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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 was held in Washington September 30 and October 1. On Friday evening of the former day, a joint meeting was held with the American Prison Association, at which addresses

were delivered by Professor John H. Wigmore, President of the Institute; Albert H. Hall, Esq., of the Minneapolis Bar; Judge Charles A. De Courcy, of Massachusetts, and Governor A. W. Gilchrist, of Florida. On Saturday two sessions were held. At the morning session an address of welcome was delivered by Judge W. H. De-Lacy of Washington, and at the same session the presidential address of Mr. Wigmore was read. On Saturday evening a banquet was held at the New Willard Hotel, at which the principal address was delivered by Attorney General Wickersham. Mr. Wickersham dwelt upon some of the defects in our methods of criminal procedure and arraigned the system for the weight which it attaches to technicalities. Comparing English and American methods and referring to the part which the English judge plays in the trial, Mr. Wickersham said:

"The judges in England are enabled to exercise control because of the position of power and respect they command in the community, in the first place, and because they are masters of English law and procedure. This last named qualification, I regret to say, does not always apply to the American criminal judiciary.

"If an able lawyer gets on the bench by mistake, we congratulate ourselves on our good fortune, and we hope that he will be continued there. In the case of an English judge, the whole position of domination is animated purely by the desire for justice, as he considers it to be.

"Such direction is shocking to the American mind, but it is equally shocking for us to see a man, who every one knows is an infernal scoundrel, hoodwinking justice and finally obtaining acquittal, after four or five trials, when every one knows he shot down the man in cold blood.

"Multiplicity of appeals, made possible by American criminal procedure, is undoubtedly the cause of much miscarriage of justice, and the escape of many criminals."

"Mr. Taft," he said, "after his long experience on the bench, has shown that the Republic pays exorbitant bills for guaranteeing that the technicalities shall not be violated.

"It is most desirable that out of the deliberations of such bodies as the American Institute of Criminal Law and Criminology recommendations for the improvement of criminal procedure, which would result in remedial legislation, should develop."

In his presidential address Mr. Wigmore reviewed the work of the Institute during the past year, and outlined the plans for the

ensuing year. "Many important workers," he said, "hitherto isolated have been found out and brought into touch. All workers have been encouraged by the consciousness of coöperation. The efficiency of all the labors has been multiplied. Wasteful and misdirected efforts have been prevented. Public interest and confidence have been confirmed and stimulated. Without organization these things must have lingered and failed.

"The local organization needed for influencing state law and practice has also been stimulated. A state conference has been held in Wisconsin, and one is to be held in the near future in Kansas. During the first year of our existence this feature has not been emphasized as it may be in the future. But, for this purpose, strong men must arise in each state who will lead the work. The states of Pennsylvania, New York, Illinois and Missouri have a special duty in this respect, and that duty has not yet been realized. Tangible results have been reached or hastened in the specific problems of our field. Nine working committees were appointed, including over seventy workers. Of these nine, seven have reported. Of these seven the work of one stands complete, the committee on the establishment of a Journal."

The committee on Translation of European Treatises has also done much of its work. The resolution of the Institute calling for the appointment of this committee recognizes that "it is exceedingly desirable that important treatises on criminology in foreign languages be made readily accessible in the English langauge." President Wigmore says of this committee that it "has let the contracts for translating nine most representative works. These will bring our whole thinking public into touch with the best European results of theory and practice. Two of these works are almost off the press, and others are actually in course of translation." The committee reports that "it realizes the necessity of educating the professions and the public by the wide diffusion of information on the subject;" that "the legal profession in particular has a duty to familiarize itself with the principles of that science as the sole means for intelligent and systematic improvement of the criminal law;" and that "one of its ('the Institute') principal modes of stimulating and aiding this study (of modern criminal science) is to make available in the English language the most useful treatises now extant in the continental languages."

The works now being published are "Criminal Psychology," by Hans Gross; "Modern Theories of Criminology," by Bernaldo de

Quiros; "Criminal Sociology," by Enrico Ferri; "Individualization of Punishment," by Raymond Saleilles; "Crime, Its Causes and Remedies," by Cesare Lombroso; "Penal Philosophy," by Gabriel Tarde; "Criminality and Economic Conditions," by W. A. Bonger; "Criminology," by Raffaelle Garofalo, and "Crime and Its Repression," by Gustav Aschaffenburg. This series will be published by Messrs. Little, Brown & Company, Boston.

The committee on System of Recording Data of Criminality had for its subject the "investigation of an effective system for recording the physical and moral status and the hereditary and environmental condition of delinquents, and, in particular, of the persistent offender; the same to contemplate in complex urban conditions, the use of consulting experts in the contributory sciences." The system reported by this committee comprises for the most part the schedules used by Dr. William Healy in the Juvenile Psychopathic Clinic of Chicago. These schedules are being used by the judges in a number of courts, both juvenile and municipal, in different sections of the country.

