Journal of Criminal Law and Criminology

Volume 2 | Issue 2 Article 2

1911

# Editorial Comment

## EDITORIAL COMMENT.

### THE NEW YORK CONFERENCE ON REFORM OF THE CRIMINAL LAW AND PROCEDURE.

Among the several agencies proposed by the American Institute of Criminal Law and Criminology, with a view to awakening interest and securing coöperation in the movement for the betterment of our criminal law and procedure, is the holding of conferences in the several states for serious discussion of the important problems which relate to the administration of the criminal law and for the interchange of views among jurists, practitioners, criminologists and others concerned directly or indirectly with the crime problem in its various aspects. In Wisconsin two notable conferences of this kind have already been held and a permanent state branch of the American Institute has been organized to carry on the work so auspiciously begun. In New York, where the need for law reform has been generally recognized and where earnest efforts have already been made to improve the existing machinery, a similar conference was held during the past month, at which a number of distinguished jurists, including the President of the United States, leading members of the local bar, police officials, law teachers, criminologists and other persons interested or indirectly concerned with the administration of the criminal law delivered addresses in which the existing defects were dwelt upon and the remedies for their improvement suggested. At the close of the conference, which lasted two days, a state branch of the American Institute was organized for the permanent and systematic carrying forward of the work begun.

In addition to the banquet at the Hotel Astor, three sessions were held, at which the following general topics were discussed by distinguished persons in their respective fields: (1) the organization, procedure and problems of the courts of inferior jurisdiction; (2) reform of the criminal law and procedure, and (3) responsibility for crime.

Naturally, the address which was delivered by the President of the United States attracted the most attention. Following the lines of his previous addresses on the subject, the President compared the efficiency of English judicial methods with our own, and declared that the superior efficiency of the English system was largely due to the character, experience and learning of the English judges, their large power in the conduct of criminal trials, the respectful attitude of counsel toward the judges and the simplicity of English procedure. The responsibility for

one of the chief sources of evil, he said, was the presence of lawyers in our legislatures, who have insisted upon limiting the power of the judges by statute and thereby taking away from them respect for their rulings, so apparent in every English court of justice.

"In many states, judges," said the President, "are not permitted to comment upon the facts at all. They are not even allowed to charge the jury after the arguments of counsel, but they are required to submit written charges to the jury upon abstruse questions of law, with no opportunity to apply the principles concretely to the facts of the case, and with the result that the questions, both of law and fact, are largely left to the untutored and undisciplined action of the jury, influenced only by the contending arguments of counsel.

"The restraint that a judge in the course of a trial imposes upon the manner and conduct of counsel in an English court is thus wholly wanting, with the result that there seems to have been a substantial change in the code of professional ethics governing counsel, and in the extremes to which counsel in the defense of their clients seem to think it is entirely proper for them to go. Their conduct makes neither for the dignity of the court, for the elevation of the ethics of the bar, for the expediting of criminal procedure, nor for the reasonable punishment of crime."

The amount of unpunished crime in this country, as compared with that in England, was, he declared, humiliating to every true son of America, and was a standing reproach to our civilization. "Why is it, then," he said, "that, speaking generally, every person who commits a crime in England is tried and rarely escapes punishment, while in this country it is not too much to say that a majority escape the law?" The answer, he said, lies in the greater efficiency of the English judiciary and in the lighter regard for the law and its enforcement on the part of the American people as a whole, and a less vigorous public opinion in favor of the punishment of crime, the effect of which is to weaken the obligation of prosecuting officials and juries.

At the first session of the conference Hon. Alfred R. Page, a justice of the Supreme Court, discussed the importance of magistrates' courts in the great cities, and pointed out the improvements that have been made in those of New York since their reorganization under the law of 1909 which bears his name. At the same session Chief Magistrate McAdoo discussed the relation of the police to the crime wave and Prof. John Bassett Moore, America's greatest authority on the law of extradition, dwelt upon the difficulties in the way of punishing criminals who escape from one jurisdiction to another. Prof. Moore suggested that, since the governor of a state cannot be compelled to discharge his constitutional duty of delivering up criminals from other states, a comprehensive federal statute should be passed relieving the executive of this duty and imposing it upon some judicial officer, so as to do away with the present combination of executive and judicial action, a combination which,

although it affords large opportunities for escape to fugitives who have money to spend, does not tend to promote the ends of justice or respect for law.

At the second session an address was delivered by Mr. William M. Ivins, who pointed out the lack of adequate definitions of crime, and dwelt upon the extraordinary variety of criminal statutes.

"We spread on our statute books," said Mr. Ivins, "from forty to fifty thousand statutes, a large proportion of which are criminal laws. A man is a criminal in one state and not a criminal in another in respect to an unfortunate number of matters. It will ultimately be found that if our present constitutional system finally breaks down, its most disastrous break will be due to the fact that, through legislation, that which is criminal in one part of the country is not criminal in another; that that which is criminal on the right bank of a river is not criminal on its left bank; that that which is punishable somewhere is punishable nowhere else, and that which ought to be punishable everywhere may, after all, be punishable nowhere."

At the same session addresses were delivered by Prof. Giddings, on the "relation of the criminal to society;" by Assistant District Attorney Nott, on the "effect of the double-jeopardy principle in criminal trials; by Prof. Edwin R. Keedy of Chicago, on English and American criminal procedure compared, and by Dr. Roland P. Faulkner, assistant director of the census, on "criminal statistics in the United states."

