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Notes on Current and Recent Events

NOTES ON CURRENT AND RECENT EVENTS

Federal Officials and the Criminal Law.—The select committee of the Sixty-Second Congress, to Investigate the Administration of the Criminal Law, has submitted its report, which is published as Senate Report No. 128:

"The undersigned, being the select committee of the Senate duly appointed under the authority of a resolution of the Senate adopted April 30, 1910, known as Senate resolution 186, and instructed by said resolution—

'to inquire into and report to the Senate the facts as to the alleged practice of administering what is known as the 'third-degree' ordeal by officers or employees of the United States for the purpose of extorting from those charged with crime statements and confessions, and also as to any other practices tending to prevent or impair the fair and impartial administration of the criminal law—"

which committee was continued after the 4th of March, 1911, and during this session of Congress, by a Senate resolution adopted February 21, 1911, beg leave to report as follows:

"Under the terms of the above resolution by which the committee was created the inquiry directed to be made was limited to the alleged practices of "officers or employees of the United States." We have not, therefore, inquired into such practices by State or municipal officers or employees. Whether Congress had the power to have directed such an enquiry into practices of State or municipal officers or employees or not, it certainly did not attempt to do so in the resolution creating this committee.

"We have caused it to be generally published in the press that we were ready to hear any complaints falling within the scope of our powers, and have had such as have been received investigated. Several of these complaints were against the Metropolitan police of the District of Columbia. Most of these complaints were more in the nature of brutality by policemen than in the nature of "third-degree" ordeal. In one instance a policeman of the Metropolitan police was proved to have been guilty of gross brutality inflicted upon an innocent citizen in an attempt to arrest another citizen. This officer was afterwards convicted in the criminal court of the District and discharged from the force. Major Sylvester, the superintendent of the Metropolitan police, who has been for ten years the president of the International Police Chiefs' Association, numbering several hundred members in this country and Canada, testified that while there were instances of brutality by police officers from time to time in various parts of the country, that they were sporadic and were not the regular practice. At the annual meeting of the International Police Chiefs' Association, held at Birmingham, Ala., in June, 1910, the employment of the so-called third-degree ordeal for the purpose of extorting confessions, and brutality in the treatment of prisoners was strongly condemned by resolutions adopted by the association.

"In the case of the alleged administration of the "third-degree" methods to the Seyler brothers in Atlantic City, which, as reported in the press, was possibly the moving cause for the creation of this committee, we, through our agent employed to make the preliminary investigation in such cases, obtained

the affidavits of the Seyler brothers as to the alleged brutalities practiced upon them by the police of that city. As this was not a case involving officers or employees of the United States, the committee was without authority to investigate it. While the agent of the committee was making a preliminary examination of the facts of this case, one of the Seyler brothers was arrested with stolen goods in his possession and was subsequently convicted and sentenced for theft. No well-defined case of the practice of the "third-degree" method by the Metropolitan police of the District of Columbia has been presented to the committee. While we are not prepared to say that cases do not occasionally arise, we have not discovered any, although diligent search has been made.

"Mr. John E. Wilkie, Chief of the Secret Service Division of the Treasury Department, testified that he knew of no practice by Federal officials either in his own or other departments or bureaus of the Government which tended to prevent the fair and impartial administration of the criminal law. He knew of no instance of cruelty or brutality in the attempt to extort confessions from those charged with crime. He stated that he had himself subjected suspects to lengthy examinations, and instanced one case where he had talked with the prisoner for four consecutive hours and the person had at the end of that time made a confession to him. There seems to be no clear definition of what constitutes the so-called "third-degree" ordeal. In a general way any examination of a prisoner by officers of the law is called by the prisoner and by the press the administration of the "third degree" or the "sweating process." These examinations and investigations are carried on by all departments of the Government, by detective agencies, and by the police forces in the different States and municipalities. From the nature of the case, there is no witness to it except the police officer conducting the examination and the prisoner himself, and, from the nature of the case, convincing evidence of brutality would be difficult to obtain. Whatever may be the facts as to the alleged administration of the so-called "third degree" by the police of the States and cities, in the opinion of the committee the Congress of the United States is lacking in authority to legislate concerning the alleged practice, except where it is practiced by officers or employees of the United States. The Hon. George W. Wickersham, Attorney-General of the United States, testified before the committee that he had never heard of the use of the so-called "third degree" by any Federal official and that the knowledge which he had obtained since his appointment led him to believe that no such practice exists among Federal officials.

"It appears from testimony taken before the committee that in important cases involving violations of the Federal statutes, upon application by the district attorney, the Department of Justice authorizes the employment of special United States marshals and specially appointed investigators to watch the jury for the purpose of preventing jurymen from being tampered with. This committee deprecates this practice or custom, although it may be justified upon the ground that inasmuch as the accused or his friends may employ men to watch the jury, that therefore the Government should be allowed the same privilege. This committee regards the employment of men by either the prosecution or the defense for the purpose of shadowing jurymen as liable to great abuse. The spectacle of a sworn jury shadowed by secret employees of both parties to

the suit during the entire period of a trial does not seem to this committee to comport with the impartial administration of justice.

"It also appeared from testimony before the committee that parties who had given information to the Government and persons who were expected to testify for the Government in criminal prosecutions were at times paid by the Government or taken into Government employment until after the trial. Inasmuch as the defendant has the right to employ people whom he expects to use as witnesses at the time of the trial for the purpose of holding them within reach, we do not think that the Government should be deprived of the same right as long as the defendant is accorded that right. Perhaps this is not done frequently enough to be designated as a 'practice,' but it is done occasionally, and it seems to this committee that it might easily tend to impair the impartial administration of the criminal law.

"A few complaints have been made to the committee of the acts of certain United States district attorneys in the prosecution of criminal actions. These complaints were made more with an object of affecting the issue of the suits than for the purpose of securing an impartial administration of the criminal law, and your committee concluded that it was not expedient to proceed with them further at the present time.

"Section 1 of Article XIV of the amendments to the Constitution of the United States provides:

" 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"Clause 2 of section 2 of Article IV of the Constitution of the United States provides:

" 'A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

"Clause 2 of section 2 of Article IV provides for what is known as the 'extradition' of a person charged with crime who shall flee from justice and be found in another State. Under the authority of this clause of the Constitution several instances have occurred where persons alleged to have committed a crime in one State and fled into another State have, upon the requisition of the State where the crime was alleged to have been committed, and the warrant of the governor of the State to which the person so charged with crime had fled, been taken before a court and remanded to the custody of the agent of the State in which the crime was alleged to have been committed and by him returned to the State from which he was alleged to have fled, without affording any opportunity to the person so charged with crime to test the legality of the proceedings against him or the jurisdiction of the court granting judgment against him. The courts have held that if the person so charged with crime is within their jurisdiction when produced for trial they will not inquire into the legality of the proceedings by which he was brought within their jurisdiction. Although such a proceeding may not strictly fall within the province

of this committee as a practice tending to impede the impartial administration of the Federal criminal law and may not be resorted to so frequently as to properly constitute a practice, still, in the opinion of this committee the extradition of a person charged with crime and his transfer from one State to another—perhaps far distant and by a route calculated to prevent his obtaining a writ of habeas corpus to test the validity of the proceedings which resulted in his arrest and transportation—presents a condition of affairs which, if possible, should be made impossible by legislation.

"If the court, before whom the person charged with crime is brought, in reality has no jurisdiction and the person is deprived of any opportunity to test that question by reason of his hasty transportation to and custody in a remote part of the United States, he has to all intents and purposes been kidnaped, and such person would seem to have been deprived of his liberty without due process of law. We, therefore, recommend to the consideration of Congress whether Congress cannot constitutionally provide some remedy against the possibility of injustice in the execution of extradition under clause 2 of section 2 of Article IV of the Constitution of the United States, either by providing that the person so charged with crime shall not be removed from the State in which he is found within a certain number of days, thus affording him an opportunity to test the validity of his arrest and extradition in habeas corpus proceedings, or in some other manner if authority for any such exists."

The "Third Degree."—Henry C. Spurr, in a recent article in *Case and Comment,* discusses the legal aspect of confessions made to police officers. Among other things he says:

"The Hon. Orlando Hubbs, of Long Island, came forth at the present session of the New York Senate, with a bill designed to shield persons under arrest from the terrors of this modern inquisition, as some of the observers are pleased to call the police practice of questioning prisoners. The bill makes any admission by the defendant while under arrest inadmissible as evidence unless corroborated by a disinterested person and the defendant has been advised that his admissions may be used against him. As in the case of the good deacon who always accepted every adverse stroke of fortune with resignation, but who finally declared it was about time to express his sentiments when one day a tornado came along, uprooted his trees, leveled his fences and barns and knocked the deacon himself in a heap behind his cow stables, it would seem as if the time had come to say something on the other side of this question on behalf of a sane administration of the criminal laws for the protection of life and property, especially in view of the fact that we in America have already been at such pains to safeguard every interest of the accused that it sometimes takes as long as three months to get a jury in a criminal case, and when, by reason of delays and technicalities and new trials, the course of justice is so impeded and the punishment of crime made so uncertain that our administration of criminal law has caused us to become a laughing stock in other countries. Before making this new crossing suggested by Senator Hubbs, is it not our duty to stop and look and listen?

"An examination of the cases will show that the courts have been influenced by two theories as to the propriety of the use of confessions. The first of these may be called the humanitarian theory. It is responsible for all

the courtesies that have been extended to persons accused of crime, for the delays and the technicalities which have made the administration of the criminal laws at the present day so slow, so uncertain and, in many respects, so unsatisfactory. As applied to the exclusion of confessions, it has been called by Jeremy Bentham, in his 'Rationale of Judicial Evidence' (7 Bentham's Works, Bowring's edition, p. 454 ff), 'the fox hunter's reason.'

"The other theory is that confessions are to be excluded only when there is reason to believe that they may not be true. If they appear to be reliable, the fact that the accused may have been taken off his guard is no objection to them, since the punishment of crime is not a sport or a game, but a serious business, made necessary for the welfare of society and the protection of life and property. 'The reason for the exclusion of confessions,' says the court in People v. Wentz, 37 N. Y. 304, 'is not because any right or privilege of the person has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt.'

"There is, of course, some real danger that confession may not be true. It would hardly seem as if an innocent man would admit the commission of a serious crime; but experience has amply shown that they may do so. It has been said that 'the human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth as different agitations may prevail.' (2 Hawk, P. C. 6th ed., p. 604.) Let this be conceded. Then, if the reliability theory as to the admission of confessions is sound, the problem of dealing with the third degree is not whether the personal comfort of the accused is likely to be disturbed, but whether admissions secured in this way can be depended upon. Are innocent men being brow-beaten into confessions of crime by means of the third degree?

