay in Kansas in securing a jury?

"8. Please suggest means by which unnecessary delays in securing juries may be prevented by law.

"9. When there are a number of defendants, would you suggest decreasing the number of challenges now allowed to each individual:

"a. When all of the defendants are represented by the same counsel?

"b. When not represented by the same counsel?"

While a number of answers contained suggestions, valuable for other purposes, your committee states that it was the opinion of the judges and county attorneys that there is not much reason for complaint because of delays and technicalities due to the provisions or omissions of our criminal procedure.

Your committee also sent to the various clerks of the district courts of the state a circular letter, to which eighty-three responses were received of which the following is a summary:

1.	The number of prosecutions pending at the beginning of this period	481
2.	The number begun during this period	4,755
3.	The number of convictions	2,535
4.	The number of acquittals	462
5.	The number of mistrials which were not followed by dismissal	91
6.	The number of dismissals	1,676
7.	The number not tried during the three years	472
8.	The number appealed to the Supreme Court	65

An examination of the Supreme Court reports of Kansas shows the following dispositions of criminal cases appealed to that court for five years, from January 1, 1906, to December 31, 1910:

Favorable to Defendant—

1.	Conviction reversed	9
2.	Conviction reversed and remanded	24
3.	Information quashed	2
4.	On arrest of judgment	0
5.	Question reserved.....note a	0

Favorable to the State—

1.	Conviction affirmed	124
2.	Information sustained	7
3.	On arrest of judgment	0
4.	On question reserved.....note b	1
5.	Defendant's appeal dismissed	8
		175

Note a.—*State v. Hardenbaugh,* 75 Kan. 849, dismissed.
Note b.—*State v. Lyon,* 83 Kan. 168, when jury found the fact.

But while your committee is able to make a favorable report upon the condition of the criminal procedure of the state, it does not believe that this procedure is perfect or that it cannot and should not be improved wherever possible. It must be remembered that the conditions in this state are such as to avoid a severe test of our procedure. This is due largely:

1. To the comparatively small number of criminal offenders, caused no doubt by the lack of congested centers and to the size of our population.

2. To the character and education of our people.

As the population and wealth of the people increase and the various enterprises and relationships become more complex, the administration of criminal law will be rendered more difficult. Juries are now selected in this state without delay, but this may not be true in the future should our cities so increase in size that time must be taken to examine the jurors for prejudice because the jurors are unknown to the attorneys. Other circumstances might be mentioned to show that the difficulty of the administration of the criminal law increases with the size, wealth, complexity of interests, and character of the population. It is not enough, therefore, to state that the criminal procedure is at present satisfactory. Opportunities by which justice may be thwarted or unnecessarily delayed should be eliminated so far as possible. To accomplish this, the entire field of procedure must first be examined to ascertain what the procedure should be as compared with what it is. Legislation to prevent present specific abuses is often a mere makeshift, diverting the attention from fundamental errors, and creating new difficulties by inconsistencies. The work of investigation should include the follow-

ing: the determination of the fundamentals and the discovery and tabulation of abuses.

As to the fundamentals of procedure, your committee states that some of its members became directly interested in the labors of a similar committee of The American Institute of Criminal Law and Criminology for the year 1910 and, without adopting or endorsing that report as its own, your committee presents the same here, after some alterations in the order of the propositions:

"I. Rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and the maintenance of the dignity of tribunals should be distinguished carefully from rules intended to secure to the accused a fair opportunity to meet the case against him and a full opportunity to present his own case. Rulings upon the former class should be reviewable only for abuse of discretion and nothing should depend on, or be obtainable through, the latter class except the securing of such opportunity."

We believe this to be practically the rule in Kansas whenever our Supreme Court has been called upon to distinguish between rules of procedure within the discretion of the trial court and those which belong as a matter of right to the accused. Improvements in this respect cannot be made by law but only by education of the trial courts who are to apply these rules. Miscarriages of justice, therefore, in this respect will be due entirely to the failure of the individual to exercise the proper discretion and certainly cannot be charged to the law.

"II. No prosecution should be thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved."