At the third session the principal address was delivered by Howard S. Gans, Esq., of the New York bar, on the "consequences of unenforceable legislation." Mr. Gans asserted that millions of dollars in the form of blackmail were being paid annually to the police and politicians of New York City for the privilege of violating laws that should never have been enacted and which were practically unenforceable. The effect on the police, he said, was most demoralizing, since it established a partnership between them and the keepers of disorderly resorts, and, besides, it tended to undermine the public conscience. He advocated a system of toleration and regulation of the social evil, such as was recommended by the committee of fifteen some years ago.

At the same session Dr. Carlos MacDonald discussed the subject of medical expert testimony in criminal trials, in the course of which he advocated the restriction of the function of the jury to the determination simply of the facts in insanity cases, leaving to experts appointed by the courts the determination of the question of the sanity or insanity of the accused. Had such a system been followed in the trial of the Thaw case, the fact of the guilt of Thaw could have been determined in

a few hours and the question of his sanity could have been settled in two or three days, thus sparing the public the disgusting details which were strung out through a period of many weeks.

At the banquet an address was delivered by Mr. N. W. MacChesney of Chicago, President of the American Institute of Criminal Law and Criminology, in which he suggested the following changes in our criminal procedure:

The right of the prosecution to comment upon the defendant's refusal to testify should be secured. The right to use private confessions obtained by officers of the law (commonly called the "third degree") should be abolished.

The same right of change of venue should be given to the state as to the accused, and removal under proper restrictions from one county to another allowed.

The provisions requiring a unanimous verdict should be done away with, and in all except capital cases a three-quarters verdict should be allowed.

The amendment of indictments should be allowed at any time if the entire character of the crime is not changed and the accused is given the right, if necessary, to prepare any additional defense made necessary by such change.

The power of the trial judge should be rehabilitated so that he can exercise his common law powers with the right to summarize and comment upon the evidence as in the federal courts, and cease to be what President Taft has compared to a mere moderator in a religious assembly.

The same number of challenges should be allowed to the state as to the accused, and they should be placed, so far as possible, upon the same footing, without undue hardship to the accused.

Public defenders should be provided if an appeal is to be allowed the state, so that in such cases the burden to the accused may be minimized, where he, without means, has to face the power, prestige and resources of the state.

Where accused takes the stand in his own behalf, he should be subject to cross-examination and should be taken to have waived his constitutional privilege against self-incrimination. The principle of jeopardy should not apply in case of mistrial or retrial.

An indictment should be sufficient if it specifies the crime, its time and location, with sufficient particularity to prevent second prosecution.

Press comment should be stringently limited to actual report of the proceedings, without comment, editorially or otherwise, and without comment from the state's or district attorney.

Jurors should not be disqualified because of the reading of accounts or hearings of rumors regarding alleged crime, but only when they cannot give a fair verdict because of fixed opinion.

Expert testimony should be rigidly regulated, and if the experts are not furnished by the state their qualifications should be passed upon by it, their fees limited, and contingent fees absolutely prohibited.

Jury service should be compelled on the part of practically every citizen, and to that end the law should be amended so that the time of such service may be fixed so that it will give the least inconvenience possible.

A transcript of the evidence of a witness at a former trial, whom it is impossible to produce, should be competent evidence in a second trial.

## SECOND ANNUAL MEETING OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.

The second annual meeting of the American Institute of Criminal Law and Criminology will be held at Boston, August 31-September 2, in connection with the annual meeting of the American Bar Association, which takes place during the same week. There will be three sessions of the Institute, at the first of which a special address will be delivered by a distinguished member of the bar, whose name will be announced later. At the same session the annual address of the President, Mr. N. W. MacChesney of Chicago, will be delivered, and the report of the committee on "organization of the courts," of which Prof. Roscoe Pound is chairman, will be presented and discussed.

At the second session the committees on "criminal procedure" (Dean John D. Lawson, chairman), on "insanity and criminal responsibility" (Prof. Edwin R. Keedy, chairman), on "indeterminate sentence and parole" (Albert H. Hall, Minneapolis, chairman), and on "probation and suspended sentence" (Judge Wilfred Bolster, chairman) will present their reports, which will be discussed and acted upon.

At the third session the reports of the committees on "system of recording data concerning criminals" (Judge Harry Olson of Chicago, chairman), on "crime and immigration" (Gino C. Speranza, New York, chairman), on "coöperation with other organizations" (Charles R. Henderson, chairman), on "translation of foreign treatises" (Prof. J. H. Wigmore, chairman), on the "organization of state branches" (Prof. E. A. Gilmore, chairman), and on "criminal statistics" (Mr. John W. Koren, chairman) will be presented and considered. At the same session reports will be made by the secretary of the Institute and the editorial director of the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, after which the election of officers will follow. A more detailed program will be published in the next number of the JOURNAL.

During the past year the reports of the committees, all of which have been published in the JOURNAL, have attracted wide attention, and in several states they have furnished the basis for important constructive legislation. Many of the suggestions made in these reports have been recommended by various speakers to the consideration of bar associations, and in several states they are now being considered by committees of such bodies.

The Institute was founded to advance the study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and for coördinating the efforts of individuals and organizations interested in the efficient administration of

criminal justice. American progress along these lines has heretofore been lamentably slow and backward, and the opportunities of such an organization as the Institute for stimulating wider interest in criminal science and for promoting constructive reforms are admittedly great. The subjects to be considered at the Boston meeting are of deep and fundamental importance to all persons concerned in any way with the administration of the criminal law, and there should be present a large number of members. J. W. G.

## PROFESSOR FRANZ VON LISZT.

On the 2d of March, 1911, Dr. Franz von Liszt celebrated his sixtieth birthday. Born in Austria, he studied at the universities of Vienna, Göttingen and Heidelberg, was *Privat-Dozent* in Graz for four years, after which he moved to Germany, where he was professor of penal law, first at the university in Giessen, then in Marburg and Halle, until he was finally called to Berlin.