Other important topics worked upon during the year and reported at the last conference are, "Organization of Courts," "Criminal Procedure" and "Criminal and Judicial Statistics."

All of these committees are to continue their investigations of the subjects assigned them last year, and to report again at the next conference.

The Institute authorized the appointment of committees to study during the coming year the following additional topics: "An investigation of the insane offender, with a view first to ascertain how the existing legal rules of criminal responsibility can be adjusted to the conclusions of modern medical science and modern penal science, and, secondly, to devise such amendments in the mode of legal proceedings as will best realize these principles and avoid current abuses," and "The alien and the courts with a special reference to the following questions: treaty rights; status under the various state laws; procedure including interpreters, appeals, etc.; deportation for commission of crime; and criminal statistics as affected by legal disabilities."

The Institute also voted that its executive board should have power to accept an invitation on behalf of the International Criminalistic Union to become the recognized unit of that association in this country, and steps to that end were taken.

A report which attracted special attention was that presented

by the committee appointed last spring to visit England and make an investigation of English methods of criminal procedure. In presenting this report, Dean Lawson spoke of the organization of the English Judiciary and of the dispatch with which juries are selected, cases tried and appeals disposed of. Mr. Lawson stated that he had spent three months attending the courts of London and another month on the circuit, and that as a result of his observations he was convinced that we were a century behind England as regards our methods of criminal procedure.

"I have sat with the Court on various benches throughout England," he said, "and have traveled with the Circuit Courts and Court of Appeals, and learned much of their practice and the expeditious way in which they dispose of the legal business that comes before the English courts. That experience is sufficient to convince one conversant with American methods of the imperative necessity for reform in the administration of justice in this country.

"In England every man gets absolute justice and fair play, but the courts there will not tolerate delay. It is rare that a juror is challenged. Opposing lawyers get together before cases are called, agree upon the venire, and make every arrangement possible to assist the court and obtain an early trial. American practices leading to interminable delays and repeated postponements of cases are not known, and would not be permitted if attempted. On one day I recall the Court of Appeals made more than fifteen decisions in addition to attending to motions and other routine business that came before the court. After the lawyers had concluded their arguments the judges held a short consultation, authorized one of their number to give the opinion of the court, and it was done instantly. I marveled at this, and asked why decision was given in this way. The judges of the English court saw nothing unusual in such practice. 'These people are before us for a judgment,' one member of the court replied. 'We have heard the argument and know the law, so why not render our opinion immediately.'

"That is the reason the English courts are not congested like ours, and it is this policy that makes British justice speedy and sure. Reversing a judgment is a rarity, and cases never hang fire as they do with us. The system is much more advanced than ours, and their practice includes many of the reforms that President Taft has advocated and which inevitably must be adopted in the United States."

Only a few minutes were required, he said, to select a jury, and after the arguments were concluded the verdict was usually returned

by the jury before leaving the box. In one case which he saw tried the verdict was reached in three minutes after the judge had given the instructions. In another case the jury retired, but was out only five minutes. When appeals are taken but a short time elapses before they are heard, and they are disposed of with marvelous celerity. In one day, he said, the new Court of Criminal Appeal actually disposed of fifteen cases, and on July 12, when it rose, it had disposed of every case on its docket. We publish in this number of the *Journal* the first installment of this report, and the second part will appear in the January number. It represents the results of a very careful investigation of English methods of procedure, gained not from books but from actual observation of the workings of the courts themselves, and is, we believe, a fair and accurate presentation of the facts.

All of the reports referred to above, except the second part of the last mentioned one, have now been published in the *Journal.* Taken altogether, these reports make, in our opinion, a substantial contribution to the literature of criminal law and criminology, and represent a well conceived and effectively executed year's work by the Institute. If each succeeding year's contribution to the cause of a better and more scientific criminal law should approach in quantity and quality that of the first year, the existence of the Institute will have been abundantly justified.

The organization of the Institute for the ensuing year was affected by the election of the following officers:

President—Nathan William MacChesney, of Chicago, former vice-president of the Illinois Bar Association, and Commissioner on Uniform Laws.

First Vice-President—William H. DeLacy, of Washington, D. C., Judge of the Juvenile Court.

Second Vice-President—Edward T. Devine, of New York City, Professor of Social Economics in Columbia University, and Secretary of the Charity Organization Society.

Third Vice-President—John D. Lawson, of Columbia, Missouri, Dean of the law school of Missouri University.

Fourth Vice-President—Adolf Meyer, of Baltimore, Maryland, Professor of Psychiatry in Johns-Hopkins University.

Fifth Vice-President—Charles F. Amidon, Judge of the United States Court for the District of North Dakota.

Treasurer—Bronson Winthrop, New York City, member of the New York Bar.