"It is unquestionably true that many criminals have confessed their guilt or have made admissions which have led to their conviction, under the 'grilling' of the police, which they would not have done if they had had time for deliberation, or had had an opportunity to consult counsel. Many have been convicted when they would have gone free had they kept still, but this is far from being against the peace and welfare of society. It is rather for its benefit. As before stated, it is the serious business of the state to discover and punish the guilty, and, if the police are assisted in their part of this duty by the employment of the third degree, honest men need not be conscience stricken because the process is not always entirely fair, in the sense that word is used by the sportsman, to the criminal.

"But conceding the purpose of the police to be honest, are unreliable confessions produced by means of the third degree? Confessions extracted by means of physical torture are worthless. Are statements drawn out by this so-called mental inquisition also not to be relied on? When it is remembered that nothing that can operate on the hopes or the fears of the accused is permitted, nothing that can be construed either as an inducement or a threat is allowed, it would seem as if little room were left to lead an innocent man to say he is guilty. An examination of all the reported cases on the subject will show in fact that there is little chance of this. And if this is so, the proposed New York law would not be a benefit, but a menace to the State.

"If Senator Hubbs' bill should become a law, it would practically shut

out all confessions, for, in cases in which they might be useful, how are they to be corroborated by a disinterested person? Who is this disinterested person to be? It would mean that conviction must be secured without confessions.

"If there is to be any restriction in the use of confessions, it would seem as if it ought to be aimed at verbal admissions. These are oftentimes extremely unreliable, because the words of the accused may have been misunderstood and misinterpreted, and because he may be misrepresented, owing to the infirmities of the memory of witnesses and, also—to concede a point—by the desire of an overzealous public officer to convict one whom he believes guilty of a crime. But if the confession is signed by the accused, or taken down accurately when it is made, and there is every reason to believe that it is true, it would seem as if it ought not to be rejected simply because it was obtained by means of the third degree.

"On every side the cry is raised that we are altogether too lax in the enforcement of our criminal laws. It would seem as if no necessity had yet been shown for the erection of a new barrier to the punishment of crime by the abolition of the third degree." R. H. G.

Reform the Criminal Law.—One appalling concrete statement from the well-presented discussion of Judge George Hillyer, recently published, should serve to press upon State legislatures the importance of reforming the criminal law along certain well recognized and essential lines. In substance, that statement is this:

In 1910 there were 8,975 homicides in the United States, nearly all of which were murders; only one in eighty-six of the criminals suffered capital punishment. This was an increase of nearly 900 homicidal crimes over 1909, when one criminal in seventy-four was executed. Georgia shared in both the record and the increase in extent greater than that proportionate to population.

In London, a city of 7,000,000 inhabitants, there were but nineteen murders in 1910 and only twelve in 1909. Atlanta, with her 160,000 population, will easily equal that record, though immeasurably behind London in the percentage of criminals captured and dealt with by law; for there escape is the exception.

The reason for the difference is found in the swiftness and the certainty of punishment under the English criminal law, whose quality and administration are effective in the suppression both of criminal tendency and mob rule.

R. H. G.

Imperative Law Reforms.—In the *Editorial Review* of July, 1911, is an article on "Imperative Law Reforms," by Edward J. McDermott, of Louisville, Ky., from which the following is taken:

"The experiment of law reform in England and Germany during the past thirty years has made it plain that we ought to reform and must reform, by radical measures, our system of procedure both in civil and criminal trials.

"The present demand for law reform in the United States is imperative and widespread. Former President Roosevelt and President Taft, in public addresses and official messages, have frequently and earnestly recommended a thorough-going reform of civil and criminal procedure in the Federal Courts in order that similar improvements might be promoted later in State courts. In the fall of 1910 the National Economic League submitted to its members a test vote to determine what subjects ought to be discussed at once by its

various organizations. The result of the vote showed that the two subjects which the members wanted to discuss most were the following: (1) Delays and Defects in the Enforcement of Law, and (2) Direct Legislation. These two subjects received by far the largest number of votes. The first-named subject was discussed by the Boston Economic League at its meeting in January, 1911, by distinguished lawyers of Maine, Massachusetts and New York. At the annual meeting of the American Political Science Association on December 28, 1910, in St. Louis, the writer of this article read a paper on the subject of 'Delays and Reversals on Technical Grounds in Civil and Criminal Trials.' It will be found in the published proceedings of that Association and in the *American Law Review* for May, 1911, and almost complete in the May number of the *Journal of Criminal Law and Criminology.*

"Dr. Crippen's trial in London for the murder of his wife lasted four and one-half days; Thaw's trial for the murder of Stanford White lasted twelve weeks. About the same time, Whiteley, who murdered a merchant in London, England, was tried and convicted in five hours. The jury was selected in eight minutes. This contrast in procedure is suggestive.

"In England criminals are neither coddled nor 'lionized.' If the convicted prisoner takes an appeal, he runs the risk of having a judgment against him made worse than it had been in the lower court. Paul Lambeth, in a telegram from London on November 19, 1910, gave an example:

"'In the Criminal Appeal Court, William Sampson, convicted for shooting, with intent to murder, a man in a railway tunnel, appealed against his sentence of twelve years' penal servitude. The Lord Chief Justice was of the opinion that the sentence was too light and the court increased the term to fifteen years. The appeal added three years to the punishment.'

"It is agreed that certainty of punishment is a greater deterrent to criminals than severity of punishment; but reasonable speed of punishment is also a powerful factor in the suppression of crime. Justice delayed is often justice denied. A poor woman in the State of Kentucky had a case in court for many wearisome, heart-breaking years. At last a judgment in her favor was affirmed in the Court of Appeals, and she was about to receive an estate worth $75,000, when, a few days after the success of the action, she died.

"As some people think more of a man's clothes and style than of his principles, so some lawyers are concerned more with the mere procedure in a trial than with the triumph of the party that ought to succeed on the merits of the case. The quibbling of the logicians and disputants of the Middle Ages has often formed the subject for satire; but our present-day legal disputes over technical questions of procedure are pettier, less profitable and more indefensible than the fine-spun arguments and theories of the much-abused schoolmen of the Middle Ages.

"The greatest hindrances to justice in our criminal courts are the following:

"(1) Unpunished perjury, the natural loss of witnesses by delay, and the systematic and corrupt dispersal of important witnesses from the place of trial;

"(2) The refusal of courts to compel a defendant to produce documents or other physical things that may make his guilt clear;

"(3) The abuse of expert testimony;

"(4) Reversals in appellate courts on the ground of petty technical errors in mere procedure;

"(5) Maudlin sympathy for the accused in conspicuous cases on the part of the public or of the low or semi-criminal classes that hang about the courts during exciting trials; and the reluctance of jurors and sometimes of judges to punish any criminal adequately, especially if he be an influential murderer or have money enough to pay for open legal aid and disguised illegal assistance. Even the press is sometimes used to create public opinion in favor of such accused persons.

"In most cases of murder, the accused is a 'lion' to the vulgar and to the criminal classes. The unfounded defenses most frequently used are (1) self-defense; (2) insanity, and (3) the 'unwritten law.' These defenses are practically inconsistent with each other, and yet they are often combined in one case under the plea of 'not guilty' in order to confuse the jury or to enable it to excuse or conceal its own debasement. The flimsy testimony of corrupt or incompetent 'experts' is generally used in spectacular murder cases to establish the factitious plea of insanity. This hollow pretense is often used to uphold the 'unwritten law.' If that 'law' were sound either in reason or in morals, it should be embodied in a written statute or it should be suppressed with a stern hand. We should not let weak jurors and judges disregard their solemn oath and render dishonest verdicts when we have not the hardihood to put such a law on the statute book. Few men with any character for ability or integrity would be willing to pass an act to make death the penalty for such acts as are supposed to justify murder under the 'unwritten law.' That 'law' is often supported by perjury when the victim's mouth has been closed by death and when his defense to the charge against him can not be made. He is condemned and disgraced unheard. To the loss of life is added the loss of his good name, and yet he may be wholly innocent of the charge based, in many cases, on false or distorted facts or on statements that he, if alive, might easily disprove or explain.

"Under the Kentucky Criminal Code, which is practically similar to the procedure in many other States, the accused, under the plea of 'Not Guilty,' may set up any defense other than a former conviction or acquittal for the same offense.

"The law everywhere should be so amended that the accused in his plea should be compelled to state whether his defense is (1) that he was not guilty of the act charged, or (2) that he did the act in self-defense, or (3) that he was insane at the time he did the act. Under neither of these pleas should the court admit the sort of evidence that is usually offered to invoke the so-called 'unwritten law.' The accused should be allowed to offer no evidence of insanity unless he filed the special plea of insanity. Such a reform in procedure would prevent the abuse of this feigned defense. In such cases the officers of the State would not be taken by surprise, but would have ample time to prepare themselves with testimony as to the sanity of the accused. The law should provide that when the accused, at his arraignment, has pleaded 'insanity,' he shall be confined at once in some suitable, safe place where he may be observed and studied by experts appointed by the court for a reasonable time under good conditions for the observation of his conduct at a time when he does not know that he is being observed and when his shamming may be the more easily de-

tected. This plan, without any statute enforcing it, has been successfully tried in St. Louis. The court and the jury will thus have the benefit of the examinations and observations of disinterested experts who will probably be able to detect whether the accused is really unsound in mind or only feigning. Anybody interested in the subject of Expert Testimony will find it discussed in an address which I. delivered to the Kentucky State Medical Association in September, 1910, and which was published in the *Journal of Criminal Law and Criminology* in January, 1911.

"The law should also require that a jury shall specifically state in its verdict whether or not it has acquitted the defendant on the ground of insanity. A committee of the New York State Bar Association recommended that the defense of insanity should be abolished altogether; that the jury should be allowed to decide only whether the accused did the forbidden act; that the jury, in passing upon that question, should not pass upon the question of sanity. This view was embodied in a statute of the State of Washington. The theory of that statute was that an insane man with homicidal instincts is dangerous, that the community must be protected against him, and that he should be imprisoned or otherwise handled under such circumstances and for such a length of time as will make it reasonably sure that he will not take the life of any other person. On September 10, 1910 (110 Pac. Rep., 1020), that statute was held to be unconstitutional by a divided court in Washington. It seems to me that it ought to be possible and that it is possible to draft a constitutional act providing that, if an accused person be acquitted of murder on the plea of insanity, the accused shall be confined in a safe, suitable place for a reasonable time, under the observation of experts, to make it reasonably certain, before his discharge, that he is, at last, quite sound and will not again be a menace to the community. A severe penalty should be provided for any officer who negligently or corruptly permits such a murderer to escape, and for any person that aids him to do so.