It is, of course, impossible to review the whole of Prof. von Liszt's life work to-day, for he still stands in the heat of the battle for new ideas of penal law and his strength is still unbroken. But even at the present time we can say with assurance that he is the greatest modern jurist of Germany, one through whom thousands and thousands of men from all countries have been converted to a modern view of penal law and its administration, and thus have become bearers of culture into all parts of the world.

As long ago as in 1878 his *"Lehrbuch des österreichischen Pressrechts"* aroused merited interest, which was strengthened by his presentation two years later of the *"deutschen Reichspressrechts."* Even at that time his *"elan"* showed itself, his knowledge saturated with modern ideas that, in the year 1884, was most clearly put forth in the *"Lehrbuch des Deutschen Strafrechts,"* which since then has appeared in eighteen improved and supplemented editions and has been translated into six languages. To-day this book is considered not only the best introduction into German penal law, but also the best exposition of the differences between the "classic school" and the "young German" school of criminology, which has energetically thrown the "classic" idea of retribution overboard and which conceives of crime as a psychological and social necessity within culture and history. This work, in fact, already contains all the answers to the recent despairing query of the most important representative of the classic school, Prof. Birkmeyer, in Munich: "What does von Liszt leave remaining of the present penal law?" It points towards a future, not too far distant, we hope, in which the con-

ception of punishment as opposed to the claim for protection alone which society urges against the criminal, will come to be a false designation, and, instead of punishment, people will say, protective measure; instead of penal law, protective law; instead of criminal procedure, protective procedure, etc.

In 1881 von Liszt, with Profs. von Lilienthal, von Hippel, Kohlrausch and Delaquis, founded the *"Zeitschrift für die gesammte Strafrechtswissenschaft,"* in which from the beginning he has devoted the most careful attention to the literature of other countries. This periodical helped him to prepare the way for the foundation in 1888 of the celebrated *"Internationalen Kriminalistichen Vereinigung"* (see the article by Dr. van Hamel in the last number of the JOURNAL), which, with the coöperation of the Belgian, Prins, and the Dutchman, van Hamel, has grown to be one of the most admirable evidences of the international unity of culture. Unfortunately, we younger men are almost tempted to say, its original "ten commandments," for diplomatic reasons, so that men of opposite views might also join it, had to be compressed into the two sentences which might also be called the creed of its "younger sister," the "American Institute of Criminal Law and Criminology." "The International Union of Criminal Law holds that criminality and the means of combating it must be considered from the anthropological side as well as from the judicial. Its aim is to pursue a scientific study of criminality, its causes and the means of attacking it."

The *"Internationale Kriminalistische Vereinigung"* also made possible Prof. von Liszt's greatest work, *"Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung,"* the first volume of which deals with European penal law, the second with penal law in all the other civilized countries except Persia and Siam.[1] With this work von Liszt has, once for all, lifted the science of criminal law out of its national limits and thus laid the foundation for a penal code that shall be international in its main points. The value of such an act cannot be placed too high. Till now von Liszt and those who have worked with him have collected the material for us, so that we are easily and comfortably able to see how the penal law looks over the whole civilized world. In that of every country we shall find some special points to admire. "If fate should still permit Prof. von Liszt," says Gross, "to offer us a scientific comparison of the principles of penal law all over the world we shall then need only a firm will to make the ideal of a unified 'world penal law' with common principles, a common literature and common administration of justice at least conceivable." It is regrettable that von

[1]This monumental work will be reviewed in an early number of this Journal.

Liszt has always to complain that the state and the learned bodies fail to support such undertakings as they do so liberally work in the provinces of history, philosophy and natural science. Prof. Gross rightly adds: "When we see the vast sums that are spent in other branches for scientific institutes, expeditions, museums and illustrations, we cannot understand why almost every aid should be denied to jurisprudence—certainly the most important subject for the maintenance and preservation of the state." That this lament is equally true in America as in Europe need scarcely be stated here.

While this work showns von Liszt to be a great scholar and compiler, in the recently published criticism of the official *"Vorentwurf zu einem Strafgesetz des deutschen Reichs"* (*"Die Reform des Reichsstrafsgesetzbuchs"*) and in the *"Gegenentwurf"* he stands at the head of those eminently practical German advocates of a modern criminal policy to whose efforts it will mainly be owing if the German people receive a penal code that corresponds to modern views within a calculable time. Under his leadership these men are fighting a battle that requires all the intellectual forces of the individual. That, in spite of his sixty years, he is one of the most untiring of them gives us the right to hope that he will still present not only Germany, but the whole civilized world with other works on which we can congratulate him, one of our foremost and fellow fighters in Germany, and all the nations of culture.

A. A.

## REVERSAL OF SENTENCE WITHOUT NEW TRIAL.

There has been considerable comment on the case of *People v. Nesce,* recently decided by the New York court of appeals. The opinion in this case by Haight, J., holds that the right of a defendant to speak for himself after conviction in a capital case is one of substance, and it is reversible error for the trial court to omit, before pronouncing judgment, to ask the defendant if he has anything to say why sentence should not be pronounced against him. The trial, however, terminates with the verdict and the error may be corrected without granting a new trial by remitting the case to the trial court to proceed upon the verdict in accordance with the requirements of the law. The New York *Law Journal,* in commenting on the case, says that it represents a substantial change of attitude as to error in capital cases since the decision of the same court in *Messner v. The People,* 45 N. Y. 1, and that "the court of appeals has felt the pressure of professional and popular opinion against treating a criminal defendant as an extraordinarily privileged character

for whose escape any species of legal error or irregularity, no matter how artificial and insubstantial, must be utilized."

