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"They ought to come to Ohio to find out how it works. If they will not do so, you ought to tell them how it works."

These were the final words of Dean John H. Wigmore, in his last of three lectures on evidence recently delivered to the lawyers in Cincinnati. The Dean had reference to the constitutional provision that no person shall be compelled to be a witness against himself in a criminal case.

There is a strong movement to repeal, or at least to modify Art. IV of the federal bill of rights, protecting persons and houses from unreasonable searches and seizures and Art. V, which among other things, protects an accused person from being compelled to testify against himself in a criminal case.

It has been the habit of public speakers and writers to criticize the administration of criminal justice. The late Chief Justice William Howard Taft said that the administration of criminal justice in this country was a disgrace to our civilization. An ex-president of the American Bar Association, Mr. Earle W. Evans, has repeatedly quoted the late Chief Justice and has brought to the door step of lawyers and bar associations the responsibility for the failure of criminal justice.

Dean Wigmore was addressing Ohio lawyers and he realized that they knew that in many respects Ohio is far in advance of her sister states in the administration of criminal justice.

Ever since Ohio became a state, there has been a provision in its constitution that "no person shall be compelled, in any criminal case, to be a witness against himself." (Art. I, Sec. X.) This provision gives the accused the right to sit mute during his trial. Formerly no comment could have been made about his silence by the prosecuting attorney nor any reference to it by the judge. In all criminal prosecutions up to twenty-two years ago, it was the safe course for counsel for the defense, where there was a likelihood of embarrassment in the cross examination of the accused, to keep the defendant off the stand. With a gesture of confidence, counsel for the defense would rest his case without calling the defendant as a

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witness. Sometimes counsel attempted to give the jury the impression that the state's case was so weak, that it was unnecessary for the defendant to testify. Not a single word could later be said either by the prosecuting attorney or the judge as to why the defendant had not testified.

We are now in the twenty-third year of the amendment to our state constitution on this question. On September 3, 1912, the people of Ohio by a vote of 291,717 to 227,547 added to the provision against self-incriminations these words—"*But his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel.*"

When an Ohio prosecuting attorney rests his case, the defense is often put to a sore test to determine whether to call the defendant to the stand. If the defendant does not take the stand the prosecuting attorney, in his argument, can take up one material fact after another, which the jury wants to know about, point his finger at the accused and ask—"Why did you not take the stand and tell the jury the thing it wants to know, to wit: whether or not thus and so is a fact?" He may thus run the whole gamut of the case and ask the jury to draw its conclusions as to why the defendant did not testify. It is a withering ordeal for the defense.

On the other hand, if counsel for the defense, in order to escape the running fire of the prosecuting attorney in the argument, puts the accused on the witness stand, it furnishes the prosecuting attorney the opportunity to tear into shreds the testimony of the accused. In these days of the interchange of police records, with finger print identification of criminals, the prosecuting attorney may cause the whole defense to blow up with a few questions about prior convictions. Thus under the Ohio practice, when the prosecuting attorney says "we rest," the attorney for the accused looks at the vacant witness chair and finds himself like the Greek sailors with Scylla on the one hand and Charybdis on the other. He knows not which course to take.

Nothing which has been written into the books of Ohio jurisprudence has had a more salutary effect in the administration of criminal justice than the twenty-five words above quoted, which the people added to the constitution by a majority of over sixty-thousand in September, 1912. Dean Wigmore knows that the amendment has worked well in Ohio and he is amazed that the critics of criminal justice have not found it out. He therefore charges us in Ohio to tell these critics about the things they have not found out for themselves.

We have always had in our constitution the provision that the accused shall meet the witness face to face. Up to twenty-three years ago, this meant that the living witness had to be seated in the witness chair so that the accused could look across the court room and behold the witness in the flesh and blood. Twenty-three years ago, the people of Ohio by the majority above indicated, reaffirmed the provision that the accused has the right to meet his witness face to face but provided further, *"for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance could not be had at the trial, always securing for the accused means and the opportunity to be present in person and with counsel at the taking of such depositions, and to examine the witness face to face as fully and in the same manner as if in court."* If the prosecution desires to take depositions the state pays the traveling expenses of the accused to and from the place where the deposition is to be taken. General Code, Sec. 13444-14.

During the last five years there have been many indictments of bankers, brokers and other financial agents, whose prosecution required deposition to be taken in other states. In those states where depositions cannot be used in criminal cases, prosecution often has failed and culprits have gone unscathed, because witnesses in a busy broker's office in New York have refused to travel to other states to testify. In Ohio all this is changed. If the witness will not come to Ohio, his deposition is taken by the prosecuting attorney. Literally truck loads of depositions and exhibits have been produced in criminal prosecutions, where the attendance of a living witness could never have been secured. Of course, this statute also benefits the accused if he finds a favorable witness in another state who will not attend the trial.