"In St. Louis not long ago, there were four brutal murders perpetrated almost simultaneously. Two of the murderers had been formerly tried for murder, had escaped on the plea of insanity and had finally committed a second murder. Not long ago a murderer of Tennessee was acquitted on such a sham plea and then promptly escaped from the asylum. A similar result followed in Kentucky in the case of Thomas Buford, who murdered Judge Elliott in Frankfort, Ky., in 1879, because of an adverse judicial opinion written by Judge Elliott for the Court of Appeals. An exactly similar case occurred here lately in which a man convicted of murder escaped by the same method. Cases like these take place in other States.

"Such miscarriages of justice bring lawyers, the courts and the law itself into disrepute. Radical reforms must be adopted to make the administration of justice more efficient and more respected. In spite of our nation's rise in the scale of civilization—in spite of our wealth, power and prestige—we feel that property and life are not secure enough; that the bomb and the pistol have too many victims; that riots and mobs occur far too frequently; that private vengeance is too often safely carried out; that juries acquit too many culprits; and that the machinery of the courts does not work satisfactorily. Reform is imperatively demanded. To the courts the richest and the humblest should be able to turn confidently for the protection of every reasonable right and for

the redress of every wrong. As Brougham long ago said, 'The law must not be dear, but cheap; not a sealed book, but an open letter; not the two-edged sword of craft and oppression, but the staff of honestly and the shield of innocence.'

"The attacks which Mr. Roosevelt and some newspapers have been making of late on the courts are based upon the theory that the judges, who are authorized only to interpret the Constitution and the Statutes, must decide, not what the law is, but what it should be. So long as we have written Constitutions and Statutes which bind the courts, the judges have no right to be governed in their opinions by what they think the people may want for the hour. Till public opinion has caused the Constitution and the Statutes to be regularly changed to conform to the wishes of the people themselves, the judges must not yield to public clamor nor to what the people may seem, for the time, to want. A judge who decided, not what the law now is, but what the people, without changing the letter of the law, want it to be, would be unworthy of his place. All the judges were once practising lawyers and, as lawyers, they may have been biased unduly in favor of old legal theories; but the people, to get relief, must make the Constitution and the Statutes so plain and imperative that no upright judge can err as to the meaning. Then, if the judge fails to do his duty, he should be removed, if sitting for life, or be defeated, if sitting for a term. Our judges and lawyers have been educated in, and are accustomed to, an antiquated system of procedure. We can and should promptly change that; but the fundamental principles of the substantive law can be safely changed only by amendments to our Constitution and Statutes. The Judges cannot veer about to suit popular feeling, much less to gratify hasty, popular clamor in favor of new theories and untried experiments in socialistic legislation, even though it appeals to our sense of justice."

R. H. G.

Technicality and Crime.—Judge George Hillyer, in the *Atlanta Constitution,* recently made the following comments under the title "Technicality Responsible for Foul Crimes and Mob Violence."

"The real fault, certainly the greatest part of the fault, lies in the forms of judicial procedure under which there are so many technicalities and delays as that when one of these horrible crimes occur, good men in the community have not sufficient assurances that the course of the law will result in administering the needed punishment. These delays are not the fault of the judge, or of the sheriff, or sheriff's officers, or of the jurors. They are the fault of the law. It is easy to amend the law, and to give to the courts and its officers the necessary power. So that the verdict and judgment of the courts may be speedy and true and may be promptly executed.

"We began an agitation in the State Bar Association of Georgia as far back as 1894. Governor McDaniel, of Walton county, was, with the writer, on one of the committees which recommended the needed reforms in many of these matters. During the last session of our State legislature it was my privilege to assist Mr. Edwards, one of the members of the legislature from Walton county, to draw up a series of bills which he wanted to introduce, and did introduce, but which, so far as I know, never reached a vote.

"So there is a special misfortune that just at the beginning of this session, the people of Walton county, who are deserving, at least, of some credit,

should be brought to the front for censure in these matters. I am sorry the lynching occurred, and earnestly persuade and argue, and pray against the occurrence of a lynching anywhere and everywhere. It is better to appeal to the legislature for redress, as *The Constitution* has been so nobly doing in this present crisis; just as it has done for years past. Let the woman or girl victim testify by interrogatories, under well-guarded rules. Let motions for new trials be made short. Let it be understood that in these rape cases the wicked perpetrators cross the dead line, and that when there is an immediate, open and fair trial, with the verdict of an intelligent jury, that shall end it! When I say a verdict, I mean a true verdict, and let such a verdict be followed by the immediate execution of the penalty—the just penalty—such as the law pronounces against such evildoers. And let it follow publicly and openly, in the county where the crime was committed, very speedily, only three or four days, or less, after the date of the crime; and my word for it, both the crime of rape and the lynchings will nearly or quite disappear, and no longer occur or be repeated as a reproach to our civilization.

"Similar reforms are, of course, needed throughout the whole domain of criminal procedure. The National Bar Association of the United States, a few years ago, recommended almost the same reforms in criminal procedure that were recommended by the above-named committee of the Georgia Bar Association, sixteen years ago. Nearly the same reforms were after that recommended by the judiciary committee of the House of Representatives at Washington, though only part of them finally found effect or consummation in an act of Congress. Like reforms, during the intermediate period, were recommended by President Roosevelt, and also by President Taft.

"President Taft repeated these recommendations twice in his annual messages to Congress. Great leading periodicals, such as *The Journal of the Institute of American Criminal Law,* published at Urbana and Chicago, Ill., with scores and, indeed, hundreds of the leading publications of the country have followed and done the same thing. Again and again the great religious bodies of the country have spoken out on the same line. Our State Bar Association has more than once taken decided action. At the recent session of that body, only a few weeks ago, at St. Simons Island, Ga., the Georgia State Bar Association spoke out most emphatically, and took steps looking toward the creation of a committee that should formulate and recommend the proper changes and reforms, including the procedure and administration for the enforcement of the criminal law.

"Can we ever forgive ourselves if, in the conflict between the military and the mob, a thing sure to happen if the legislature does nothing, and in the conflict a hundred or more valuable lives are lost? Can anybody deny that, as was said by one of our great religious bodies, our laws ought to be 'so amended that all men may know the courts have both the will and the power to do sure and immediate justice in every case?" R. H. G.

Judge Rodenbeck on Reform.—The *Central Law Journal* says:

"At the last meeting of the New York State Bar Association, Judge Adolph J. Rodenbeck read a paper on 'The Reform of Procedure in the Courts of New York,' which has been printed in pamphlet form and extensively circulated. Judge Rodenbeck was one of the Board of Statutory Consolidation and some

of the matter contained in this pamphlet is the fruit of work done by that board toward the revision of practice. With the passage of the Consolidated Laws, indeed, there was eliminated from the Code of Civil Procedure many provisions of substantive law. Judge Rodenbeck, however, shows that there are still other provisions remaining in the Code as to the classification of which the board was in doubt, and therefore it was concluded not to disturb them. The examination of all of the provisions of the Code by the Board of Statutory Consolidation, with a view to logical classification and grouping of related topics under a single head, was also a work of permanent utility toward a scheme of Code revision. The Board of Statutory Consolidation, however, 'found that it was physically impossible to accomplish both the consolidation of the general substantive statutes and the revision of the practice, and therefore directed its efforts to the completion of the former, leaving the latter for subsequent and independent treatment.'

"Judge Rodenbeck examines, at considerable detail, various schemes for Code revision that have been formerly promulgated. He also cites in comparison, and often with approval, provisions under other systems of practice, especially the English practice rules. He formulates a scheme for the revision of the New York Code embodied in the following rules:

" 'Rule 1. The practice should be governed by a legislative practice act, which should be as brief as possible, covering the substance of procedure, and which should be supplemented by suitable rules of court covering the form of procedure, both the practice act and rules being arranged according to the same logical analysis following the steps in an action; its provisions, so far as practicable, should be general in their character, with few exceptions to such provisions and with the omission of minute details of practice, and the courts should have ample power to make rules for the orderly and expeditious dispatch of causes unhampered by technical statutory requirements (p. 59).

" 'Rule 2. The general provisions applicable to more than one step in an action should be broad and liberal in terms, should omit minute details, should contain few exceptions and should leave a wide discretion in the courts (p. 66).

" 'Rule 3. There should be provision for a complete disposition of the entire controversy by the joinder of all parties, whether jointly, severally or in the alternative, for a simple statement of all differences between them, subject to an order for a separate trial, in the discretion of the court, of any issue; for the determination at one time, so far as practicable, of preliminary questions such as pleadings, parties, admissions, discovery, interrogatories, inspection, commissions, examinations, place and mode of trial, and for a wide latitude as to securing evidence for trial (p. 84).

" 'Rule 4. All questions of fact should be disposed of finally upon one trial, so far as possible, and there should be given to the court power to submit a cause to a jury in such a way, by reserving questions of law or submitting questions in the alternative, that another trial of the same facts may be obviated (page 90).

" 'Rule 5. The court should have power to grant any relief and to render any form of judgment in favor of any party or parties as against any other party or parties that the facts warrant (page 95).

" 'Rule 6. No judgment should be set aside or new trial granted unless it appears that the error has resulted in the miscarriage of justice, and, so far

as it can be done constitutionally, only as to such questions as to which the error was committed, and the appellate courts should have power to take additional evidence so far as they can be given that power (page 105.)

"'Rule 7. The provisions for the satisfaction of a judgment should be such as to afford a prompt and effective enforcement of the judgment (page 107).'

"Our position has always been that the Code should either be very radically revised or not revised at all. In spite of its inordinate length, its assuming to regulate trivial details of practice with the solemn force of law, its higgledy-piggledy arrangement and interpolations—with all its unscientific and burdensome character—it has now been made approximately certain by practice decisions and attempts merely to patch it up would result only in new doubts. From this point of view a misgiving might be caused by Judge Rodenbeck's statement that 'a total repeal of the present system would be demoralizing. It would be unwise to adopt a practice act not based upon the present Code.' If by this it is meant that nomenclature and the general course of procedure prescribed by the present Code should not be departed from arbitrarily and merely for the sake of change, we concur. It is believed, however, that in the course of any revision in cases of doubt the leaning should be towards regulation by rules of court and not by statute.

"Hon. Elihu Root, President of the New York State Bar Association, pursuant to a resolution of that association, has appointed a committee to consider the subject, consisting of Judge Rodenbeck, John G. Milburn, William B. Hornblower, Adelbert Moot and Charles A. Collin, who, it is expected, will inaugurate some plan for advancing the work. Co-operation is solicited and suggestions may be sent to Frederick E. Wadhams, Albany, New York, secretary of the association. It is believed that co-operation and suggestions from members of the Bar, whether members of the New York State Bar Association or not, will be welcome. Judge Rodenbeck's pamphlet is certainly a valuable contribution to the literature of the subject and will amply repay perusal. His argument for the abrogation of the distinction between actions and special proceedings, for example, is cogent and convincing. Many of the features of the proposed rules above quoted have in one form or other already been much discussed during the agitation for reform in practice, now covering many years, but which has been growing more insistent and imperative during the past three or four years. Judge Rodenbeck closes with an appeal to the Bar to forego its temperamental and habitual conservatism and and to join heartily in a movement to remedy what everyone concedes to be a great evil." R. H. G.