This is practically the rule in this state as provided by paragraph 6810 of the General Statutes of Kansas for 1909. The only difference is in the use of the words "to the wrong court or wrong venue," instead of, "in the wrong county," as provided by our statute. Since the question of venue of offenses committed within the state of Kansas arises only when brought in a court in the wrong county, the proposition is not new to our procedure and no change is necessary.

"III. Questions of law conclusive of the controversy, or of some part thereof, should be reserved, and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court and in any other court to which the cause may be taken for review to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require."

This proposition may be divided into two parts: First, that, after defendant has been acquitted, the Supreme Court shall have power to review an error, notwithstanding such review cannot affect the accused because of the constitutional provision against a "second jeopardy;" second, that it shall be the practice to reserve questions of law and

proceed to the verdict of the jury, which shall be upon the issues of fact raised by the pleadings.

The present code says (Sec. 6857, Gen. Stat. 1909): "Appeals to the Supreme Court may be taken by the state upon a question reserved by the state." The state has made several attempts to reserve a question after a verdict or finding of fact in favor of the defendant, or after a motion to discharge has been sustained. But the Supreme Court has declared that it had no power to review the question reserved under these circumstances and has dismissed the appeal. See the following cases:

State v. Hardenbaugh, 75 Kan. 849; *State v. Hickerson,* 55 Kan. 133; *State v. Smith,* 49 Kan. 358; *State v. Moon,* 45 Kan. 145; *State v. Crosby,* 17 Kan. 356.

It may happen that the constitutionality or the interpretation of a statute is involved in the case. It would seem that for the sake of future guidance of trial courts, questions should be settled in the case at bar and not deferred until some trial court has adopted a contrary view of the same question and the matter carried to the Supreme Court by the defendant.

If it is thought that an amendment of the constitution will be required before such power can be conferred upon the Supreme Court, a constitutional amendment and a statutory provision is given in the latter part of this report. (See "Matter Prohibited," 3a.)

Second, that it shall be the practice to reserve questions of law and proceed to the verdict of the jury, which shall be upon the issues of fact raised by the pleadings.

Without approval by the committee, constitutional and statutory provisions by which the right may be obtained are presented in the latter part of this report.

"IV. Any court to which a cause is taken for review should have power to take additional evidence by affidavit, deposition or reference, as rule of court may prescribe, for the purpose of sustaining a verdict wherever the error complained of if lack of proof of some matter capable of proof of record or other incontrovertible evidence, defective certification or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to have been competent."

This provision would not deprive the accused of the constitutional right to a trial by jury, although, as proposed, it does deprive him of the right to face the witnesses. A statutory provision that avoids the latter objection is stated in the latter part of this report. (See "Matter Submitted," 2.)

In *State v. Crosby,* 17 Kan. 356, the prosecution failed because, in the estimation of the trial court, no proper foundation was laid for the introduction of evidence to show the incorporation of the person from

whom the defendant was charged to have embezzled a certain amount of money. Had the trial court admitted the evidence and the defendant been convicted, on appeal a new trial might have been granted. A jury would, however, have passed upon every fact necessary to show the elements of the offense, and the only new evidence needed would have been that which was merely foundation evidence. No error was committed so far as the merits of the case were concerned. Why not confine the new inquiry to such evidence as is necessary to lay the proper foundation? This rule is analogous to section 580 of the new code of civil procedure, which reads as follows:

"In all cases except those triable by a jury, as a matter of constitutional right, the Supreme Court may receive further testimony, allow amendments of pleadings or process, and adopt any procedure not inconsistent with this act which it may deem necessary or expedient for a full and final hearing and determination of the cause."

"V. No conviction should be set aside or new trial granted for error as to any matter of procedure, unless it shall appear to the reviewing court that the error complained of has,

a. Resulted in a conviction contrary to substantive law, or,

b. Deprived the accused of some right given by adjective law to insure a fair opportunity to meet the case against him or a full opportunity to present his own."

The provision of our criminal code is as follows:

"6867. Errors disregarded. No. 293. On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

This section was adopted in 1868 and, although it has not been interpreted so as to require the defendant on appeal to make an affirmative showing of error in all cases, yet your committee believes that the doctrine of "harmless error" need not be carried beyond the spirit of the code as interpreted by our Supreme Court.