In the Messner case the opinion of the court, after citing authorities, said: "These and other authorities that might be cited conclusively show that it is indispensable that the record should show in capital cases that the prisoner was required to show cause, if any, why judgment should not be awarded against him, and that it is the duty of the court to hear and determine the sufficiency of such cause as much as to pass upon any other question during the trial. Indeed, this may be regarded as a part of the trial, as it is an essential prerequisite to an adjudication of the guilt of the prisoner." And a new trial was granted. In that case, however, Judge Allen was in favor of reversing the judgment and remitting the proceeding to the court of oyer and terminer to give judgment on the conviction, and he found statutory authority for such procedure in a statute providing "that the appellate court shall have power, upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the said appellate court shall direct." The majority of the court, however, declined to adopt this view.

There would seem to be no reasonable ground for granting a new trial simply because of error in passing sentence. No error being alleged in the trial, on what ground can the verdict be set aside? The error being in the sentence, clearly the logical and reasonable thing to do is to correct the sentence, and that is as simple as it is logical. In Pennsylvania it was held by the Supreme Court in 1867 that, upon the reversal of a judgment for error in the sentence only, the appellate court itself would resentence the prisoner, and this seems to have been the practice very early, as the court in that case (*White v. Comw.*, 3 Brewster, 30) finds authority for it in a statute of 1836, which was, it says, nearly a transcript of the old act of 1722 defining the powers of the Supreme Court. In 1899 the Superior Court of Pennsylvania, in reversing a judgment for error in the sentence, said: "This error, however, does not require anything further than a reversal of the sentence, which will have no effect on the trial and conviction. The case will be sent back for another sentence."

This would clearly appear to be the better and only sensible rule, and the Nesce case shows a commendable disregard of an unreasonable precedent and the establishment of a rule clearly demanded by logic and common sense. E. L.

## THE CASES OF WALSH AND MORSE.

President Taft has many times called attention to the fact that our cumbersome and technical ridden system of criminal procedure, with its wide latitude of appeal and the numerous opportunities which it affords for obtaining new trials on account of procedural errors, gives the wealthy defendant, who is able to command the services of able counsel, a substantial advantage over the poor man, who, by reason of the expense involved in taking appeals, is in practice unable to avail himself of those opportunities. It is notorious that in some jurisdictions convictions justly obtained after long trials and infinite effort, to say nothing of the expense to the state or the injury to innocent victims, are set aside by courts of appeal for trivial errors which are supported by neither reason, common sense nor justice. When convictions have been secured and sustained by the courts of final authority, after years of delay, all the overwrought, maudlin sentimentality of an indulgent community and all the influence which the friends of a rich criminal of high social standing are able to exert are brought to bear upon the executive to induce him to nullify the findings of courts and juries who have heard the evidence and who, after giving the accused the benefit of every reasonable doubt, have adjudged him guilty. In previous issues of this JOURNAL we have called attention to some of the more flagrant instances in which the convictions of powerful and influential criminals have thus been set at naught by timid, sentimental or politically friendly executives. The cases of John R. Walsh and Charles W. Morse, recently convicted of misapplying the funds of national banks, and who were sentenced to the penitentiary for a term of years, afford refreshing examples, however, of the possibility of punishing financial pirates in spite of their high social position, their ability to command the services of the most astute and resourceful lawyers of the community and the powerful influence which they are able to bring to bear upon the executive in favor of executive clemency. In both cases all the arts of legal defense known to our criminal procedure were employed, and every resource of the law was exploited to its utmost by ingenious and skilled lawyers, but in spite of it all justice emerged triumphant. It was proven that over the bank of which Walsh was president, besides two others in which he was the chief stockholder, his power of control was absolute, and that he used recklessly and in violation of the law their funds for the development of railroads, stone quarries, coal mines and other enterprises in which he was interested. After serving a portion of their terms of imprisonment, both applied for a pardon. The grounds upon which Walsh based his application, as stated by the President of the United States,

were: first, because his violations of the laws were technical and did not involve moral turpitude and secured him no financial benefit; second, because all the depositors of his banks were paid through the sacrifice of his private fortune; third, because he was, in doing what he did, attempting to upbuild industries of substantial benefit to the country; fourth, because he is an old man, in ill-health, not likely to live long, and one who has borne a good reputation and lived a life of simplicity and not of self-indulgence. After a careful examination of the record, and after listening patiently to the appeals of influential friends, the President denied the pardon. The statement of reasons given by him for refusing to interfere contains, in our opinion, a just characterization of the infamy of a class of crimes which have too often been committed by financial speculators in whom innocent men and women have placed their trust and confidence and of which the perpetrators have too often gone unwhipped of justice.

"In the first place," said the President, "the record shows moral turpitude of that insidious and dangerous kind to punish which the national banking laws were especially enacted. Those laws were intended to secure on the part of national banking officers the faithful and honest administration of their trust in the use and handling of the funds of the bank, including its capital, surplus and deposits, for the benefit of sharehouleds and depositors. A bank officer who uses such funds to promote enterprises in which he has a private interest and without the knowledge and consent of the shareholders for whom he is a trustee involves the whole capital of the bank in unauthorized speculation from which he is to derive profit if successful, is guilty of a fraudulent breach of trust, is guilty of moral turpitude, and must be punished under the national banking act. No reference to usual business methods, no suggestion of great business enterprises, no excuse of building up useful industries and no subsequent attempt to make good the losses which his acts have brought upon innocent persons who trusted him can gloss over the fact that such a man is taking other people's money for his own uses.