Reform of Judicial Procedure in Oregon.—At the general election of 1910, a constitutional amendment containing the following provision was adopted by the voters of Oregon:

"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the

decision of the appeal. If the Supreme Court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court. Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court."

Commenting on this provision the editor of the *Central Law Journal* says:

"The power and the duty devolved upon the Supreme Court to dispose finally of causes on appeal is stated very explicitly. It lies in the hands of either party desiring to put an end to a case taken on appeal to secure the exercise of that power. In granting this privilege it is seen that the Constitution of Oregon recognizes very clearly that, as a record can show in absolute perfection everything that occurred in the trial court, there is no necessity for clinging with unreasoning tenacity to the old doctrine of the trial court's superior ability to dispose of questions of fact. Recession from this doctrine we have been persistently urging." J. W. G.

Mr. Hitch on Proposed Improvement in Procedure.—Robert M. Hitch, Esq., of Savannah, in his paper before the Georgia Bar Association on "Procedure in Courts of Original Jurisdiction," comments as follows: "The chief complaints against our system of procedure are that it is slow, uncertain, expensive and ineffective. Two recent criminal cases suggest a very illuminating comparison. I refer to the case against Dr. Crippen in the English courts and the case against Dr. Hyde in the courts of Missouri.[1] The former was calculated to create a wholesome respect for the law. The trial of Dr. Hyde was commenced on April 16th in Kansas City, a verdict of guilty was rendered on May 16th, one month later, his motion for a new trial was overruled on July 5th, his appeal was heard on February 6th, and recently a new trial was granted and everything is to be gone over again. That procedure is calculated to create disrespect for the law."

The most serious complaint is against the administration of our criminal law. "Some of the evils relate to the technical machinery of administration, while others extend to the grand jury room, the petit jury box and the sheriff's office. It sometimes occurs that sheriffs are derelict in the performance of their duties. While the governor is supposed to see that the laws are executed, neither he nor any other official has any control whatever over the sheriff. Frequently the grand juries fail to indict and the petit juries fail to convict when indictment and conviction would seem to be inevitable. The trouble here is that we have state prohibition as to the commission of crimes and local option as to the punishment for crimes committed. The system is illogical and inconsistent. Either the county commissioners of the several counties should be

[1]See this Journal, Vol. II., No. 3, 435 ff.

empowered to adopt criminal statutes to suit their respective localities (an intolerable suggestion), or, if the criminal laws are to be made by the State as a whole, then the State should be given authority to enforce those laws in every county.

"It is almost always within the power of the lawyer to make such changes in the law as conditions may require. Our entire system of government, Federal and State, is largely the work of lawyers, and it is to the glory of the profession that we have furnished the American people with a system of government which in the main is the best that history records. It is to our discredit, however, that we have allowed these evils of administration to grow up in modern times and to go on unchecked, and it is only natural that the public should blame the lawyers if well recognized defects in the laws of administration and procedure are not remedied and corrected with promptness and thoroughness."

Further he makes several suggestions looking toward improvement in procedure, among which are the following: "Wipe out the greater part of our statutes governing details of procedure, and in the place of those statutes let the Supreme Court adopt rules of procedure covering all such matters of a general nature and let the several trial judges adopt such supplemental rules of practice as may be needed in their several jurisdictions. This would give elasticity and flexibility to the system and permit changes to be readily and easily made as the needs therefor might arise. A precedent for this is furnished in the National Bankruptcy Act wherein provision was made for the adoption and promulgation by the Supreme Court of all necessary forms and rules governing the practice.

"2. Let the sheriffs be made subject to suspension by the governor, in his discretion, to be followed by impeachment proceedings instituted by the attorney-general in the name of the State and at the direction of the governor and before a bench of three judges from circuits nearest that of the sheriff's residence. Provide for prompt hearing and allow no appeal. A number of other states have laws similar to this, so the proposition is not without precedent.

"3. Allow grand juries and petit juries to be drawn for any county in any case from any part of the congressional district, upon motion of the attorney-general in the name of the State, such motion to be made at the direction of the governor. Some of our counties in former times were as large as the average congressional district of to-day, and this change would therefore not be in reason opposed to the doctrine that a man should be indicted and tried by a jury of the vicinage. Besides, modes of travel and communication are vastly superior now to what they were in former times. By this system there would be a reasonable probability that the State laws would be uniformly enforced in the several counties irrespective of local sentiment in favor of those violating some particular statute. The federal system of drawing juries furnishes an example precedent for this proposition.

"4. Fix the number of strikes in all civil cases and in all felony cases at six on each side and in all misdemeanor cases at three on each side. Let the defendant be sworn and examined as a witness in criminal cases the same as in civil cases.

"5. Abolish all new trials except in rare and unusual cases when the appellate court might desire additional light on the facts. Abolish so-called briefs

of evidence and let the entire transcript of the proceedings go up to the appellate court. Abolish motions for new trial and bills of exceptions. Let the appellant state in his brief the points on which his appeal is based, and have the brief served on opposing counsel fifteen days before the hearing in the appellate court. Let the appellate court render final judgment in all cases, civil and criminal, increasing or diminishing recoveries in civil cases and sentences in criminal cases, in its discretion. One verdict by a jury is enough. It seems to me a solemn farce for a case to be sent back two and three and four times for re-trial before a jury. Such a thing should be legally impossible of occurrence. The victor in such cases finds himself vanquished at the conclusion. The law has kept the word of promise to his ear and broken it to his hopes. It has given him a Barmecide's Feast.

"6. Allow no appeals in misdemeanor cases. The pardon board and the governor can be trusted to take care of an occasional miscarriage of justice in that class of cases. Allow no appeals in civil cases where the amount in controversy does not exceed five hundred dollars in value. Where a less sum is involved neither side can really afford to appeal, the poor man least of all.

"7. Abolish the pardon board and discourage in every possible way the miscellaneous signing of petitions for pardon by people and the granting of pardons by the governor except in rare and unusual cases. Our people have acquired a Gallic instability of character. They have developed a sentimentality which seems to abhor punishment for crime. Jurors who convict a man of a crime involving life imprisonment will sign a petition for his pardon within a brief while after conviction. It is a safe bet that Mrs. Maybrick could not have been kept in any American prison for as much as five years, even if there had been no doubt whatever of her guilt. We have much to learn from England in firmness and stability of character, as well as in adherence to law and the judgments of the courts."

In conclusion Mr. Hitch said: "The General Assembly of Georgia convenes within a few weeks, and I would suggest that this association memorialize the governor and through him the General Assembly to create a commission of fifteen distinguished citizens who shall be charged with the duty of studying the evils which have grown up under our present procedure, of making diligent inquiry into the laws of practice and procedure in other States and countries, and of reporting to the General Assembly in 1912 with a plan for the reorganization of our judicial machinery, and for a thoroughgoing reform and revision of all our laws of administration and procedure, civil and criminal, to the end that justice may be done speedily, economically and with inexorable certainty and precision." R. H. G.

Attitude of Bench and Bar Toward Reform in Judicial Procedure.—A recent number of the *Central Law Journal* (vol. 71, pp. 327-329) contains an editorial in which the mental attitudes of the bench and bar toward judicial reform are contrasted. Judge Evans of the Supreme Court of Alabama is quoted as saying in a recent opinion: "Our system of pleading is like an exogenous plant, whose capacity for multiplying limbs is only limited by the climate and the fertility of the soil. * * * What the system should be in this State could in my opinion best be devised, after a most thorough investigation into the workings of the different systems of pleading of the different States

and countries of civilization, by a body of men most learned in the law and altruistic in character. It may be true that the common-law system has its snake heads, but it seems to me that in nearly every instance where one has been cut off by our legislature, two have grown out to take its place."

Thereupon he brings his digression to a close as follows: "Do I object to the system? I can't say that I do. While as a citizen and a judge I deplore it, yet as a lawyer and dialectician I rejoice in it. As a means for the administration of justice, its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon."

"We believe that, in general aspect, the portrayal of the Alabama situation may be considered by our readers applicable in other States, but we dissent from the view that members of the bar, as lawyers and dialecticians, may rejoice therein. Furthermore, we see little in the system as 'an intellectual gymnasium' for special laudation.

"The system fosters astuteness more than acumen, expertness more than erudition, cheese-paring more than breadth in interpretation and trivialities in literalness more than the spirit of a noble science. The evil in our administration of justice is being as freely acknowledged by lawyers as by judges and with neither appears a more sincere desire to have this evil corrected. It is the 'bent' of mind it has produced in the bar and the bench which we will attempt to portray.

"At the threshold of this attempt we will assume that an environment in the evil has been created for practitioner and for court. It has produced exigencies which have caused both to yield. It has made the practitioner devote no inconsiderable, if not the greater part, of his attention and effort to the obstructing rather than the facilitating of the administration of justice. It has overwhelmed the court so that it cannot 'possibly investigate' sufficiently to 'understand the law.' Therefore, the environment accentuates these exigencies the more it is prolonged.

"The bar has come to regard successful practice of law to consist in avoiding, and interposing obstacles to, a trial on the merits, notwithstanding that the shibboleths of the codes are that pleadings shall contain plain statements of facts constituting actions and defenses, and that they shall be fairly and freely construed in the interests of justice. This is not saying that they relish this style of success, but merely that it is the only way that is open to them under the lawless law that is to be administered.

"In their Sisyphean efforts to roll stones of principle to the top of our system's hill, only to see them roll back to its base, if they are lawyers with ideals worthy to be cherished, their minds incline to the desire that the machinery of justice shall be scientifically exact. Under any other plan they constantly encounter judicial whims they cannot anticipate and they reap discomfiture from rules as uncertain as the length of 'the chancellor's foot.'

"Neither is the practitioner inclined to believe that, because desultory or interested efforts have not produced a scientific system, which by reason of its certainty will insure the largest measure of justice, such a system is unattainable. The harder he struggles with a loose, disjointed, uncorrelated affair, the more he yearns for its opposite, and that for which one most yearns, the more clearly it appears in the horizon of endeavor.

"Upon the judge the environment presses in a wholly different way. His

prime purpose is in reference to a concrete result—the disposition of a cause on the merits. He thinks of precedents, but they are more like restraints than guides. It is natural to every man to believe that he is possessed of an intuitive sense of justice which needs no prods or fetters. His inclination is to debate within himself, in each case, whether he should go the length a precedent invites or stop at the point a precedent defines. If the precedent is not in accord with his own sense of justice, he is inclined to distinguish it away or squarely repudiate it. In a word, he wishes to do justice, but it is his own justice he wishes to do.