"VI. It should be permissible.....to prosecute any and every species of offense by information after examination and commitment by a magistrate, permitting also prosecutions by indictment with or without such examination and commitment."

The information has for many years been almost the sole, though not the exclusive means, of charging the offense. Although our method of calling a grand jury has been criticised as cumbersome, in view of the satisfactory operation of the information we suggest no changes in the law of indictments.

"VII. Amendments of indictments or informations should be allowed:

"1. As to all formal matters in any court at any time;

"2. In order to prevent variance by the trial court, before or during trial, upon such terms as will afford to the accused reasonable notice and opportunity to make his defense;

"3. After trial, to conform to the proofs, either in the trial court or in a court of review, where the variance was not expressly brought to the attention of the trial court when the variance was offered and the trial proceeded without claim by the accused that he was not properly notified of the case actually made against him."

In view of the almost exclusive use of the information, your committee sees no need of urging a provision for amendments of the indictment, but the committee has formulated a provision for amendments of the information, which is presented in the latter part of this report.[1]

"VIII. The office of the indictment or information should be:

"a. To give the accused notice of the crime with which he is charged and of the case on the facts which will be made against him;

"b. To set out the facts constituting the alleged offense with sufficient exactness to support a plea of former conviction or acquittal, as the case may be."

The report of the Committee of the American Institute of Criminal Law and Criminology adds:

"The further office of providing a formal basis for the judgment of conviction, so that the indictment or information may set forth everything which is necessary to a complete case on paper, no longer serves any useful end, produces miscarriages of justice and should be done away with."

Before submitting formal matter for consideration the committee states that it has been unable to make a careful examination of the remaining parts of the criminal law prior to the final conviction of the accused, namely, the organization of courts, the definition of crimes and the human agencies employed to ascertain the guilt or innocense of the accused. Individual members of the committee have gathered considerable data but the committee has been compelled to confine itself to the investigation of our criminal procedure. Improvement upon the crystallized experience of the years can be accomplished only after a long course of investigation and hard reasoning. Before the inventor can act efficiently and successfully, he must see clearly and think correctly. It is possible that miscarriages of justice because of delays and technicalities may be reduced by a better organization of our courts. Certain it is that much of the technicality of the law is due to definition of crimes. Improvement in the classification of crimes may be possible. Then too, legislation has been fragmentary. Additions and amendments to the Crimes Act have been made from time to time by various legislatures through bills prepared by different legislators. Necessarily, the definitions of crimes will lose or lack exactness of expression, and they may even be inconsistent. A complete revision, not a compilation, of these may be necessary. The folly of borrowing statutes from other jurisdictions without a careful investigation of our own will create inconsistencies, as is shown in the case of *State v. Rhodes*, 77 Kan. 202. In this

case the question was whether a real estate mortgage was "deed or writing for the conveyance or assurance" of lands, etc. On argument, it was shown that the language of the Kansas Act had been taken from a Missouri statute and that the Supreme Court of Missouri had decided a mortgage to be a "conveyance" within the meaning of the Missouri statute. In Kansas, however, a different theory of a real estate mortgage prevails. It is "a mere security—an incident to a debt to secure which it is given." Therefore the failure in the mortgage to recite or describe a prior mortgage with intent to defraud was not an offense under our statute.

In view of all of the above, our committee presents the following for action of this association:

MATTERS SUBMITTED.

1. We recommend that a Committee on Criminal Law and Procedure be continued, the members of which shall be appointed by the president of the association for the ensuing year.

2. We present for consideration the following amendment to the statutes:

"6867a. The Supreme Court, without ordering a new trial, shall have the power to direct the trial court, from which the appeal was taken, to take additional evidence, the defendant being present, to make findings of fact and to transmit the same, together with the evidence, to the Supreme Court as now provided by law for a transscript of the evidence, such additional evidence being for the purpose of sustaining a verdict wherever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for the jury, be shown to have been defective."