Secretary—Harry E. Smoot, Chicago, Attorney for the Juvenile Protective Association.

Executive Board—Amos Butler, of Indianapolis, Ex-President of the American Prison Association; Frederic B. Crossley, of Chicago, Librarian of the Gary Library of Criminal Law and Criminology; Charles A. Ellwood, of Columbia, Missouri, Professor of Sociology in the University of Missouri; Eugene A. Gilmore, of Madison, Wisconsin, Professor of Law in Wisconsin University; Harry Olson, of Chicago, Chief Justice of the Municipal Court; Arthur W. Towne, of Albany, New York, Secretary of the State Probation Commission; John H. Wigmore, of Chicago, Professor of Law in Northwestern University; William Healy, of Chicago, Director of the Juvenile Psychopathic Institute; Roscoe Pound, of Cambridge, Massachusetts, Professor of Law in Harvard University; Frederick W. Lehmann, of St. Louis, Ex-President of the American Bar Association.

The Institute, through its committees, will do special work during the coming year on seven different topics, the precise wording of which can be found by consulting the bulletins of the Institute or its Journal. These topics embrace the different phases of the advanced work now being done by the scientific men in criminal law, criminology, penology, psychiatry, psychology and other contributory sciences. J. W. G.

Judge Holt on Unpunished Crime.

It is an encouraging sign when judges take note of the inefficiency of our criminal law and criminal courts to deal with the problem of crime in our present society; yet it would be well for such judges to be informed upon developments in the fields of criminal sociology and penology, if they would avoid making serious blunders. This point is illustrated by the address of United States District Judge George C. Holt, of New York, before the Wisconsin State Bar Association on June 29th.

Judge Holt very properly called attention to the enormous amount of unpunished crime in this country, and the relative inefficiency of our criminal law and criminal courts in dealing with the problem. He estimated that there were one hundred thousand men living in the United States who had participated in lynching riots, unpunished for their crimes, and over one hundred and fifty thousand who had participated in strike riots, where murder and injury to person and property had been done, who had gone unpunished. Besides these there are in our large cities an enormous number of

murders, maimings, burglaries, highway robberies, and the like which go unpunished. Judge Holt rightly insisted that the great amount of unpunished crime in this country has become a menace to our free institutions, and even to our civilization. Rightly, also, he called attention to the faults of our courts as in part responsible for this large amount of unpunished crime. He spoke especially of the inexcusable delays in the administration of justice, the admission of irrelevant testimony, the latitude allowed experts in criminal trials, and the multiplicity of indictments as things which should be corrected in our criminal courts.

Very properly, also, he admitted that punishment alone could never solve the problem of crime, that crime could only be gotten rid of by getting rid of the criminal. At this point, however, he made the mistake of suggesting that habitual criminals should be put to death. It is exceedingly regrettable that this one slip in Judge Holt's speech should have been magnified by the sensational press into the principal thing in his address. This, of course, was a grave injustice to Judge Holt; nevertheless, he should have known that penologists everywhere have come to the conclusion that the segregation of habitual criminals will answer all purposes of the death penalty, and avoid the many objections which may be rightly urged against the death penalty for every form of crime except that of murder. It must be admitted that the death penalty is of use in the solution of the problem of crime only in a relatively low moral state of society. It is at best a concession to the low moral status of the masses, for there is not much use in abolishing the death penalty for murder as long as the mass of the people show their thirst for blood by lynchings. The proposition, however, to reestablish the death penalty for offenses less heinous than murder is a backward step, unwarranted by either the state of society, or the nature of the problem of crime, and it is to be regretted that such a proposition was advocated in an otherwise excellent address.

C. A. E.

Judicial Disregard of Technicalities.

It is refreshing to observe the changing attitude of the courts toward technicalities in judicial procedure. The signs indicate that the widespread criticism to which some of them have been justly subjected for sacrificing justice to technicality and substance to form is beginning to produce results.

In the May number of the *Journal* we commented on a notable opinion of the Supreme Court of Oklahoma (*Caples v. State*, 104

Pac. 493, 1909) which refused to grant a new trial for the omission of a useless word in an indictment, and which at the same time took occasion to say that it purposed to give the people of the state a "just and harmonious system of criminal jurisprudence, founded on justice and supported by reason, freed from the mysticism of arbitrary technicalities." "This standard," the Court added, "will control our decisions, it matters not what or how many other appellate courts may have decided to the contrary." "Now that our criminal jurisprudence," it went on to say, "is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice so that the innocent may find it to be a refuge of defense and protection, and that the guilty may be convicted and taught that it is an exceedingly serious and dangerous thing to violate the laws of this state, whether they be rich and influential or poor and friendless. * * * * If we place our criminal jurisprudence upon a technical basis it will become the luxury of the rich who can always hire able and skillful lawyers to invoke technicalities in their behalf. We will give full consideration to all authorities which are supported by living principles, and will follow them when in harmony with our laws and the conditions existing in Oklahoma. But we must confess to a want of respect for precedents which were found in the rubbish of Noah's Ark, and which have outlived their usefulness, if they ever had any." All honor to the Supreme Court of Oklahoma for this enlightened and progressive stand, and we wish the words in which its opinion is thus announced could be burned into the mind of every appellate judge in the land. It is impossible for a layman to understand why this rule should not be the guiding principle of every judge who thinks more of substance than of form, and who desires to exalt justice above technicality.