"Further than this, he wishes, if he can, to do justice in his own way, and rules and forms may seem to him either as merely declaratory of his own plan, and, therefore, largely superfluous, or he is impatient of them as making him do something he does not wish to do. Also the judge tires of unending discussion about the interpretation and practical application of these mere accessories of the law.

"That a court cannot go directly to the heart of controversies it is established to decide, after it has tried so hard to end discussion about preliminaries, is a covert reflection on its intelligence, and it is merely human they should become weary about them. Also it may be said that just as the practitioner is inclined to believe that fixed rules are the only safe course, judges may conceive themselves able to mould a less exact system into a good working plan. At the same time, if judges were left to devise and formulate their own system, they would make each rule as universal as they could and one regulation consistent with another. There is sufficient disposition on the part of everyone to try to do this much. The judge, like the counsel before him, wants certainty, but the judge may not care so much about its according with old precedents as the counsel. The judge would be willing to trust to the judiciary developing and correcting the accessories to justice, while the counsel might think that this development and amendment would endanger the harmony of an original plan.

"Something, all agree, must be done. What is the best course to pursue? To our mind legislative tampering with a code is a distinct failure. Responsibility should be placed somewhere else. We believe there is but one of two methods left—either that suggested by Judge Evans or to devolve the duty on the judges of courts of record." R. H. G.

Criminal Procedure.—The following is taken from the *National Corporation Reporter* of August 31:

"In a recent address before the New Jersey Bar Association, its president said that 'a more complete, wise and excellent structure of criminal legal procedure than that furnished by the common law for the protection and security of the individual and the punishment of evil-doers, is not to be found in the code of any nation upon the face of the earth. It does not contain a single requirement that has not been the direct result of the experience of ages.' We presume that the learned speaker referred to criminal legal procedure as it exists to-day in this country, for in England, until long after our separation from that country, a person accused of crime could not testify in his own behalf and was denied the services of counsel on his trial.

"It would be interesting to have the opinion of an intelligent layman on this optimistic description of criminal procedure—some layman who, for a year, had kept track of the crimes committed, let us say, in the city of Chicago, of

the length of time elapsing between the arrest of the prisoner and final sentence, and of the number of convictions as compared both with the number of crimes and the number of indictments. Of this much of his opinion we may be certain, and that is, that he would have serious doubts of the good faith of any lawyer who, in view of the results of our system of criminal procedure, would lift a voice in its praise. But lawyers know that Bar Association oratory is very apt to lead to extravagance of language, of which, in a cooler moment the learned speakers would not be guilty.

"The purpose of a trial is to determine as quickly as possible, consistently with a fair trial, whether the defendant is guilty of the crime with which he is charged, and to secure a conviction, if he is guilty. Judged by this standard, the American system of criminal procedure is probably worse than the criminal procedure of any civilized country. Some of its defects are too firmy embedded in State constitutions or public opinion to allow of any hope of their removal within the immediate future, such, for instance, as the prohibition against the examination of the prisoner, either at or before the trial, the unanimous verdict, etc. But many other features of our criminal procedure have been grafted on the old common-law procedure, either by the legislature or by judicial rulings, and can be gotten rid of as soon as public opinion can be led by an awakened sense of public duty in the members of the bar. As an illustration of these excrescences, we refer to an article by the Hon. Wm. P. Lawlor, Judge of the Superior Court of California, contributed to a recent number of the *Journal of the American Institute of Criminal Law and Criminology.* The fifteen pages of this painstaking contribution towards procedural reform are packed with instances of obstacles interposed by the courts or the legislature to the speedy and efficient disposition of criminal charges. Many of these are local to California, but others are found, more or less, in other States. Among these is the gross abuse by the defendant's counsel of the right to tender instructions. Judge Lawlor states that in a recent case tried in San Francisco nearly two hundred instructions were proposed, containing in the neighborhood of 35,000 words—enough to make a volume of 75 to 100 pages. Of course, the only purpose of presenting those instructions was to confuse the minds of the jurors and establish a false standard for their guidance by telling them in two hundred different ways that, if such and such facts existed, they must find the defendant not guilty.

"Laymen will always judge the courts by their results. If they see that only one crime in three is punished, that rich criminals are able either to escape punishment altogether or defer the evil day for years, until the public has almost forgotten the offense, and then go free, after minimum punishment, because of the clemency of a weak governor or the venality of a parole board—if they see a system of extreme technicality administered so as to produce a new trial or a reversal on appeal, in two cases out of three, where the defendant is able to hire capable counsel—they will inevitably conclude that the system is a bad one, and that the lawyers who created the system, in one way or another, are responsible for its defects, and that they keep it in its existing condition of inefficiency because it is to their advantage to have it so. It is idle to tell them that a criminal trial under our system of procedure is a wonderful exhibition of technical skill and that every element of that system 'has been the direct result of the experience of ages.' Their answer would always

be that the system which produces such results as our system produces is a bad system. And they would be right." R. H. G.

The New Jersey Legal Aid Society.—Mr. Theodore Gottlieb describes the work of the New Jersey Legal Aid Society in the *New Jersey Law Journal* for June. The society was established, he says, about ten years ago, with the policy of the New York Society as a model, and is an incorporated charitable society endorsed by the committee of the Board of Trade. "It is founded on the democratic principle that justice is a matter of right to all men, and, despite many inequalities inherent in our social, political and legal systems, it aims, nevertheless, to place the rich and the poor on a substantial equality before the law. The object and purpose of all legal aid work is well stated in the platform of the Chicago society:

First. To assist in securing legal protection against injustice for those who are unable to protect themselves; and this is accomplished by assisting such deserving persons who are financially unable to employ an attorney to prosecute or defend a just cause, the Society maintaining an attorney for that purpose.

Second. To take cognizance of the working of existing laws and methods of procedure and to suggest improvements.

Third. To prepare new and better laws, and to make efforts toward securing their enactment and enforcement.

There are several large and cosmopolitan cities in New Jersey where dwell thousands of poor, ignorant and defenseless aliens, and these, and often our native intelligent poor as well, are victims of oppression and are plundered because they have not the means to invoke the law in their behalf or to protect themselves. The ordinary dispute arising out of contract fraud, detention of chattels or disputes with landlords cannot be settled without investigation and often must be taken to a district court for redress. This court is known as the "poor man's court," because the fees for summons, constable and other court charges are small, amounting to about five dollars per case, exclusive of an attorney fee of five to twenty-five dollars, but often these costs alone are an insurmountable barrier to the poor client with a valid claim, and thus 'equality before the law' is, in that specific case, but an empty, high-sounding and meaningless phrase.

These small cases are important; they cannot and should not be ignored. The alien, the defenseless and the victimized, smarting under the sting of an injustice, must be taught respect for American law and institutions, and that the basic principle of law is equality; and the start in the right direction is made when we teach them that there is justice for the poor and the oppressed. The New Jersey Legal Aid Society has offices with the Bureau of Associated Charities, and branch offices in Hoboken and Jersey City, where its attorneys may be consulted by applicants, correctly advised of their legal rights, and, if necessary, the appropriate legal steps are taken for the redress of grievances.

Since its organization the Society has disposed of over 7,500 cases of all kinds, the greatest number of single matters being wage and service claims. In this matter it has been of great service to the poor servant, the ignorant farm hand and foreign mechanics, all too poor pay for enforcing their legal rights. All cases of this nature are investigated, a letter written, followed, if necessary, by a personal call and, in some cases, by suit in the district court.

The pernicious activities of the loan sharks furnish many cases for our attorney. There are at least thirty in Newark fattening upon the poor and helpless. Interest rates, disguised as charges for legal services and as agent's commission in procuring the loan, range from forty to one hundred and fifty per cent, and the class thus exploited are but one degree removed from poverty, as they generally borrow only when a husband, son, daughter or other means of support has failed.

The first society of this kind was established in New York over a generation ago and there are now similar organizations in Philadelphia, Boston, Cleveland, Detroit, San Francisco, Atlanta and other large cities. The legal dispensary in Edinburgh, Scotland, is modeled after the New York Society. J. W. G.

The Law's Delay.—The justices of the Supreme Court of Brooklyn have, during the past nine months, brought nearly up to date a calendar that last fall was three years in arrears. This, says the Outlook, "is an encouraging indication of what can be accomplished elsewhere in the State and in the Nation if the courts set about the work in the same spirit of determination to put an end to the law's needless delays. Legislation may be necessary for this purpose in some parts of the country; but what is much more needed than new legislation is a spirit of determination on the part of the courts and cordial cooperation on the part of the lawyers. Delay in the administration of justice is often a denial of justice; and, if the courts and lawyers could be made to realize this, the present denial of justice owing to delay would be greatly lessened. In October, 1910, causes at issue in 1907 (that is, causes ready for trial and placed upon the calendar of the court) were being tried. In other words, the court was three years behind in the administration of justice. Nine months later—that is, in June, 1911—the latest issue tried in regular order was November 11, 1909, which shows that at the close of the court year the court was about a year and a half behind. In other words, in nine months it had tried enough cases in number to reduce the delay from three years to a year and a half. If the same progress is made next year, there is good reason to believe that in June, 1912, the court will be trying the issues which have just been joined and placed upon the calendar. In other words, the court will not be behind at all. A further indication of how the disposition of the cases by the court has been, and is, exceeding the incoming business is shown by the following figures: From and including October, 1910, to June 30, 1911, the last court year, the total number of new issues filed (or cases placed upon the calendar) was 2,803. The number disposed of during the same time, including trials, settlements, dismissals, etc., upon the regular call in order in court, was 3,267, or 464 more cases disposed of than were placed upon the calendar. These figures apply to jury trials only; for as to cases tried by the court without a jury, the calendar is up to date. This result has not been achieved without hard work. There have been during these months seven jury parts, one of which was given over a good portion of the time to criminal business. The judges have held court from 10 A. M. to 4:30 P. M. regularly, and as often as once or twice a week, one or more of the judges has sat as late as six o'clock. Trial term is not held on Saturday, otherwise there has been no break in the Court sessions except during the week of the Christmas holidays. It should be added that many of the judges, holding trial terms and sitting five

days during the week, have been called upon to sit on Saturday to dispose of Special Term matters."

Judge R. M. Wanamaker, of Kansas City, tells of his experience with the law's delay in a recent article in the *Gazette Globe:*

"In all trials one side must lose, and not infrequently both of them lose. An instance of the latter is contained in an account of a petty case, too common in our courts:

" 'Here is an account of a lawsuit where a $1 dog causes $400 costs of litigation. The case has been on the dockets for a year and last week it was decided, though it took two days of the court's time, four lawyers and thirty witnesses to complete the job. The man who sued for the dog lost.