3a. We offer the following amendment to the Constitution in order that the Supreme Court may be authorized to pass upon questions reserved in cases where the defendant has been acquitted:

Amend article 3, section 3, by inserting the words "which may include provision for review of question of law reserved by the state in criminal cases where the accused has been convicted or acquitted," so that the section shall read as follows:

"3. The Supreme Court shall have original jurisdiction in proceedings in *quo warranto*, *mandamus*, *habeas corpus*, and in injunctions brought by the State, and such appellate jurisdiction as may be provided by law, which may include provision for review of questions of law reserved by the state in criminal cases, whether the accused has been convicted or acquitted."

3b. We submit the following for consideration: to amend the General Statutes of 1909 by inserting section 6812a, as follows:

"The trial court may submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and such court and the Supreme Court, to which the case may thereafter be taken, shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require."

This provision, though differing slightly in phraseology, was presented to the American Bar Association in 1909 in an "Amended Bill to Regulate the Judicial Procedure of the Courts of the United States," by a special committee, and was adopted. (See 34, *Rep. Am. Bar Assn.*, 603, 82.)

4. The following is submitted:

To amend paragraph 6647 of the General Statutes of 1909 so as to read as follows:

"An information may, without leave, be amended in matter of substance or of form at any time before the defendant pleads.

"The information may, in the discretion of the court, be amended on the trial as to all matters of form, when the same can be done without prejudice to the substantial rights of the defendant.

"To prevent variance, the information may, by leave of court, be amended during trial upon such terms as will afford the accused reasonable notice and opportunity to make his defense, and after trial it may, either in the trial court or in the Supreme Court, be amended to conform to the proofs, where the variance was not expressly brought to the attention of the trial court when the evidence was offered and the trial proceeded without claim by the accused that he was not properly notified of the case actually made against him."

5a. We further present the following: to amend paragraph 6679 of the General Statutes of 1909 to read as follows:

"The indictment or information must contain: first, the title of the action, specifying the name of the court to which the indictment or information is presented and the names of the parties; second, a statement of so much of the facts constituting the offense in plain and concise language, without repetition, as shall give the defendant reasonable notice of the offense with which he is charged and of the case on the facts which will be made against him, setting out the facts constituting the alleged offense with sufficient exactness to support a plea of former conviction or acquittal, as the case may be."

To amend paragraph 6685 to correspond, as follows:

"Fourth, that the offense charged is sufficiently set forth in plain and concise language as to give the defendant reasonable information of the act or omission to be proved against him and to identify the transaction referred to with sufficient exactness to support a plea of former conviction or former acquittal, as the case may be; but it shall not be necessary for the indictment or information to set forth every element of the offense charged, but only so much detail of the circumstances as shall accomplish the purposes above set forth in this section."

An information is sufficient which fulfills the following requirements:

1. Fair notice to the defendant of the nature of the charge and of the identity of the act or omission for which he is prosecuted.

2. Identification of the charge and of the acts or omissions sufficient to enable the accused to plead former acquittal or conviction in case of second prosecution.

"A chief object of reform of procedure, both criminal and civil," says the report of the Committee on Criminal Procedure to the American Institute of Criminal Law and Criminology, October, 1910, "must be to insure trial and review of the case rather than the record. The present practice amounts to record-worship. The reasons therefore are purely historical. Partly it is a remnant of the old mode of determining causes, so far as possible, by some arbitrary mechanical agency. Partly it had its origin in a just fear of fraud at a time when amendments could only be made by erasure of a parchment record, the reasons for which have been obsolete for centuries. Chiefly it grew out of the exigencies of the old mode of review by writ of error, now superseded in most jurisdictions by a more modern appeal. When review could only take place by inspection of the parchment record in a search for error, it was necessary that the indictment set out a complete case against the accused, disclosing every element of the crime, since the court of review could only know what was proved from what was averred. To-day causes may be and are reviewed on the case made at the trial. But we still continue to review the case made in the indictment also. Under modern conditions, the latter review serves no useful end. No cause which has been tried on evidence should be reviewed solely upon pleadings. If a case was made at the trial, the question should be whether the accused was fairly notified thereof, and had a fair opportunity to meet it and to present his own case, not whether the record would sustain a judgment at common law.