We are glad to be able to call attention in this connection to a somewhat similar stand recently taken by the Court of Appeals of New York, whose code of criminal procedure declares that in capital cases the appellate court must give judgment without regard to technical errors or defects, or to exceptions which do not effect the substantial rights of the parties. In the case of the People v. Gilbert (109 N. Y. 10) the defendant had been convicted of murder, and his guilt was established beyond a doubt, but his counsel sought a reversal on the ground that the indictment neglected to state that the victim was a "human being"—an omission which it was contended was prejudicial to the rights of the accused. But such hair splitting

logic did not impress the Court of Appeals, and it made short work of the petition. In overruling the objection, Judge Vann took occasion to express his opinion of the place of technicalities in judicial procedure, and to say that the criminal law was fast outgrowing the subtle refinements which had been devised for the protection of innocent persons in an age when the severity of the criminal code was such as to shock the moral sense of all right minded men.

"Technical objections are no longer regarded as serious," said Judge Vann, "unless they are so thoroughly supported by authority that they cannot well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe, as in many cases, to shock the moral sense of lawyers, judges and the public generally. When stealing a handkerchief worth one shilling was punished by death and there were nearly 200 different capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities, to a great extent, have lost their hold."

Commenting on this decision the Springfield (Mass.) *Republican* observes that one can only marvel that so absurd a technicality as the above should ever have been able to get a hearing in any American court, much less a judgment of this statement and weight. To the shame of our technical-ridden system, however, there are many jurisdictions in which such technicalities are still respected and made use of to delay or defeat justice. We have called attention in previous numbers of this *Journal* to some of the more flagrant instances in which this has happened, and will doubtless have occasion to do so again in the future. The attitude of the New York Court of Appeals is thoroughly in accord with common sense and reason, and will meet the approval of all laymen as well as all members of the bar who have the proper sense of their obligations to society. If all courts would dispose of technicalities in this way much of the present widespread dissatisfaction with the administration of the criminal law would disappear. That an appellate court should render judgment upon the merits of the case without regard to technical errors which do not substantially prejudice the rights of the accused is as self-evident to a layman as the mathematical fact that five and five make ten. "What would you think of a Supreme Court," asks the

Philadelphia *Star*, "that set aside a ball game where the score was 99 to 1 and required it to be played over again simply because the umpire made a mistake in his decision that affected one run? It might be clear that the game had been won on the merits and that the umpire's decision had not affected the result, and yet because he made one error the game would have to be played all over again."

And yet, as the *Star* adds, the Supreme Courts of many of our states are proceeding along analogous lines in reviewing the decisions of trial courts. It is a source of gratification and evidence of a coming reaction that the highest courts of Oklahoma, Wisconsin, New York, and other states have set themselves against the old view which often sacrificed justice to technicality, and have announced their determination to administer justice on the basis of reason and common sense. J. W. G.

Judicial Support of Technicalities.

The attitude of the New York Court of Appeals in the case referred to above is in refreshing contrast with that taken by the Supreme Court of Alabama in the recent case of the state against West, where a conviction for stealing hides was set aside because the indictment failed to state whether the aforesaid articles were mule, goat, cow, or sheep hides. The constitution of Alabama declares that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, and in the judgment of the learned tribunal which was called upon to review the record of the trial court in this case, the thief, whose guilt had been established beyond all doubt and who had been sentenced to the penitentiary for a term of six years, had a constitutional right to more specific information concerning the kind of skins stolen in order that he might the better prepare to meet the charge against him. To an intelligent lay mind this is the veriest quibbling; it is simply trifling with justice, and it is such farcical performances as this that are doing so much to heap ridicule upon the legal profession and to bring our methods of judicial procedure into disrepute. Nevertheless, a writer in the Chicago *Legal News* undertakes to defend the Alabama Supreme Court from the charge of sacrificing justice to technicality. Indeed, he boldly asserts that this is not a *technicality* but a *fundamental principle* of the constitution and the law. "Now it must be apparent," he says, "that the mere charge of stealing some hides, without more, is simply equivalent to saying that West was guilty of stealing. It would obviously be as impossible for West

