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1934 California Constitutional Amendments in the Field of the Criminal Law

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THE 1934 CALIFORNIA CONSTITUTIONAL AMENDMENTS IN THE FIELD OF THE CRIMINAL LAW

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The constitutional amendments under consideration are as follows:

"Pleading guilty before committing magistrate," Article I, Section 8; "Permitting comment on evidence and failure of defendant to testify in criminal cases," Article I, Section 13; and "Duty of Court in charging jury. Court may comment on evidence," Article VI, Section 19.

These amendments were adopted by the voters of California on November 6, 1934.

The constitutional provisions permitting a defendant to plead guilty to a felony complaint before a committing magistrate reads as follows:

"If the felony charged is not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein; thereupon, or at any time thereafter while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate and the district attorney or other counsel for the people, plead guilty to the offense charged or to any other offense the commission of which is necessarily included in that with which he is charged, or to an attempt to commit the offense charged; and upon such peal of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court."

This amendment was designed, of course, to expedite the prosecution of felony cases. On its face it appears to do just that, as it eliminates the preliminary hearing and, upon a plea of guilty, provides that the magistrate shall immediately commit the defendant and certify the case to the Superior Court. In a felony case where

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such a plea is taken, the delay caused by a preliminary hearing and the fifteen day period thereafter for filing the information are thus apparently wiped out and the defendant moved rapidly on his way to sentence.

It will be noted that this amendment requires the consent of the magistrate and the district attorney, or other counsel of the people, before the defendant can thus plead to the complaint. At first blush, it would seem that the magistrate and the district attorney would readily give their consent to such a procedure, but if we bear in mind certain provisions of the Penal Code imposing special penalties upon defendants who have suffered prior convictions and the duties of district attorneys to investigate criminal records of defendants, if any exist, and to charge prior convictions in informations and indictments and prove them at trials, it will readily be seen that taking a plea of guilty on a felony complaint before a magistrate might well result in speeding up the wheels of justice so fast that it would be impossible for the prosecutor to obtain the necessary data to charge and prove prior convictions before the defendant would be on his way to state's prison. This amendment in practice actually speeds a part of the machinery of justice without sufficient regard to the efficiency of other parts just as important.

In Los Angeles it takes on an average ten days to obtain from the Federal Bureau of Investigation at Washington a transcript of a criminal record of a particular defendant. By a rush order the time may be cut to four or five days. After the transcript is received, it is then necessary under Section 969-B of the Penal Code, to obtain certified copies of the records of the penitentiary or reformatory where the defendant was formerly incarcerated, in order to acquire the evidence necessary to charge the defendant in the indictment or information with the prior conviction and prove the same at the trial. In most cases it is impracticable, if not impossible, to get these facts in time to allege them in felony complaints. The fifteen day period between commitment by the magistrate and filing information, affords ample time for investigation and proof of a criminal record.

If the district attorney is to perform his duty in respect to the matter of charging and proving prior convictions where they exist, it follows that he should not readily give his consent to a plea of guilty in a felony case before a committing magistrate, as such a procedure is altogether too expeditious to permit him to observe these provisions of the Penal Code to which we have just referred.

The office of the district attorney of Los Angeles County, realizing this situation, will not consent to guilty cases before preliminary magistrates except in those cases where it appears certain that defendants have not previous criminal records. It being practically impossible to ascertain at the early stages of the prosecution whether or not a particular defendant has had a criminal record, the amendment to Article I, Section 8, is of little, if any, value when considered in connection with the other duties of the district attorney just discussed. Practically all the advantages that seem to exist under this amendment are available to defendants who want to waive preliminary examinations.

The constitutional amendment permitting comment on evidence and failure of defendant to testify in criminal cases, so far as it concerns us here, reads as follows:

"But in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court or by counsel, and may be considered by the court or the jury."

This amendment, in the opinion of the writer, is of considerable value. In this jurisdiction, it is now the common practice of prosecutors to call to the attention of the jury the failure of the defendant to take the witness stand where such a situation exists. Although it is not possible for anyone to state accurately what the effect of such comment is, it would seem, at least from the standpoint of the prosecution and also in the interests of the search for the truth, to be helpful to the jury in considering the whole case. Probably this amendment forces many a defendant to take the witness stand who otherwise would stand mute. It is a fact that convictions in Los Angeles County in felony prosecutions have increased about four per cent since 1934. To what extent any constitutional amendment has contributed to this increase is of course problematical.

We now come to the discussion of Article VI, Section 19, of the California Constitution, which reads as follows:

"*Duty of court in charging jury. Court may comment on evidence.* The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

This amendment must be considered in the light of certain decisions by the Supreme Court and District Courts of Appeal of this state. In *People* v. *Patubo,* 94 Cal. Dec., page 296, wherein the trial court was reversed because of certain comments on the evidence, the Supreme Court says:

"Under the recent amendment (1934) to Section 19 of Article VI of the State Constitution, a greater latitude is permitted to trial judges in instructing jurors than was allowed before its adoption."

In the first case in which the District Court of Appeals construed this amendment, namely, in *People* v. *Talkington,* 8 Cal. App. (second), 75, the judgment of the Superior Court was reversed because of the following comment by the trial judge:

"I have tried a great many cases in this court, and now I have the right to state to you what I believe with reference to the evidence in this case, and comment upon it and you have heard the argument of the district attorney. I believe I agree with him almost absolutely."

Such a statement was held to be erroneous because it appeared therefrom that the judge had become an advocate and that his comments lacked impartiality and were argumentative in form. As pointed out by these and other decisions, the right of the trial judge to comment upon the evidence is not absolute in this state, but apparently limited about as trial judges are limited in this respect in the Federal Courts.

In actual trials of felony cases in Los Angeles County, judges do not as a rule comment upon the evidence, notwithstanding the power given to them under the recent amendment. Inasmuch as the power to comment is virtually dormant in felony trials here, this amendment has produced to date little, if anything, of value. Can it be that trial judges follow the lines of least mental resistance? If so, that is human nature. It is of course easier for a judge to read instructions prepared by prosecutors and let it go at that than to analyze the evidence intelligently and advise the jury fairly thereon. We have heard of trial judges who are obsessed with the fear of being reversed by appellate courts, believing no doubt that reversals spell incompetency. This belief, we submit, is just another judicial error.

We close with the observation that as the voters of this state needed educating to approve this amendment, so perhaps the judges need educating to use it.