"Nor is a complete statement of all the elements of a crime necessary to permit the record to be used as the basis of a plea of former conviction or of former acquittal. If sufficient notice is afforded the accused, surely others who have reason to read the indictment will be able to perceive what was charged and tried. The better an indictment fulfills the purpose of notice to the accused, the more thoroughly it will meet the requirement of record upon which to maintain a defense of former conviction or of former acquittal. Perhaps no practice will do away entirely with the need of extrinsic evidence in such cases. Under the present practice it must be resorted to frequently.

"Moreover it must not be forgotten that our present practice sometimes develops the formal office of the indictment, namely, the office of sustaining the judgment of conviction on paper at the expense of the chief substantial office, namely, the office of affording notice to the accused. This is often true in cases of statutory offense, where it is permissible to charge the offense in the very language of the statute. It is even more true in some jurisdictions where legislative zeal to insure conviction of offenders against certain statutes has provided for an indictment in general terms. The way to get rid of the difficulties growing out of the formal function of indictments is not through such impairment of their substantial function. As H. L. Stephen has put it, 'the prisoner should have notice of all the law and all the facts which would be cited against him.' But the question should be whether he had such notice. If he has, the function of the indictment is performed. The question then should be as to the case made at the trial. To-day there is no difficulty in showing an appellate tribunal exactly what that case was. We do not need an elaborate indictment to that end.

"Most jurisdictions to-day have penal codes or criminal codes. An indictment referring to the section on which it is founded followed by 'so much detail of the circumstances of the alleged crime as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to' would accomplish every real purpose of criminal pleading."

Probably an amendment to the Bill of Rights will be required for the above statutory provision. The Bill of Rights requires that the accused be informed of "the nature and cause of the accusation against him." Whether this means notification of every element of the offense is a question of interpretation. If so, the following amendment to the Bill of Rights, section 10, is presented instead of the constitutional provision above:

"In all prosecutions, the accused shall be allowed to appear and defend in person or by counsel; be notified of so much of the nature and cause of the accusation against him as shall fairly enable him to prepare his defense, and be sufficient to form the basis of a plea of former conviction or former acquittal."

The rest of the section shall read as at present.

Your committee further reports that it has been unable to complete its investigation of the work as outlined in the committee report of 1911, namely:[1]

1. Criminal procedure.
2. The organization of courts.

[1]From this point we have the report as presented in January, 1912.

3. The definition of crimes.

4. The human agencies employed to ascertain the guilt or innocence of the accused.

Your committee has been unable to investigate the criminal law and procedure of this state in the order indicated in its report of last year, but it has concerned itself with certain miscellaneous matters from which it has selected the following for report at this time:

1. Mistrials, due to the physical or legal incapacity of jurors, or to personal feeling between individuals in the jury room.

In addition to the three-fourths verdict advocated by some, your committee presents the following for consideration:

(a) In any criminal case, the court, upon his own motion, or upon the motion of either party, may order fourteen jurors to be impaneled to try the cause, of which number the first twelve persons accepted shall consider and render a verdict, unless before verdict returned and accepted one or more of the twelve shall, in the judgment of the court upon showing made, become incapacitated by sickness, or unsoundness of mind, die, or be found to be disqualified by law because of circumstances occurring before or during trial, in which event the place of such incapacitated juror shall be filled from the two remaining jurors, who shall also have been sitting and hearing the cause, and such jurors shall be taken to fill such vacancies in the order in which they were accepted.

The above provision, however, does not avoid mistrials because of personal feeling between jurors, and your committee suggests the following:

(b) That a jury of fourteen be impaneled to try the cause, any twelve of whom may sign and return a verdict.

2. The time of appeal in criminal cases shall be changed from two years to one year, so that the present paragraph 6858 of the General Statutes of 1909 shall read as follows:

"The appeal must be taken within one year after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken."

3. Provision should be made whereby the state or municipality may institute a civil suit to recover an amount equal to the fine that might be assessed for offenses punishable by fine only. The action should be known as "a suit for a civil penalty," and the offender brought into court by a simple citation to show cause why judgment should not be pronounced against him for the cause stated.