in the instant case safely to go into the trial, unless the kind of hides stolen were mentioned in the indictment as it would had the charge been the general one of *stealing animals* without mentioning whether they were *mules, goats, cows,* or *sheep,* and the state were permitted on the trial to prove that the defendant stole a *lot of animals.* There is no difference between the two cases. In either case he would be wholly unprepared to meet the vague and ambiguous charge." Again: "In order to properly instruct the jury, the indictment must inform the court of the kind of hides the defendant is charged with stealing. Inasmuch, however, as the circuit judge in Alabama did not know the indictment was bad on its face, he doubtless experienced no difficulty in instructing the jury on the simple question of stealing hides; that and nothing more, and so, the jury found a verdict against the defendant for stealing hides. Now, if West should be prosecuted again on the same charge of stealing hides, he could again and again be convicted, as his plea in bar could only mention hides and he could rely on the face of the indictment alone, and would not be permitted to eke out the charge in the previous indictment by parol, showing that the hides were the same in the latter as in the former prosecution. And thus one of the main safeguards which the prosecution throws around the accused, whether he be innocent or whether he be guilty, would be broken down."

This brand of argument strikes the layman very much like the logic of the Duchess in *Alice in Wonderland* where she says: "Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise."

Our advocate of this kind of "criminal" justice informs us that it has been determined in Missouri that an indictment which charges one with shooting at a mark on a public highway is defective unless it designates by name the particular highway (31 Mo. 349), and, he adds, "The various court reports are full of just such rulings." We regret to say that the last statement, to the shame of the law, is all too true. We commented in a previous number of this *Journal* on a recent decision of the Supreme Court of Missouri (*State v. Campbell,* 109 S. W. Reporter, p. 706) in which the conviction of a man for a dastardly crime was set aside because the article "the" was omitted from the indictment, thus indicating, as Samuel Scoville has remarked, that in Missouri the definite article "the" is of more importance than a man's honor or a woman's chastity. And this ruling was made in the face of a Missouri statute which declares

"that no indictment shall be deemed invalid for any fault or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

We rejoice to know, however, that there are respectable authorities in Missouri who repudiate the doctrine that the article "the" is an essential part of an indictment, and that its omission therefrom is a denial of due process of law. One of these is Frederick W. Lehmann of St. Louis, ex-president of the American Bar Association, whose remarks on the subject were printed in the last number of this *Journal.* "Had a mob assembled to lynch the fiend in this case," says Mr. Lehmann, "and I had appeared on the scene and pleaded with them to let the law take its course they would have said, 'We have no respect for a law which puts the definite article *the* in sanctity above the chastity of our wives and daughters.' Such things bring the law into contempt and disrepute and make you and me ashamed of it when we are arraigned at the bar of the common sense of mankind."

We have already called attention to the refusal of the Supreme Court of Oklahoma to grant a new trial because of the omission of the article "the," and the declaration of the court that it intended to do all in its power to place the jurisprudence of the state upon the broad and sure foundation of reason and justice. "We know," said the Court, "that there are respectable authorities holding to the contrary, but this Court will not follow any precedents unless we know and approve the reason upon which they are based—it matters not how numerous they may be, or how eminent the court by which they are promulgated." The Supreme Court of Wisconsin has taken the same enlightened view in a decision involving the validity of an indictment which omitted the useless phrase "against the peace and dignity of the state." "This formula," said the Court, "is a mere rhetorical flourish adding nothing to the substance of the indictment, and of course the accused cannot possibly be prejudiced or in any manner be misled by its omission from the indictment."

It is difficult to see how a court which seriously regards itself as an instrumentality for the administration of justice can take any other view of the matter. And yet the Supreme Court reports of many of our states are full of decisions overruling well-deserved convictions for the omission from the indictment of such words as "the," "there," "did," "and," the use of "or" instead of "and;" the slight misspelling of words; abbreviations, and the like. Some of the cases

in which justice has been delayed or defeated through such hair-splitting refinements were recently pointed out by Charles Brewer of the Maryland Bar in an article summarized in the September number of this *Journal.*

As an example of the way in which the requirement in regard to the choice of words in the indictment and the constitutional requirement that no one shall be twice placed in jeopardy for the same offense may be abused, Mr. Brewer cites the following case from South Carolina:

Two pianolas had been stolen. The indictment read "two pianos." Witnesses were brought in who testified that *pianolas* had been stolen, and not *pianos,* as charged. The indictment fell down and the accused was discharged. A vigilant district attorney was on hand, however, and promptly had the accused rearrested, charged with stealing two pianolas. The "shrewd" counsel defending the accused had a new set of witnesses this time—experts. The experts were able to convince the court that, after all, *pianolas and pianos were the same thing.* The court ruled that, having been tried once for stealing pianos, the accused could not twice be tried for the same offense. The fact that two musical instruments had been stolen seems to have been overlooked.