"Walsh had acquired great power in the control of three large banks. His guilt is in proportion to the trust and confidence extended to him. Of course, he did not intend to steal the money of his depositors or stockholders, but he is not less guilty on this account. He abused their trust and confidence and imperiled the money of those who trusted him in enterprises of most speculative character, and he thus lost their money. If the speculation had been successful, as he hoped, they would not have lost, it may be, and he would have allowed them the usual interest or dividend. The real and great profit would have been his.

"Many influential and prominent persons have petitioned for his pardon. They do not fully appreciate, it seems to me, the high importance to society that such criminal breaches of trust as this be severely punished. Such breaches sometimes escape punishment because the misuse of the funds results successfully. In such cases the dishonest or reckless bank officer takes the profit and the bank is made whole and no one is the wiser. Then the officer comes to

regard himself as a shrewd manipulator within legitimate business lines. The truth is that in the mad rush for wealth in the last few decades the lines between profit from legitimate business and improper gain from undue use of trust control over other people's property and money have sometimes been dimmed, and the interest of society requires that, whenever opportunity offers, those charged with the enforcement of the law should emphasize the distinction between honest business and dishonest breaches of trust. . . .

"There are circumstances which have been emphasized by those who have represented Walsh in the application for pardon that appeal to one's sympathy, if the case is judged with reference to Walsh alone. But it must be judged with reference to the right of society to have the law vindicated and crime punished, no matter how influential the convicted person or how many friends his present pitiable condition may lead to speak in his behalf. The opportunity to commit such crimes is only afforded to men who have enjoyed high position in society and have secured the trust and friendship of many. Every case of this kind, therefore, must present some such consideration as those referred to, and if the Executive, on an appeal for clemency, should yield to them it would defeat the object of the law and present a demoralizing difference between the punishment meted out to the ordinary criminal whose circumstances have naturally led him into crime and one whose position in society should have made for him the strongest restraint against violation of the law."

"It is a happy day for the United States," observes the Boston *Transcript,* "when men of rank and class can be brought to book and the gibe and jeer that the man higher up cannot be punished in our law courts is proved untrue."

The firmness displayed by the President in the face of the powerful influence brought to bear upon him shows that he possesses a high sense of his constitutional duty and a proper understanding of the objects and purposes of executive clemency. The example set by the President in these cases should have a salutary influence, and we doubt not that it will serve to clear up and strengthen some of our conceptions in regard to the obligations of society to protect the innocent against such breaches of confidence. J. W. G.

## SIMPLICITY IN INDICTMENTS.

In connection with the discussion as to the simplification of indictments the experience of Pennsylvania may be of interest. The general form of indictment for murder in use is as follows:

The Grand Inquest of the Commonwealth of Pennsylvania now inquiring in and for the body of the county of ....., upon their oaths and affirmations respectively do present that ..... ....., yeoman, late of said county, on the ..... day of ....., in the year of our Lord ....., in the County aforesaid and within the jurisdiction of this Court, did then and there feloniously, wilfully and of his malice aforethought kill and murder ..... ....., contrary to the form of the Act of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

This simplified form of the common law indictment resulted from an act passed by the legislature in 1860, which provided that:

"In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which the death of the deceased was caused, but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased."

Other provisions in regard to the simplifying of indictments and formal defects therein were embodied in the same act, the most important of which are as follows:

"If on the trial of any indictment for felony or misdemeanor, there shall appear to be any variance between the statement of such indictment and the evidence offered in proof thereof, in the name of any place mentioned or described in any such indictment, or in the name or description of any person or persons or body politic or corporation therein stated, or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein; or the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offense; or in the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever, therein named or described, or in the ownership of any property named or described therein; it shall and may be lawful for the court before whom the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense upon such merits, to order such indictment to be amended, according to the proof, by some officer of the court, both in that part of the indictment wherein said variance occurs, and in every other part of the indictment in which it may become necessary to amend; and after such amendment the trial shall proceed in the same manner in all respects, and with the same consequences, as if no variance had occurred. And every verdict and judgment which shall be given after making such amendment, shall be of the same force and effect, in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made.

"Every indictment shall be deemed and adjudged sufficient and good in law, which charges the crime substantially in the language of the Act of the Assembly prohibiting the crime and prescribing the punishment, if any such there be, or if at common law, so plainly that the nature of the offense charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer or on motion to quash such indictment, before the jury shall be sworn, and not afterward; and every court before whom any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared."

It will be noted that these provisions are very similar to those of the English statute of 14 & 15 Victoria, ch. 100, passed in 1857, and were

doubtless modeled after them. Since 1860, therefore, Pennsylvania courts have been practically free from "a class of technical niceties which are a reproach to the rational administration of justice," to quote the language of the framers of the act. These provisions, of course, had to be construed by the courts, but that few questions now arise under them is indicated by the fact that in the fifty-three appeals to the Supreme Court in capital cases from 1905 to 1910, in only one was any question raised as to the indictment. Should the indictment not furnish the defendant sufficient information to prepare his defense, the court will, in a proper case, order a bill of particulars to be furnished him by the district attorney; but this is in the discretion of the court and its action will not be reviewed on appeal. The wisdom and beneficial effect of these provisions has been apparent in criminal trials in Pennsylvania, no less than in England. E. L.

## EVIDENCES OF PROGRESS IN LAW REFORM.

Editor John D. Lawson, of the *American Law Review,* a tireless advocate of law reform, has recently found evidence in the decisions of a number of courts that the cry for a more speedy and certain justice is being heard by the judges in various parts of the country. The demand that technicality shall not obscure the real issue is, he says, finding already a response by more than one appellate judge, and in more than one appellate court, and public opinion is beginning to make itself felt and is inducing some of the courts to sweep aside form when it stands in the way of justice.