The defense of an alibi has been much abused in criminal cases. In many states the defendants plea consists of the two words "not guilty." The prosecution is not advised by such a plea whether the defense is self-defense, an alibi or what. Where an alibi may be shown under the general plea of not guilty, the prosecution may be taken by surprise when the defendant takes the stand at the very end of the trial and testifies that he was in a remote place at the time of the commission of the offense. It is often too late for the prosecuting attorney to secure witnesses in rebuttal.

We have changed this by statute. Since July 21, 1929, a defendant, pleading an alibi must file his plea in writing not less than three days before the trial and must designate the place where he claims to have been at the time of the alleged offense. In the event

of failure to do so, the court may in its discretion, exclude the evidence offered for the purpose of proving such alibi. (Gen. Code Sec. 13444-20). This has greatly reduced the number of alibis now pleaded in Ohio. A defendant, face to face with his statute, turns from the statute to those lines of one of James Whitcomb Riley's poems—

"No power low nor high,
Could ever quite substantiate,
That feller's alibi."

Equally important is the statutory provision that insanity as a defense must be specially pleaded. Gen. Code Sec. 13441-4. When insanity is set up as a defense, the court may commit the defendant to a state hospital for the insane where he shall remain under observation for not exceeding one month. And the court may appoint two or more specialists in mental diseases to examine into the defendant's mental condition and to testify at the trial. This statute has put an end to fake insanity defenses in Ohio.

We have referred to two amendments to the constitution of Ohio and one statute, and we now purpose to cite a single decision of our supreme court, which has done much to aid the prosecution. This is the case of *Whiteman* v. *State of Ohio,* 119 O. S. 285. It is noteworthy that the prosecuting attorney who represented the State in the Whiteman case and who persuaded the supreme court of Ohio to lay down a rule of law which has paralyzed many a defense, was Chas. P. Taft II. Mr. Taft is a son of the late Chief Justice. The son's record as prosecuting attorney, is a refutation at least as far as Ohio is concerned of his father's charge that the administration of criminal justice is a disgrace.

In the Whiteman case, decided on November 14, 1928, the court held—*"Where other offenses of like character are committed by the same person in the same locality within a period of time reasonably near to the offense on trial, and where the same plan, system and method are followed, testimony of such other offense is relevant to the issue of identity."*

This decision was a solar-plexus blow to the highwayman who commits more than one robbery on the same evening. If he denies his identity either by a plea of alibi or otherwise, witnesses may be called to prove that the accused not only robbed the victim mentioned in the indictment but others at other places. When identified by witnesses as the man who held up two or more victims, there is usually an entire collapse of the defense.

In the Whiteman case proof was offered by the prosecution of

the "same plan, system and methods" as was employed by the defendant in the case on trial. In the State's case Mr. Taft proved three robberies. In detailing the different occurrences, the witnesses for the prosecution were allowed to describe the clothing and uniforms worn by the defendants in all of the robberies; the manner of their executing the several robberies, the agencies employed, and perhaps other characteristics which were true of each of the alleged robberies. He also was permitted to show that the robberies occurred in one neighborhood and within a radius of a mile and a half; that an automobile was employed by the robbers; that two persons were in the automobile; that they were dressed in bus drivers uniforms; that they carried a flash light; that their plan was to drive their car next to that of their victims and compel them to stop; that they would then impersonate officers; cause the victims to leave their cars and then search and rob them.

The opinion was written by Chief Justice Marshall and it deserves the attention of every student of criminal justice. The court held that all the evidence of the three separate robberies was admissible at the trial on a charge of perpetrating one of the robberies, for the purpose of showing the identity of the accused. While this testimony was not to be received as proof of the defendant's commission of the second and third robberies, it is apparent that such testimony may turn the balance of the scale of justice from a verdict of not guilty to one of guilty.

Much might be said about the system of pleading in criminal cases in Ohio. We have no long technical indictments. An indictment for murder usually consists of less than one hundred words. It is simpler and shorter than a bill of particulars on a promissory note in the municipal court. Generally speaking, there are no technicalities in the admission of evidence. Some of the lawyers throughout the country, who are asserting that defendants are escaping conviction through technicalities, ought to come to Ohio and show us how it is done. In this state the court appoints and pays lawyers for the defense of indigent persons. If some of the lawyers who say that technicalities acquit the defendant, will come to Ohio, perhaps some of our obliging courts could be persuaded to appoint these critics to represent defendants in criminal cases and let us be shown how to walk the defendants out of the court room, on technicalities. We Ohio lawyers do not know how to do it.

In conclusion we join in the invitation extended by Dean Wigmore to all critics of the administration of criminal justice to come to Ohio and see how the prosecution works. Perhaps some other states may profit by our example.