Other instances of a similar kind have been pointed out by Samuel Scoville of the Philadelphia Bar, and in an article summarized in the July number of this *Journal.* As an example of the style of logic which finds ready acceptance in some jurisdictions, Mr. Scoville cities a California case decided in 1904:

"An information was filed against A in which it was stated that A did unlawfully and feloniously commit an assault upon the person of B by means likely to produce great bodily injury— to-wit, with a heavy wooden stick. On an appeal to the Supreme Court the latter held that this information, although following the wording of the statute, was fatally defective because the means of injury were not described with sufficient precision. A layman might very well suppose that a heavy wooden stick could be understood as a means likely to produce great bodily injury; but the masterly reasoning of the Supreme Court of California disposes of any such fallacy, as follows:

"'Describing a stick as "heavy" imparts no certain information; the term is relative; a stick which in the hands of a boy or a feeble person would be considered heavy, in the hands of a robust person would be deemed light. Again, it might be heavy and yet so large and unwieldy as to be useless in the hands of a powerful man toward the commission of an assault. It might, too, be heavy and yet so small or short that no danger of bodily harm could reasonably be apprehended from its use. Aside from the use of the term "heavy" there is no description in the information as to the definite weight, strength or size of the stick, or other qualities, properties or characteristics showing that it was a means likely to produce great bodily injury.'

"Under this decision," observes Mr. Scoville, "it is undoubtedly the duty of any citizen of California who expects to be assaulted with a stick to provide himself with a tape-measure and pocket scales, nor to forget, immediately after the

assault, to obtain a complete set of the vital statistics of his assailant. Yet certain serious contingencies suggest themselves. What should be done if the individual wielding the stick nefariously made away with the same before any of its physical properties could be determined? Again, the court fails to explain the victim's duty in case the hardened owner of the stick refused to furnish any statistics as to his size, weight or strength. The argument itself has a familiar ring, and an examination of certain of the writings of that well-known legal authority, Mr. Lewis Carroll, will make it apparent where this Supreme Court learned its logic."

The Alabama case referred to above in which the court insists upon greater particularity in describing the offense, is not the first contribution to the jurisprudence of technicalities delivered by this august tribunal. In 1908 it set aside the conviction of a murderer because the indictment, which contained the usual staggering array of useless verbiage, did not conclude with the sacrosanct formula, "against the peace and dignity of the state."

We cannot too strongly condemn such judicial refinements as these. In the ordinary business transactions of our daily life they have no place. Nowhere except in our judicial procedure do they find a ready acceptance. In some cases they are so grotesque and absurd as to excite well-deserved ridicule from sensible men, lawyers and laymen alike, and more than anything else they are responsible for the widespread popular dissatisfaction with our present methods of administering justice. They tend to impair confidence in the courts, promote and foster lawlessness, diminish respect for the legal profession, and often result in gross denials of justice to those who have a right to look to the courts for protection. J. W. G.

Should Courts Ever be Criticized for Their Decisions?

Our strictures in the preceding note upon the courts for sometimes subordinating justice to technicality through hair-splitting logic and refinements raises the old question as to whether the judiciary should ever be criticized for its decisions. There have always been some who fancied that judges, unlike other mortals, are infallible, and that their judicial conduct ought not to be subject to criticism, certainly not by the laity. But the greatest English and American judges have, themselves, repudiated any such view of the perfection of the judicial office. The great English Lord Chancellor Parker once said: "Let all people be at liberty to know what I found my judgment upon; that, so when I have given it in any case, others may be at liberty to judge of me." The propriety as well as the value of temperate and dispassionate criticism of the decisions

of the courts was stated with singular lucidity and good temper in 1895 by Hon. William H. Taft, then a circuit judge of the United States:

"The opportunity freely and publicly to criticize judicial action," said Judge Taft, "is of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny and candid criticism of their fellow men. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus exert a strong influence to secure uniformity of decision. But non-professional criticism also is by no means without its uses, even if accompanied, as it often is, by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common sense, the protest of many average men may evidence a defect in a judicial conclusion, though based on the nicest legal reasoning and profoundest learning."

The late Mr. Justice Brewer, shortly before his death, in a public address in New York City, also took the same view of the matter. "The courts, their delays, and the cost of litigation," he said, "are justly criticized. No judge ought to object to criticism, and no honest judge will object."

We readily recognize that there are limits beyond which no man with a due sense of propriety will go in criticizing judicial action, and it is a matter of history in which every American should feel a sense of pride, that our judges, for the most part, have not been subjected to intemperate and unfounded criticism. There has been a commendable disposition to regard the judiciary in the light of what Edmund Burke once said it should be, as "something exterior to the state." But no judge has a right to absolute immunity from fair-minded and reasonable criticism. The judge who spends his life in construing rules of law and deciding fine points of procedure naturally tends to acquire habits of thought which lead him to attach greater importance to procedural perfection and technical accuracy than is sometimes consistent with the solid claims of justice. From such a "thraldom" judges may sometimes be rescued by the help of constructive criticism by intelligent laymen who are able to view the questions at issue with minds less narrowed.