The first case which he cites as evidence of his proposition is that of *Holt v. the United States* (31 S. C. Rep., reviewed in the January number of this JOURNAL, pp. 779-780), where the accused, who had been convicted of shooting a man in the barracks of a United States fort in the state of Washington, sought to have the conviction set aside by the United States Supreme Court on various grounds of a technical character, such as flaws in the phraseology of the indictment, the erroneous admission of evidence, the refusal of the trial judge to exclude from the jury a man who had read a newspaper account of the crime, but who stated that he had no other opinion than that derived from this source and that he believed he could try the case fairly and impartially; certain remarks made by the prosecuting attorney in his prosecuting address; permission granted to the jury to separate during the trial, and the conduct of the trial judge in requiring the accused to put on a certain blouse, thus compelling him to be a witness against himself. But these and other "meticulous" objections did not impress the Supreme Court

as being reversible errors, and the judgment of conviction was affirmed, Mr. Justice Holmes delivering an opinion which disposed of the technicality dodge in a very refreshing and effective manner.

The second case cited by Mr. Lawson is that of *Post v. Brooklyn R. Co.* (87 N. E. 771), where the court of appeals of New York, in referring to certain alleged erroneous rulings by the trial judge, said: "Under our system of appeals, every error does not require a new trial, for the vast judicial work of the state could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice, it should be disregarded, for undue delay is a denial of justice. We think that the evidence received, subject to objection and exception, could have no effect on the final result, for it did not change the material aspect of the case or the standing of any witness, or the attitude of either party, in any respect, nor make the theory of any party any more probable than it was before."

In the third case cited, *Parb v. State* (128 N. W. 65), the Supreme Court of Wisconsin was asked to set aside a conviction for burning insured property because certain members of the jury visited the premises where the fire occurred and made a personal examination of the building which had been damaged by fire. The Supreme Court admitted that the jurors were guilty of misconduct in thus personally inspecting the premises, but it did not regard that as sufficient ground for reversal unless it should appear that the substantial rights of the accused were effected thereby, which did not appear to be the case. The conviction of the accused was, therefore, affirmed, as the statute of 1909, prohibiting reversals in such cases, required.

The fourth case relied upon as evidence by Editor Lawson of the changing attitude of the courts toward harmless error was that of *Press Publishing Company v. Monteith* (180 Fed. Rep. 356), decided by Judge Coxe, of the United States Circuit Court of Appeals. In this case the accused invoked the archaic rule that error, however trivial, must be presumed to have been prejudicial. But the court refused to reverse the decision, declaring that the more rational and enlightened view is that in order to justify a reversal the appellate court must be convinced that the error complained of is substantial and affects injuriously the rights of the appellant.

"Prejudice," said the court, "must be perceived; not presumed or imagined. The object of all litigation should be to arrive at a just result by the most direct, speedy and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better; but, while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can

be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy, and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided, and that even if they had not been made the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides: 'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.' Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidenc supplied.

"The granting of a new trial is often a denial of justice; witnesses die or remove beyond the jurisdiction of the court and the resources of the litigants become exhausted. Believing, as we do, that the libel here was without justification or excuse, and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

It is gratifying to note that this wholesome decision was made before the act of Congress of March, 1909, was passed, embodying the substance of the English rule referred to above.

The fifth case is that of *State v. Byrd* (111 Pac. 407), decided by the Supreme Court of Montana. The defendant had been convicted of murder and asked for a reversal on the ground that errors had been committed by the trial judge. One of the errors assigned was the action of the trial judge in sustaining the objection of the state's attorney to a question asked a witness as to whether the prisoner "looked scared" at a certain time. The penal code of Montana provides that the Supreme Court must give judgment upon appeal, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. "Under that provision," said the court, "prejudice ought not to be assumed from the showing of error, as was the rule before the enactment of the above-mentioned law. Under the old practice, there were altogether too many reversals for technical errors and the purpose of the amendment to the penal code was to do away with the rule of presumed prejudice. It is for the Supreme Court, under the new rule, to determine whether an error affects the substantial rights of the accused, and in this case it did not appear that the error had any such effect."

Attention has been called in previous issues of this JOURNAL to other cases showing evidence of a tendency on the part of the higher

courts to administer justice without regard to technicalities which do not go to the merits of causes. Judge Vann, of the New York court of appeals, in the recent case of *People v. Gilbert* (109 N. Y. 10), stated the correct view when he said that the criminal law was fast outgrowing the old technicalities which grew up when the punishment for crime was so severe as to shock the moral sense of humane people and that technical objections should no longer be given any weight unless they were so thoroughly supported by authority that they cannot be disregarded without violating the law. J. W. G.

## AN EXAMPLE OF TEXAS CRIMINAL JUSTICE.

The decisions referred to above stand in refreshing contrast to a recent opinion rendered by the Texas Court of Criminal Appeals, a decision which indicates that there are still to be found judges who show an almost superstitious regard for technicalities of a kind which belong to the rubbish of Noah's ark, rather than to the jurisprudence of an enlightened age and country. The Texas Court of Criminal Appeals enjoys the distinction, we believe, of being one of the foremost worshipers among American appellate courts of the technicality fetish, but we are glad to know that the courts of many states refuse to follow such decisions as precedents.