The person thus cited should be required to plead all his defenses,

and be held to have waived those not plead, except, of course, those constitutional rights not within the power of any individual to waive.

It should further be provided that the plaintiff might dismiss before trial and proceed under the criminal procedure, but judgment in the "suit for a civil penalty" should bar the criminal action.

The following advantages of such proceedings occur to your committee:

First. Offenders may often be induced to pay the penalty without other proceedings and yet may be deterred from future infractions of the same law. The police laws of the state are often broken through ignorance of the existence of the particular law in question, but if the offender is arrested he is tempted to resist conviction because of the stigma resulting therefrom. An additional argument may be found in the fact that a civil proceeding will destroy the stock appeal to the jury in a criminal case, that the jury should not "attach the smell of jail" to a person of good reputation.

Second. It may succeed in securing conviction by a "preponderance of the evidence" instead of "beyond a reasonable doubt." Upon this point there seems to be a division of the authorities, but the following cases hold that a civil suit for a penalty is not in the nature of a criminal proceeding:

Mitchell v. State of Nebraska, 11 N. W. 848; *Fein v. U. S.,* 1 Wyo. 246; *Comm. v. Sherman* (Ky.), 4 S. W. 790; 1 Bishop on Crim. Law 43.

Third. Care would of course have to be taken to bring the provisions within the rule laid down in the above cases if it is desired to make the suit for a "civil penalty" a civil suit as a matter of law, but it is possible to do so, granting, of course, that the above cases state the better rule.

Prosecutions under the criminal law would not be abolished, so that the objection that a civil penalty suit would not deter certain individuals from the commission of forbidden acts because the stigma of a criminal prosecution has been removed, would not prevent the state from prosecuting a criminal action instead.

Fourth. Your committee is informed that the legislature of 1903 adopted a resolution to submit a constitutional amendment providing for the impaneling of a jury from citizens outside of the county, but that this was not submitted at the time fixed by the resolution, for the reason that the Secretary of State found some flaw in the proceedings. Your committee recommends, therefore, that the Attorney-General be requested to investigate the matter with the view of compelling the submission of the amendment for adoption.

Fifth. The change of venue from one county to another within the district should be allowed to the state where it is made to appear to the trial court that it is doubtful if a jury can be obtained in the county where the prosecution was brought.

Sixth. No person shall be disqualified as a witness in any criminal action or proceeding by reason of his conviction of a crime; but such conviction may be shown for the purpose of affecting his credibility.

Seventh. The rule in civil cases, as provided in paragraph 5872, General Statutes of Kansas, 1909, should be extended to criminal cases so that questions of law arising in the case may be decided by the court or judge in advance of the trial.

Eighth. We favor the rule that all pleas in abatement, except the determination of the fact of insanity, should be tried by the court.

Ninth. We submit for discussion the question of the extension of the inquisitorial powers of the county attorney in matters concerning:

(a) Gambling; (b) Anti-trust violations; (c) All criminal offenses.

Tenth. Your committee further states that it has concerned itself with the following question:

Is it possible to classify and denominate offenses in such a way that the charge of one offense may render possible the determination of the existence of another, or others?

By practice in this state, under the charge of murder it is possible to establish the ingredients of assault with intent to kill, or of simple assault. Petty larceny is included within grand larceny. May it not be possible to devise a system of definition and classification wherein many of the offenses will differ from others in the possession of elements or ingredients additional to those included in others, so that the charge of one having the greatest number of the ingredients would allow conviction of that offense which consists of the ingredients shown by the proof? By means of this classification the charge would be specific, would notify the defendant of the case on the facts and allow his conviction of that offense of which he was really guilty. Your committee has already discussed this question in relation to the following:

1. Offenses involving injuries to the person.

2. Crimes involving the sex relation, such as forcible and statutory rape, incest and seduction.

3. The unlawful deprivation of property.

Under such a classification, it would be possible to prosecute a number of offenses in one information and under one charge, the nature

of the offense depending upon the successive elements eliminated by failure of proof and upon the establishment of those remaining.

Eleventh. In conclusion, your committee states that the elimination of errors and the improvement of the law and procedure is to be obtained only after careful investigation. It therefore recommends that the committee be continued for further work.