" 'The suggestion about this matter is that the law should impose upon a court the duty of settling such affairs by a ten minutes' interview with both the parties. Such a thing is often done by just such simple process in the United States courts. We have seen sources of quarrels between sea captains and seamen settled by the United States judge in ten minutes' interview and settled more justly than if tried in the usual way with contentious lawyers and lying witnesses. We need such a court in the States to relieve them of the disgrace of petty litigation.' The friendly, fair and fearless intervention of the trial judge would dispose of nine-tenths of the cases of this character by generally eliminating the bad blood and bringing the litigants to understand the trivial character of the lawsuit. It must not be understood that because a claim is small it should not have fair and decent consideration by a court or that only large amounts in controversy should have such consideration, but it is quite apparent that three-fourths of the civil business of courts, which occupies the major portion of their time and labor, consists of mere money questions. It has never yet been demonstrated that it is good business to spend a hundred dollars for a fifty-dollar judgment, unless some principle of law or public policy needs to be determined.

"Six hours at most is an average court day. It will be readily seen that if ten minutes are lost by opening court at a late hour, ten minutes more in the examination of this witness and of that witness, ten minutes more in some petty argument upon a trivial objection, and so on, throughout the day's work, one-half of your time has been frittered away and nothing accomplished.

"It is to be expected that there will be opposition and criticism of these policies from some judges and many lawyers. Criticism will bring discussion and discussion will bring publicity. When the people once are brought to realize the situation generally obtaining to-day in courts, these and many other reforms will be speedily brought about. Publicity has done much to purge business of its wrongs and injustice. It will do much to purge courts of theirs.

"During the last five years upon the bench I have vigorously endeavored to employ these various ways and means of expediting business, and other short cuts to justice. The longest civil case tried, either with or without a jury, has occupied but three days, and but two criminal cases have exceeded three days. To-day we are trying civil jury cases begun within the last two or three months. While I probably have had the average number of reversals, it is gratifying to know that no case has been reversed because of an abuse of discretion or the adoption of any short cut to justice. Wherever I have erred in the

exercise of discretion, it has been in giving still too much consideration to old-time precedent and technical procedure.

"Courts themselves must restore to the public mind a very general loss of confidence in courts. They must do it by solving business questions by business methods, so that justice is done without fear or favor, denial or delay. The public are fast becoming awake as to all departments of the public service. They are asking questions of the professor, of the parson, of the statesman and of the judge."

In this connection it is interesting to observe that recently an attorney in Jersey City, after having his appeal dismissed by the court, was called upon to give cause why he should not be disbarred. The objection to the appeal was simply that it was frivolous. Some such strenuous measure as this, if applied upon courts, might go a long way toward relieving us of unnecessary delay in legal procedure. R. H. G.

Three Miscarriages of Justice.—The *Boston Transcript* on August 7, 1911, commented editorially as follows on three cases which have recently been before out Federal courts:

"The argument for the impeccability of judges, and particularly a continuance of the system of life appointment which we in the East hold to pretty rigidly, has received of late a severe jar by the actions of the Federal Court in New York City. It is beginning to appear that there may be something as bad and offensive to real justice in our system as in the recall provisions in the Arizona constitution which we have been hooting at and declaring to be a cowboy and wildcat legislation. Our readers will recall that on May 25, in the trial of the Duveen smuggling case in New York City, Judge J. L. Martin, United States district judge of Vermont, sitting as circuit judge in New York, refused to sentence Henry J. Duveen to prison but let him off with a fine. One reason given for this decision was that Duveen's health was such that he would die in prison; but all have heard of so many of these hopelessly ill culprits who miraculously recovered after being let out of jail or after a similar soft-hearted and soft-headed judge had refused to sentence them to prison, that Judge Martin ought not to be excused for his blindness in this instance. This was a singularly offensive case. The Duveens were given special privileges by the custom-house officers. They were allowed to appraise their own goods and even the goods of their competitors because of their eminent standing. In this way they not only robbed the Government but they had a chance to 'sting' their competitors more than the proper duties. At last they were detected in having themselves underestimated the value of things they brought in and also in having smuggled in, without any duty whatever, millions of dollars of goods. As we said at the time, there is absolutely no excuse for these smugglers, no reason why they should escape punishment. It may not be well to send a dying man to prison, but there is no reason why the judge should not have sentenced and then suspended the sentence and see if Duveen would die so promptly.

"This case attracted attention throughout the country. It was succeeded on July 20 by another customs fraud case, when Hugo Rosenberg, implicated in customs frauds to the extent of one million and a half, was freed by Judge Archbald of the United States Circuit Court on the payment of a twenty-five thousand dollars fine. This sentence was made in spite of the powerful plea

for a jail sentence by District Attorney Wise. He said: 'He is one of a crooked crowd, and I would rather see him get one day in jail than be let off with the payment of a fine of $1,000,000. The exaction of a fine would be a travesty on justice. This man is here after having jumped his bond. Before he did that he tried in every possible manner to get free from the indictments by paying a fine that would be but a paltry part of the money out of which he has swindled the Government. He visited my office and, admitting his guilt, crawled upon his knees and tried to kiss my hands in an effort to get me to consent to a fine. I refused to be any party to a money compromise of the case. During the year he has been a fugitive from justice. Rosenberg has in various ways tried to reach me, but I have consistently refused to be a party to any dicker with a criminal of his stamp, guilty of wholesale frauds on the revenue of the country.'

"What brought this case into particular prominence was that on the same day Judge Archbald sentenced a comparatively poor Greek fruit dealer, Dionysius Pollas, to three months' imprisonment for customs fraud. Rosenberg was a millionaire importer of millinery goods, silks and dresses. Pollas imported dates, figs and cheese. As District Attorney Wise said: 'The frauds committed by the man Pollas, whom you have just sentenced to a three months' term in the penitentiary, were but a huckleberry as compared with those perpetrated by Rosenberg. Prison terms are the only way to stop wealthy men violating the customs laws.' This glaring contrast stirred the whole country.

"Now comes another case in the same court and by the same Judge Archbald. This was the wire pool cases which the Government has been prosecuting, and Edwin E. Jackson, Jr., who was the supervisor of these pools, was on Friday fined $45,000 instead of being sent to jail as District Attorney Wise demanded. There were eighty-four men that were implicated under indictment for their part in this pool. Ten of these changed their pleas of 'not guilty' to *nolo contendere;* one of these was Herbert L. Satterlee, son-in-law of J. P. Morgan. There was but one count against nine of these men and each of them was fined one thousand dollars, but there were nine counts against Jackson and he was fined five thousand on each. This was as heinous a case in the eyes of District Attorney Wise as that of Rosenberg, and the district attorney was vehement in his denunciation of Jackson, who is a lawyer and who organized the pool. It is probable that if the bar of New York has any sense of honor that they will at once disbar Jackson. Here is what the district attorney said against this man in his protest against his being fined instead of jailed:

"'He is the worst type of criminal that society can be damned with for he has made his millions by dragging into the illegal pools that he has built up men who were honorable and had no intention of doing an illegal act. Then when he found that his pools were going to be prosecuted, he went all over the country to get the men he had duped to come to his aid. He is not like many others who have been indicted, for he knew well that his practices were illegal. He is a lawyer. Then when the members of the pools became suspicious he fooled them into believing that he had put the whole thing up to the Department of Justice and that it had been approved. It was he who originated the whole scheme for the wire pools and it was he who was responsible for the system of fines that were levied and collected. Instead of a

legitimate law office, with law clerks, he has maintained a great suite of offices full of detectives, inspectors and accountants to see that the pool members do not break their pool agreements. Fifty different pools were operated from his office. Inasmuch as even the maximum fine would only represent a small percentage of the fortune he has made from his practices, I ask the court to impose a prison sentence.'

"It is hardly necessary for us to add any comment to these three cases. One must, of course, take into account the fact that a district attorney is there for the purpose of getting as strong a conviction as possible and that he is likely to exceed the bounds in demanding extreme punishment, yet Mr. Wise's points are so clearly and so well stated and appeal so much to the average man that there is no going back of them. The fact that his appeals were all overruled in these three cases constitutes an unpleasant reflection upon the Federal courts of New York. They give a handle to the Socialists and all the other apostles of discontent and unrest to rail against our entire social and governmental system. They are, to say the least, most unfortunate and one can easily see Arizona pointing its finger at New York while the country applauds. Mr. Wise is right. The demands of justice and the stopping of such iniquitous practices as smuggling cannot be effected by fining men of wealth. Plenty of money can be got to pay their fines. What will really punish them and stop their crimes is sending them to jail. That's a harsh thing to do, in the eyes of Judge Archbald or our own 'reform' governor, but it only will make the criminal know what lawbreaking entails." R. H. G.

Judge Ralston's Address.—Judge Ralston, who has acquired a special reputation in the trial of homicide cases, speaks with authority and force in his address to the Pennsylvania State Bar Association upon the delay in the execution of murderers. It is admitted that the criminal law loses much of its force by the long interval which separates the punishment from the crime, and that the multitude of technical delays which are permitted under our procedure impair the popular respect for public justice. While the contrasts that are often made with the prompt disposition of a murder case in England are not always intelligent, they do direct attention to the relative inefficiency of our methods and emphasize the demand for their correction.

How can they be corrected? Judge Ralston, speaking out of abundant experience and thoughtful observation, suggests some practical amendments to the statutes regulating appeals that would shorten the time consumed; but while some improvement might be made by legislation, he concludes, "the delays which now occur at all stages of the proceedings can be avoided in one way only, and that is by the prompt and vigorous action of those whose duty it is to administer and execute the law." The law is more impeded than helped by statutes. If the English courts reach their conclusions directly, it is because they have worked out their own procedure, by centuries of experience, with no more than an occasional statutory confirmation of judicial practice. Very much of the needed reform of practice here might be accomplished by the courts.

The great difference that impresses an unprofessional observer between English practice and our own is that in England a case is ordinarily determined at the trial; here it is only begun. The right to move for a new trial

is to be respected, because that may be the only way by which an evidently unjust verdict can be corrected; but such a motion ought to be made at once and determined at once, and not employed, as it is with us, as an accepted method of indefinite postponement. Judge Ralston explains clearly why the inevitable motion for a retrial, in Philadelphia practice, results in long delay; but his belief is not less clearly indicated that it is wholly within the descretion of judges, which no legislation could control, to hear and decide the motion without loss of time.

This is only one stage of the proceedings at which promptness depends more on judicial authority than on legislative enactment. And this, of course, applies equally in all criminal trials. Promptness in bringing a homicide case to trial must depend on the activity of the district attorney. Circumstances differ so in every case that it is impossible to erect any general standard of what is a reasonable time, except as occasional exhibitions of exceptional energy show what can be done when there is any real desire for expedition.