A good example of the kind of justice it is capable of dispensing is found in the recent case of *Grantham v. State* (129 S. W. 839). The indictment in this case charged the accused with having committed burglary in a certain house occupied by six persons named therein, but the proof, although showing that the accused was guilty of burglarizing the particular house mentioned in the indictment, disclosed the fact that it was occupied by only five of the persons named. The court of appeals held that the variance between the allegation and the proof was fatal, and the judgment of the lower court was accordingly reversed. The court of appeals did not take the trouble, however, to point out in just what way any right of the accused had been abridged or denied through the trivial variance between the allegation and the proof and we confess to an utter inability to discover how the result could have been any different if all of the six persons named in the indictment had been occupants of the house instead of five only.

Evidently, in the judgment of the court, it is of more importance to society that an immaterial procedural requirement should be absolutely complied with, even to the splitting of hairs, than that a justly convicted burglar should be punished. Apparently, absolute perfection in the framing of the indictment and in the conduct of the trial

is necessary to a legal conviction in Texas and no errors, however, trivial, will be tolerated. All the sacred forms must be strictly observed or the results of the most carefully conducted trial will be set at naught, in spite of the most incontrovertible evidence of guilt. In most states proof that a burglarized house was occupied by one person is all that is required to identify the house. In this case the identity of the house was fully established by proof that it was occupied by five of the six persons named in the indictment, but this did not satisfy the court. To sustain a conviction the proof must show that it was occupied by all of the six. In the absence of this proof the court felt bound to conclude that no such house as that described in the indictment existed; the burglary was, therefore, committed in an imaginary house, and the conviction of the burglar must be set aside. We doubt whether such a conclusion would be reached by the Supreme Court of any other state, and we are certain that it would be impossible in any civilized country of Europe. Such judicial logic as this is well calculated to excite popular contempt for the courts as instrumentalities for the administration of justice, foster disrespect for the law, and bring its administration into disrepute. Is it to be wondered at that there is widespread complaint in Texas on account of the frequent miscarriage of justice? See the extract from the governor's message on another page (p. ——) of this issue of the JOURNAL. J. W. G.

## HOMICIDE IN THE UNITED STATES.

From various parts of the country come reports of extraordinary crime "waves" indicating a shocking reign of lawlessness and an inability of the police to deal with the situation. In the city of New York crime is said to be flourishing to a degree never before equaled, and in Chicago the Camorra, together with labor union sluggers, have been terrorizing the inhabitants for months. Everywhere, especially in the large cities, the crimes of burglary and murder seem to be on the increase. The coroner of New York county reports that during the past year there were in the neighborhood of two hundred homicides in that city. According to the annual report of the chief clerk of the district attorney's office of New York City, 119 cases of homicide were investigated by the grand jury during the past year, but only 45 convictions resulted. Since 1901, 1,161 homicide cases have been investigated by grand juries in that city, but the report does not indicate the number of homicides actually committed. Only 382 of the perpetrators were convicted and punished.

The report of the general superintendent of police of Chicago

shows that 202 homicides were committed in that city during the past year. Only one of the offenders was hung. Fifteen were sentenced to the penitentiary. The others were exonerated by the grand jury, acquitted, discharged or otherwise set free. For the satisfaction of those who maintain that the carrying of concealed weapons is directly responsible for the majority of homicides, it may be stated that 110 of the 202 killings took place by shooting.

In the city of Louisville (population, 224,000) during the past year there were 47 cases of homicide and not a single murderer was hanged. The last biennial report of the attorney-general of Alabama contains the astonishing information that during the years 1908-1909 630 cases of homicide were disposed of by the courts of that state and that since September 30, 1894, there have been 4,264 such cases. A member of the Tuscaloosa bar stated in a recent address before the Alabama Bar Association that more homicides were committed in one county of that state during the past year than were committed in all England, Wales, Scotland and Ireland combined. The report of the attorney-general of Texas for 1908-1909 states that there were 1,048 indictments for murder in that state during the years 1909 and 1910. The report does not indicate the number of cases for which no indictments were found, which, it may be presumed, was very large. It would perhaps be a conservative estimate to say that the number of homicides actually committed in the state during this biennium was not far from two thousand. In Dallas county alone 56 murders were committed in one year, and only 23 indictments were found. Only one offender was convicted and he was let off with a sentence of five years in the penitentiary. In Harris county there were 57 murders and only two legal hangings. In Tarrant county there were 40 murders and not a single legal execution. We may well ask, with one of the Texas papers, "What is the matter with Texas justice?"

In North Carolina during the past year there were 141 homicides and in Ohio 191, and in each case a pitiful number of hangings. And so it goes throughout the Union. Everywhere murder is on the increase and the machinery of punitive justice unable to meet the situation.

In a recent letter to the New York *Tribune,* Dr. Andrew D. White says: "The annual statistics of crime published in the Chicago *Tribune* of December 31, 1910, which were gathered with the greatest care and conscientiousness, and which I have verified by careful study in more than half the states of the Union during the last fifteen years, show that in the United States the number of homicides (by which term is

meant, in all save a very few cases, murder) was during the year just closed 8,975, and that this is an increase of nearly 900 over the number during the year preceding. They also show that of the perpetrators of these homicides only one in 86 was capitally punished, as against one in 74 during the year just preceding."

For this reign of murder there are various causes and numerous remedies. One of the most potent preventives in our judgment is more swift and certain punishment of murderers. The idea sometimes advanced that punishment is no deterrent to crime is contrary to reason and the teachings of experience. More and more the idea is spreading that maudlin sentimentality and mistaken leniency is one of the chief causes of the deplorable amount of lawlessness in this country. Dr. White, in the letter referred to above, declares that the pettifoggers, the sentimental philosophers and the "cranks" who disbelieve in anything like prompt and effective punishment have already produced an atmosphere in which thugs, anarchists, yeggmen, safe-blowers and members of the black hand fraternity find an admirable refuge and enjoy American hospitality. A reaction against the coddling tendency is bound to come sooner or later, and, as a well-known prison authority of New York has recently remarked, the potential law-breaker had better commit his crime now and take his punishment before the inevitable reaction against our present lenient methods sets in.