Such hair-splitting refinements as those sometimes indulged in by our judges in reaching their decisions tend to make the administration of justice ridiculous and excite the contempt rather than the

respect of intelligent laymen and candid lawyers. If such opinions were promptly criticized by disinterested persons, writes Mr. E. J. McDermott, a prominent member of the Louisville bar, in a recent number of *The Docket*, they would be rendered with less frequency. Hon. Bourke Cockran, in an address before the Ohio State Bar Association, July 8, 1908, dwelt upon the increasing lack of popular esteem in which many of our courts are beginning to be held because of such decisions as those cited above. He said:

"The courts which since the establishment of our government have been objects of universal respect and admiration have become within the last few weeks objects of discussion and even criticism. These criticisms are no longer confined to the reckless, the obscure, the degraded, or the rejected of the people. They have been voiced by many men in high positions, including among their number an official no less exalted than the President of the United States."

"Assuming, as I do," continued Mr. Cockran, "that no one desires or could contemplate with patience a proposal to abolish or abandon our government as it exists, it follows that the most pressing necessity of our security is restoration of the courts to the respect and confidence they enjoyed during the last century. How is this to be accomplished? Manifestly, the way by which universal respect amounting to reverence was originally acquired, is the surest if not the only way by which it can be regained. * * *"

J. W. G.

Reform in the Methods of Selecting Juries.

The long delay involved in the selection of the jury in the second trial of Lee O'Neil Brown in Chicago recently,—some three weeks were consumed, in the course of which 800 veniremen were summoned by the court,—serves to call public attention again to the crying need for more expeditious methods of selecting juries in important cases. We have on another occasion referred to the Gilhooley and Shea cases, in the former of which nine-and-a-half weeks were required to complete the panel, and in the latter, thirteen-and-a-half weeks. In the Gilhooley case 4,150 veniremen were summoned, nearly 4,000,000 words being used in conducting the examination of them. The cost in fees to veniremen and jurors amounted to more than $4,000, and their hotel expenses aggregated $2,000 more. In the first trial of Shea 9,425 veniremen were summoned, of whom 4,821 were actually examined, the cost in jury fees alone amounting to more than $13,000. In San Francisco recently 91 days were con-

sumed in the selection of a jury to try Patrick Calhoun on the charge of bribery, and in the Cooper case in Tennessee several weeks were similarly consumed.

Of course these are exceptional cases but the fact that such delays are possible under the present system and that they are occurring with increasing frequency is evidence that something is wrong with existing methods and that thorough-going reform is greatly needed. Aside from the waste of time and expense, such delays tend to increase the aversion to jury duty on the part of professional and business men, thus rendering the task of selection more difficult. It is not to be wondered at that a man who is confronted with the prospect of being kept away from his home and business in a virtual state of imprisonment for weeks, and possibly months, before the trial is really started should, when asked if he knows any reason why he cannot render an impartial verdict, resolve the doubt in favor of his own comfort and liberty by professing a prejudice which really does not exist in his mind.

The chief cause of such delays is the American practice which assumes that one who may have hastily formed an opinion concerning the guilt or innocence of the accused from hearsay evidence or from newspaper report is incapable of rendering an impartial verdict on the basis of the evidence brought out in the course of the trial. Such a requirement practically disqualifies men of intelligence who read the newspapers and who almost unconsciously form opinions upon the merits of the case, especially when it is one which attracts widespread attention in the community. It is, moreover, inconsistent with one of the fundamental principles underlying the jury system, namely, the ability of jurors to decide controverted facts on the basis of the evidence presented in court. It is submitted that any juror who is capable of doing this intelligently is capable of altering a preconceived opinion when the evidence produced in court points to a different conclusion from that which he may have reached on the basis of hearsay evidence or newspaper report. The fact, therefore, that a juror has formed an opinion from reading newspaper accounts of the crime should not *prima facie* be a cause for challenge.

In our judgment it ought to be sufficient to ask a venireman two questions only in order to determine his fitness for jury service: first, whether he is in any way related to the accused or his victim; and second, whether he knows of any reason why he cannot render a verdict in accordance with the evidence presented to the court. The irrelevant, long-drawn-out interrogatories often resorted to by coun-

sel are unnecessary and ought not to be permitted. In the Gilhooley case referred to above, one juror was interrogated for an hour-and-three-quarters in regard to his past life, his domestic, business and social relationships and many other matters which were immaterial. Another juror was asked seventy-three questions by counsel for defense and almost as many by the prosecuting attorney. In the Iroquois theater fire case, jurors were asked whether they were opposed to dancing, whether they were fond of music, whether they believed in theater-going, whether they had any prejudices against city people, whether any of their families were ever hurt in a fire, what newspapers they were accustomed to read, and many other questions of a similar character.