There is seldom much time wasted with us in the actual trial, which is most distinctly controlled by the personal authority of the judge. The time that can be consumed in the formalities of an appeal is to a great extent regulated by statute, and this is the point where Judge Ralston recommends legislation that would hasten all these proceedings without the least impairment of any personal rights. Even with this, however, promptness of action can never be secured by prescription, but must always remain a matter of professional procedure. That is why it especially concerns the bar association.

R. H. G.

Crime and Vice in Cities.—The function of effective administration, which Judge Ralston emphasizes in the foregoing note, is forcibly brought forward by J. C. Bayles, M. E., Ph. D., in an article entitled "Crime and Vice in Cities," in the *Independent,* who comments on the fact that lawbreakers in our cities "take no chances" when a precinct commander tells them that he will enforce the law and they know he means it. Why is it then that so many officials who enter office with "honor, faith, and a sure intent," are unable to attain this end?

"The police force considers itself superior to the law. The policeman who does not conform to its rules and accept its traditions may be permitted to grow old in the service, but he has no chance of promotion. He early has it impressed upon his understanding that the relation of the individual policeman to the system is that of the loyal partisan to his party. Independence of thought or action quickly lands him outside the force, or at least destroys his career in it. He is made to realize that mayors may come and commissioners go, but that the system goes on forever; that reform and reaction may be expected to alternate with measurable periodicity, but that the underlying conditions are not likely to change, and that the police force must be a Camorra for its own protection and the public good; that reformers are impractical visionaries who waste their energies in planning what is impossible of performance; that it is not necessary to give heed to ministers or newspapers, nor for that matter to mayors and commissioners vested with a brief authority which seems a great deal more authoritative than it really is. The reason no mayor or commissioner has been able to reform the system is that those inspired with this desire have begun by trying to learn its mysteries and fathom its secrets. An official

term is not long enough for this, and even with a life tenure it would be scarcely possible to one who had not entered the uniformed police as a patrolman and worked up, step by step, to inspectorial rank. The fact remains, however, that 'the system' is the most vulnerable Camorra ever organized, and its destruction easy if gone about in the right way. Like the Gordian knot, its intricacies are insoluble, but it may be severed with one blow of the official sword whenever the hand of another Alexander shall wield it.

"The man who as police commissioner accomplishes what so many have unsuccessfully attempted will not be a politician. Probably he will have had no experience in public life. His selection and appointment could occur only under a mayor whom the politicians would regard as a calamitous accident. In municipal politics just that happens occasionally. The chief qualifications of the commissioner would be sound common-sense and executive ability. It would need but a few days of careful observation to convince him that between a commissioner temporarily in office and the uniformed force there is a fixed gulf wider and more impassable than that which separated Lazarus from Dives in the parable. His first duty would be to master the business of the department as an executive responsibility and make sure that it was conducted as nearly on business principles as is possible in the public service. Meanwhile he would learn what he could of the condition of the city and the standard of police efficiency in the several precincts. In all probability this would lead to a considerable 'shake up' for the good of the service. When he was ready for it he would assemble the captains for a conference behind closed doors, taking good care that the newspapers were not in the way of learning more than the captains would be willing to tell them—which, in the circumstances, would be very little. To them he would say, in effect:

"'As police commissioner I have assumed under oath the responsibility for the enforcement of the law as it exists. My opinion of the wisdom of any particular statute or ordinance, or of the whole code, is of no consequence to anyone except myself. If I do not like my duties and am not prepared to discharge them in good faith, my proper course is to resign, which at the present time I have no intention of doing. I realize, however, that I can be instrumental in enforcing the law only through the members of the uniformed force. I know and care to know nothing of the details of precinct management, but I can advise myself how the precincts for which I am responsible are policed and this I mean to do from day to day. My object in calling you together is to say to you that it is my purpose to hold each precinct commander personally responsible for the condition of his precinct. I will give you a reasonable time to "clean up," but advise that you make a beginning without unnecessary delay. If you are in doubt as to what needs to be done first, come and see me and I will tell you what I have found out. That I can tell you anything you do not know is improbable; but if you desire to know how much I have learned in a few days I have no objection to telling you. It may be to your advantage.

"'My deputies have been selected with especial reference to their ability and willingness to assist me in the work I have undertaken. If in the performance of the proper and necessary police duty you are embarrassed or interfered with by anyone over you, come straight to me and I will give you all the protection you need. The best service I can render you at the moment is to impress you with a realizing sense of the fact that as long as I am in

office the law will be enforced. Every member of the uniformed force who is negligent in the performance of police duty will be summoned to headquarters to answer charges, and if such charges are sustained he will be incontinently dismissed. I shall try to be just and fair-minded, but when I dissmiss an officer for cause it may be taken for granted without discussion that no influence he can bring—political, social or personal—will have the slightest weight in his favor. Should he secure reinstatement by a court of competent jurisdiction, I shall, of course, respect such order; but he will be dismissed again the moment his negligence warrants it. What has been designated as "the system" is confronted by a condition and not a theory. It may be stronger than I am, stronger than the mayor, stronger than public opinion; that is to be determined; but in the trial of conclusions there is likely to be an official guillotine worked overtime and a large basketful of heads. This is my ultimatum. Now do me the favor to return to your respective precinct stations and get busy.'"

R. H. G.

Labor for Prisoners.—A novel experiment in humanizing the prisoners has been carried on for some time at Montpelier, Vt., of which Mr. Morrison I. Swift gives an interesting account in the *Atlantic Monthly*. Not long ago the public press contained extensive comments upon a situation which has been found to exist in many of the state prisons, and a magazine article, which described how a great manufactory has its goods made by convicts in several states for thirty-four cents a day, gained considerable notoriety. The situation in Montpelier as described by Mr. Swift's article presents a positive contrast to this one.

In the streets of Montpelier, after visiting the prison, Mr. Swift met five or six of the very prisoners he had seen in jail, now walking about the streets with no prison garb, apparently free, contented and happy. They had been out to do their daily work, and, when it was over, of their own accord returned to the prison. The system under which this singular state of affairs was made possible was brought about by the sheriff of the county in which Montpelier is situated. He found a law which permitted those prisoners in the county jail who are committed for the less serious offenses to be put at work "either within or without the walls of the prison." It seemed to him that most of the prisoners deserved compassion rather than blame; that prison life without regular work was degrading them and injuring their health, and that it turned them out at the end of their terms worse physically and morally than when their imprisonment began. At first he put some of the men to work on his own farm, paying the state for their labor. Later he put them at work in laying water-mains; their wages, $1.75 a day, all went to the state. Both these experiments were complete failures. The men showed no interest in the work, and did just as little as they possibly could. The sheriff, Mr. Tracy, discovered the reason of the failure one day when he asked one of the prisoners why he would not work well, and received the reply, "I'm doing just as little as I can and not be punished, and I'm going to keep on. You would do the same." Instantly the idea occurred to Mr. Tracy that he might furnish an incentive to the men to work, and he asked, "If you could have seventy-five cents for yourself from your work every day, what would you do?" "Try me," was the answer. From that time on the pay received for the work was divided. Out of the full laborer's wage of $1.75 a day, one

dollar was given to the state, and seventy-five cents was retained by the sheriff for the prisoner, and the accumulated sum paid to him when he left prison. The innovation was extended and the men's earnings now amount to a considerable sum.

The Montpelier plan succeeded because under its operation the prisoners were trusted. They were given responsibilities of their own.

Mr. Swift says that "when such a prisoner finds that he is treated as a man, 'a feeling of mingled surprise, gratitude, elation, and pride, awakens in him; he learns for the first time the value of social esteem and determines to deserve it.' Other counties have, to some extent, adopted the system, but so far not with anything like the success obtained in Montpelier. It is evident that the personal equation counts in this matter, and that the character of the sheriff at Montpelier has a good deal to do with the success of the experiment there; an officer carrying on such a system must not only be a 'combined labor bureau and labor exchange,' but must have a really sincere interest in the welfare of the prisoner. The law itself was not a remarkable one, but the way in which it has been carried out seems extraordinary, and full of suggestion and promise. The Montpelier plan appeals to the self-interest of the prisoner in a practical way, and it develops also strength of purpose and self-respect. One question at once arises in the minds of the readers: What attitude would the labor unions take as regards such a plan? At Montpelier the men have been employed only in comparatively unskilled forms of work, even although they had learned a trade; but Mr. Swift tells us that he was assured by a trade union leader that there would not be the slightest objection on the part of the unions to any man with a trade exercising it, provided he were given union wages. It would not be safe to draw sweeping conclusions from the experiment described; but it is certainly true that such an attempt deserves most careful consideration. Mr. Swift points out that there has been a general movement the country over in the direction of giving a new chance to criminals who are not hardened. As a striking instance of this he quotes a sentence imposed by a judge in Los Angeles upon a young man who had embezzled five thousand dollars and spent it in dissipation: 'You shall stay at home nights. You shall remain within the limits of this county. You shall not play billiards or pool, frequent cafes, or drink intoxicating liquor, and you shall go immediately to work and keep at it until you have paid back every dollar you stole. Violate these terms and you go to prison.'" R. H. G.

The Scientific Study of the Law.—The following is quoted from a letter by Mr. Axel Teisen, of Philadelphia, to the editor of the *Central Law Journal,* who very emphatically approves the plan herein set forth:

"As far as I have been able to learn, there is not in this whole country a single periodical solely devoted to the scientific discussion of law, except, perhaps, some university publications, more or less in the nature of playgrounds for budding jurists. The practical portions of the journals are the most important, and all theoretical papers have to be cut short, as but a small space can be allowed to them.

"A purely theoretical periodical would probably not pay; but in case of an old-established, very widely known and appreciated publication, might it not be practical and possible to devote one issue each month to theoretical discus-

sions, leaving the other three or four to deal with reports and discussions of cases, etc., with such editorial remarks as they might call for? Such an arrangement would give contributors a chance, not merely to make remarks about legal questions, but to take them up for a thorough discussion. In this way a beginning might be made towards the creation of a scientific jurisprudence, the lack of which is much felt, and which some people have thought could be supplied, if somebody would give a million or so for the purpose of creating an American corpus juris." R. H. G.

The Concepts of Punishment and of Damages for Tort.—Prof. Giulio J. Battaglini, a translation of whose article on the "Function of Private Defense in the Repression of Crime" appeared in the last issue of this JOURNAL, in a pamphlet reprinted from the *Rivista Penale,* discourses upon the concepts of punishment and of damages for tort. Punishment and damages for tort, he says, are both consequences of anti-juridicity. But punishment is the sanction of criminal law while damages for tort are the sanction of private right. There is no substantial criterion of distinction between crime and tort. The only sure and irrefragable criterion is formal. Crimes are torts prosecutable in a peculiar way, namely, by way of punishment. We cannot say that the imposition of punishment indicates that the public interest is involved and that the imposition of the obligation to pay damages indicates that private interest is involved, because every judicial guard shields both public and private interest. When we speak of public interest we mean an interest immediately public, and when we speak of private interest we mean an interest immediately private. But we cannot draw a line of demarkation even between these. It is the fiat of the legislator that distinguishes between them and that declares one act or omission affected with an immediately public interest and another act or omission affected with an immediately private interest.