One of the most serious dangers that confronts us is the general lack of respect for law and authority which has come to be a distinguishing trait of American character. In this respect we suffer terribly in comparison with English-speaking peoples in other parts of the world. The last annual report of the Howard Association of London tells us that during the past year there were only nineteen cases of murder in that city, with a population of 7,000,000 inhabitants, and that during the preceding year the number was only twelve. In the former year five of the nineteen murderers committed suicide, all of the others except four were arrested and were either convicted and executed or committed to the insane asylum, with the exception of one, who committed suicide while in prison and one who died while awaiting trial. And yet we are sometimes told by self-satisfied, though well-meaning persons, that no more law-abiding people are to be found in the world than ourselves, and that we have nothing to learn from England in regard to the methods of protecting society against criminals. But fortunately the number who cling to this view is becoming smaller with each passing year and well they may. J. W. G.

## JURIES AS JUDGES OF THE LAW.

Of all the absurdities of America judicial procedure, none is less defensible than the provision found in the constitutions or statutes of some of our states which makes juries the judges of the law as well as of the fact in all criminal cases. In a recent number of the *Illinois Law Review,* Judge O. A. Harker discusses the working of such a rule, which has been in force in Illinois for more than eighty years. Judge Harker shows that whenever trial judges have refused to instruct the jury that they were not bound by the opinion of the court as to what the law is, they have been reversed by the Supreme Court and new trials granted. The Supreme Court of Illinois in its interpretation of the statute has uniformly held that the jury is not limited to judging of the proper application of the law to the facts brought out by the evidence, which in the opinion of many persons is all that was originally intended, but that if they are willing to say upon their oaths that they know the law better than the court does, they are not bound to receive the law as expounded by the court, and that when requested to do so it is the duty of the trial judge to so instruct them. A similar provision in the penal code of Georgia was similarly interpreted for a long time, but in 1877, after the rule had been incorporated in the constitution of the state, this interpretation was abandoned and the rule laid down that it was the duty of the jury to receive and accept the law applicable to the case as given by the court.

The idea that the jury should be the judges of the law in criminal cases grew up in England as a means of protecting the accused from arbitrary and unjust prosecutions by the crown. It was under the influence of this idea, together with the fact that the colonial judges often knew no more law than the jury, that it became common in this country in the colonial days, either to give the jury no instructions as to the law at all or to instruct them that they were judges of both the law and the facts. In the early days Mr. Justice Baldwin of the United States Supreme Court charged a jury while on circuit that they were the judges in criminal cases of both the law and the facts and that if they were prepared to say that the law was different from what he had stated it to be they were not bound by his exposition of it. But in a subsequent case he modified his instructions and told the jury that if they should find a prisoner guilty against the opinion of the court on the law of the case a new trial would be granted.

The reasons which gave rise to the adoption of such a rule, still retained in the statutes or constitutions of at least seven of the American states, no longer exist, while other conditions have grown up which

make its retention positively dangerous to the administration of justice. Under the construction which the Supreme Court of Illinois has placed upon the rule, the trial judge is reduced to the pitiful position of a mere presiding officer or moderator, whose advice, based, it may be, upon extensive knowledge of the law acquired by years of study and experience, may be disregarded by dull, perverse or dishonest jurors who have neither education, training nor fitness for deciding legal questions. Under our practice relating to the competency of jurors in criminal cases, a practice which tends more and more to disqualify intelligent men who read the newspapers and form opinions concerning the guilt or innocence of accused persons in important cases, the chances of the unfitness of the jury to pass upon important questions of law are all the greater. Thus it may and doubtless does often happen that juries composed largely of ignorant men drawn from the least qualified portion of society, who may never have read a statute in their lives or who could not understand it if they had read it, return verdicts contrary to the law and in defiance of the advice of the court. Judge Harker in the article referred to above states that during his twenty-five years' experience on the bench he tried a number of cases in which the jury paid no regard to the instructions given and returned verdicts of acquittal in the face of overwhelming evidence of guilt. A flagrant example of the "lawlessness" of jurors in Illinois and of the impotency of judges under such a system to prevent outright nullification of the law was recently afforded in Chicago where thirteen different juries in the face of incontrovertible evidence refused to convict saloon keepers for violating the Sunday closing law, thus presenting an example of a complete breakdown in the machinery of law enforcement. There are various other features about the jury system as it exists in the United States that make it a poor method for administering justice. Regarding such questions as the competency of juries to determine issues of fact, their qualifications and mode of selection and the unanimity requirement as to verdicts, there are grounds for valid differences of opinion, but concerning their fitness to decide intricate questions of law, and their right to disregard the opinions of the court on strictly legal questions, there ought not to be any difference of opinion. No part of the jury system is less supported by common sense or reason, more inconsistent with civilized standards or more contradictory to the teachings of experience. Notwithstanding the fact that the judges in most of our states are elected by the people, and usually for short terms, there is still a sort of superstitious fear of the judiciary, which in our judgment is wholly without foundation. Not content with de-

priving them of their power to sum up the evidence and comment on its weight for the benefit of the jury, not content with taking away from them their natural function of expounding the law to the jury, legislatures are insisting upon still further reducing them to a position of impotency by means of elaborate practice acts, and in some quarters it is now proposed to destroy their independence by means of the recall. Such distrust is to be deplored and the legislation to which it is leading if persisted in will eventually undermine the judiciary and destroy its efficiency. J. W. G.