According to the English practice, the requirement of due process of law in the selection of jurors is fully satisfied by the two inquiries mentioned above and the protracted rambling interrogatories which have come to be a regular feature of nearly every important trial in this country are not permitted. To an Englishman it seems superfluous and a waste of time to ask a juror anything more than whether he is related to either of the parties, and if not, whether he can return a verdict in accordance with the law and the evidence. The result is that rarely more than an hour is ever consumed by an English court in completing a panel in the most difficult case. R. Newton Crane, formerly a member of the American bar, but for some years past a prominent barrister of London, in a letter to Hon. Joseph H. Choate, dated March 1, 1903, speaking of the English procedure of empanelling juries, said: "The examination of jurors on their *voir dire* is absolutely unknown in England, while many lawyers who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve jurymen will hear three cases without leaving the box." (See report of the New York Commission on the Law's Delay, p. 111.) The truth of this statement has recently been confirmed by Dean Lawson of Missouri, who spent four months in England during the past summer studying English procedure. In an address before the American Institute of Criminal Law and Criminology at its recent meeting in Washington, Mr. Lawson declared that it requires no longer to select a jury in England than is necessary to call their names, and that the challenge of a juror is as rare as the challenge of a judge in the United States. He says he never saw a juror challenged during the four months he spent in the English courts, and he was

informed by one of the judges that only one instance of a challenge had come under his observation during a period of fourteen years. Mr. Lawson says the same jury will frequently hear three cases before leaving the box, one such case having come under his observation while attending a court in Manchester.

It is not allowable to ask a prospective juror whether he has formed an opinion or has expressed one, for it is not assumed that one who has expressed an opinion on the facts as heard from others, or read in the newspapers, is thereby biased. The burden of proof to show the existence of prejudice is on him who challenges a juror, and evidence of bias must be produced to support a challenge.

Neither counsel for the Crown nor the defense is permitted, says Mr. Lawson, to go on a fishing expedition in the course of the examination in the hope of finding some possible ground for a challenge.

"Think of taking a month or six weeks to select a jury," says Justice Henry B. Brown (retired) of the United States Supreme Court, "and requiring each prospective juror to give a history of his life and his opinion upon every conceivable subject for the apparent purpose of laying the ground, not for a challenge for cause, but for a peremptory challenge. When I was a Judge in the court of original jurisdiction," says Justice Brown, "in all the fifteen years time I do not think I spent more than two or three hours in impanelling a jury."

Hon. Frank B. Kellog, special assistant to the Attorney General of the United States, in discussing the "delays of the law" has this to say of our methods of choosing juries:

"The trouble is that in the selection of juries we have come to impose such technical rules as to opinions obtained from hearsay or from press reports that it is almost impossible in the trial of a case of great public interest to obtain a high-minded and intelligent jury. I do not minimize the importance of obtaining an impartial jury, It is, of course, necessary in all trials; but the energies of legislators, lawyers, and judges have for so many years been exercised in throwing safeguards around their selection that these safeguards have become obstacles in the accomplishment of the real purpose.

"I believe that the court should restrict the prolonged and technical examination of jurors, interposing its authority to see that only a reasonable examination takes place, and that the court itself should very largely conduct the examination. I do not say that in all cases the lawyers should be prohibited from examining jurors.

They should be permitted to examine when that may tend to elicit information which would show the disqualification of a juror. But the license which has been exercised by the bar should be prevented and the right largely restricted. In many cases the judge himself is best qualified to perform the duty, though, to be sure, he can be largely aided by counsel by reason of their knowledge of the case."

In our judgment the selection of juries could be materially expedited without impairing the value of the jury system by abolishing the rule which practically disqualifies a juror who has formed or casually expressed an opinion on the question at issue, unless the opinion is founded on manifest prejudice or is so strongly fixed that there is no reason to believe that it could be changed by the evidence; by confining the examination to simple inquiries as to whether the juror is related to either of the parties and whether he knows of any reason why he cannot return a verdict in accordance with the evidence introduced and admitted; by making the decision of the trial judge final upon objections asked of prospective jurors by either the counsel for the defense or the prosecuting attorney; by materially reducing the number of peremptory challenges now usually allowed; by providing more adequate and homelike accommodations for the physical comfort of jurors, thereby lessening the tendency to shirk jury duty by men who are accustomed to the comforts of home life; and by removing some of the petty and unreasonable restrictions on their liberty, particularly those which are inconsistent with the idea that jury service is a dignified and honorable public duty. The selection of a better class of men would also be facilitated by the abolition of the wholesale exemptions now allowed to many professional classes, the result of which is to eliminate a large proportion of the best qualified citizens and to restrict jury duty, to a large extent, to less fit classes. J. W. G.