Merkel and Heinze say that damages for tort are but a species of punishment. But, it seems to the author, damages for tort are intended to heal an old wound, while punishment produces a new wound. That damages for tort are not punishment is shown by this fact, among others, that the granting by the state of the right to sue for damages does not exempt from penal discipline. Venezian says that punishment is an absolute evil insomuch as it means privation for one without corresponding advantage to another, while damages for tort are a relative evil insomuch as damages are a loss to him who must pay them but a profit to him who receives them. But this is a mistake. Does not the state benefit from the fear raised in the breasts of the generality of individuals and from the prevention of the commission of more crimes during the imprisonment of the criminal?

There is a further difference between the concepts under analysis. The undergoing of punishment requires only a passive behavior, the obligation to pay damages implies active conduct. The essence of punishment is the restriction of the liberty of individuals. And in the case of fines we have a near approach, at least in semblance, to damages for tort. Punishment for crime can never be the consequences of anything but an act against law; but damages may be imposed for conduct allowed by law. For example, Art. 713 of the Italian Civil Code and Sec. 962 of the German Civil Code authorize the owner of bees to follow them into the property of others, but they enjoin that he re-

pair the wrong. Again children and insane persons are not responsible criminally, but in certain cases their property may be drawn upon to pay damages for a wrong committed. Only responsible persons therefore are subjected to physical compulsion, but the representatives of children and insane persons are bound to heal the old wound made by the latter. An interesting question now arises: Should the state repair the damage caused by children and insane persons who are both irresponsible in the eyes of the law? There is no justification in law for charging their estates because their acts or omissions are not anti-juridical. "But I should base my position," says the author, "in favor of charging the estates of individuals upon the ground of social utility. Social utility is the touchstone by which you must test every juridical situation." To resume the antithesis; it must also be noted that it makes no difference who pays the damages just so long as they are paid, whereas punishment can be inflicted only upon the responsible doer of the wrong. Finally, it is important to mark that while the command of the state to pay damages may be directed to associations of individuals, it is the individual alone who can commit crime and who must undergo punishment.

[Furnished by Robert Ferrari, New York City.]

Justice De Courcy's Promotion.—In the Boston *Transcript* is an account of the promotion of Justice De Courcy to a Justiceship in the Supreme Court of the state of Massachusetts. The writer of the editorial in the *Transcript* says that Justice De Courcy has had the distinct advantage of having been a very successful lawyer. Besides this, and in addition to having been a strong judge in the Superior Court, Mr. De Courey has a strong literary bent. He is exceedingly well grounded in the classics and in poetry and is noted for his oratorical ability, which he has shown in occasional addresses. Moreover, as the readers of this JOURNAL know, his interest in criminal law has always been strong and extensive. Ever since the organization of the American Institute of Criminal Law and Criminology, he has been an active contributor to the *Journal* of the Institute and a member of its editorial board.

In 1882 and 1883 Judge De Courcy was in the law office of the late Hon. John K. Tarbox, and in January of 1884 he became assistant district attorney with the Hon. H. F. Hurlburt, which office he held six years. In 1887 he was honored by appointment to the presidency of Boston University Law School Alumni Association. He was chosen city solicitor of Lawrence in 1892. The year following he entered partnership with Attorney Walter Coulson. The same year he was chosen trustee of the public library. In 1907, Judge De Courcy was chosen president of the State Conference of Charities, and in 1908 was appointed the first chairman of the Massachusetts Probation Commission, the law creating which he was instrumental in having enacted. He is vice-president of the National Conference of Catholic Charities; chairman of the committee of criminal law reform of the American Prison Association. He is a member also of the Board of Visitors of Boston University Law School. Last year he was chosen one of the Massachusetts delegates to the International Prison Congress at Washington. R. H. G.

Criminals and the Law.—The following is from the Canadian *Law Times* for July, 1911, under the authorship of Archibald Hopkins, Esq.:

"There is a change in the present method of administering the criminal law

which, while it may be open to objection, can hardly fail, if tested, to insure ameliorated conditions. Society is interested in apprehending, convicting and punishing the criminal, and holds itself responsible for doing so. Is it not equally interested in and responsible for the protection of the innocent? What greater wrong or injustice can be imagined than the arrest, indictment, and trial of a perfectly innocent person? It constantly happens. The whole power and machinery of the state is turned against a single individual who is often without means to defend himself or has to sacrifice all that he possesses to do so. The least that the state should do when it has mistakenly accused a man, is to assume the expense he has been put to. No one can compensate him for the distress he has suffered. But why should the state not do more than that? Why should it not have sworn officers of high character to defend as well as to prosecute? Whatever the objections, the benefits would be clear and immediate. The accused would be sure of a fair trial from which all subornation of perjury would be removed and which would be conducted without the legal pyrotechnics and sensationalism which now prevail. Objectionable personalities of counsel, unreasonable delay in obtaining juries, groundless objections to questions, misleading statements to the jury and chicane, trickery, and bribery in influencing them would all disappear. Government counsel for the accused would be just as sincere and earnest in their defense as the district attorney in prosecution, but the scales would be held evenly, and not as now, as has been said, with the entire power and weight of the state on one side. Not only would it greatly improve the character of criminal trials and promote the ends of justice to have government defense, but it would bring another very great benefit, it would put the criminal bar out of business. Doubtless it comprises some honorable, upright men, but it has, as a whole, always been a reproach to the profession, and an ally to crime, shielding criminals by perjury and fraud, and necessarily living off the proceeds of their wrongdoing. It is safe to say that there would be fewer crimes committed were not criminals everywhere aware that clever, experienced, wholly unscrupulous lawyers, who will stop short of nothing save their own incarceration, are always to be found to defend them by every expedient which trained ingenuity, deceit, false swearing, and jury bribing can compass. Is it not worth considering whether society as a whole would not be benefited by so changing the method of criminal trials that the government shall be charged with the defense as well as the prosecution of accused persons, far beyond any additional expense that it may involve? If it be said that an accused person has the right to select his own attorney, it might be conceded that he should be permitted to call assistance, but the directing of the conduct of the trial should be left in the hands of the government attorney, insuring the elimination of the worst evils that disgrace the existing system." R. H. G.

Aid for Convicts' Families.—Kansas City is making an interesting experiment in the problem of supporting the families of convicts. Under a law that has been in existence two months the judge of the Juvenile Court of Kansas City has power to give pensions, for the aid of such families, to wives or widows of convicts residing in his county. For one child under 14 years of age $10 a month is granted, for each additional child $5 a month. The pensions are given only when by their aid the mother is enabled to remain at home with

her children instead of going out to work. Fourteen pensions already have been granted.

Judge Edward E. Porterfield, who framed the law, says that last year there were in the Juvenile Court more than 200 children whose mothers were widows and were compelled to work away from home. These children rapidly became delinquent. Those who were mildly delinquent were sent to the McCune farm, where the cost to the state and county is $16.16 for each boy. In many cases with a $15 a month allowance a widowed mother is enabled to take care of five small children while remaining at home and doing what work she can for pay.

Thus it appears that society directly benefits in a financial sense by the new law; indirectly it benefits in that the children are kept with the mother, who in most cases is their best guardian. It will be of public interest to see how this law works. If it is generally satisfactory it probably will be a precedent for similar laws in many states. Considered only as an economic measure it seems to have merit, though this is not the most important element of the problem of dealing with poor families that have lost their natural means of support.

R. H. G.

Criminal Procedure in France and Great Britain Compared.—At the London conference of the International Law Association in August, 1910, the subject of comparative criminal procedure was discussed. A paper, entitled "Criminal Procedure in France and Great Britain Compared," was read by Ernest Todd, J. P., Barrister at Law. Mr. Todd pointed out that during the period of Feudalism the development of the criminal law in the two countries was along parallel lines; that in England the method of administering justice has remained practically the same, while the French procedure was radically changed through the introduction of inquisitorial methods, which had their origin in the Inquisition of the Church.

After stating that there was no codification of the French criminal law till the year 1670, Mr. Todd enumerated as follows the principal provisions of the Ordinance enacted that year: "(i.) It gave jurisdiction in Criminal matters to the Court of the district where the crime was committed; (ii.) It limited the private jurisdictions, and extended those of the King's judges; (iii.) It limited appeal jurisdiction to the King's judges; (iv.) Great efforts were made during the discussions to supersede the jurisdiction of the Church in Criminal matters altogether, but in the end the Church triumphed and her jurisdiction was confirmed; (v.) It made the very important change that a person who made a complaint upon which criminal proceedings were taken should not *ipso facto* become liable as prosecutor to bear the costs of the prosecution, this liability only being incurred if he declared himself a 'Partie Civile;' (vi.) Provision was made for the better regulation of prisons, for food and medical aid being given to prisoners, and for a mitigation of the horrors which then existed inside the state prisons; (vii.) It confirmed the power of the Juge d'Instruction to examine the prisoner and witnesses against him secretly, but made provision for this being done within twenty-four hours of arrest (a most salutary and necessary provision, having regard to the practice then prevailing of allowing prisoners to languish in gaol without any sort of trial for an indefinite time); (viii.) The provision that a prisoner should not have the assistance of counsel during his examination by the Juge d'Instruction was confirmed; and (ix.) Pro-

vision was made for those cases in which the accused might be subjected to the torture."

Further extracts from Mr. Todd's paper show the development of the French law of criminal procedure, and also certain differences between the procedure of France and that of England.

"This Ordinance of 1670 remained in force until the revolutionary period, commencing in 1788, when its provisions were found to be necessary of revision. After much discussion, in which comparison was made between the provisions of the procedure ruling in England with those in force in France, it was decided to make very important alterations in favor of the prisoner, and it is submitted in the direction of granting him elementary justice, for we find that by an edict of 1788, extended and slightly altered by a further edict of 1791, the following very great concessions were made: (1) the prisoner should, right from the commencement of proceedings against him, be accorded the assistance of counsel; (2) the whole of the proceedings should take place in public; and (3) the prisoner should, without cost, be supplied with copies of the depositions of all witnesses giving evidence against him. In addition to this, it was provided, that if the prisoner himself could not afford counsel, this should be provided for him at the public expense. These provisions once conceded, one would have expected them to remain for all time, a monument to the sense of justice ruling in favor of accused persons, and of the sentiments of humanity guiding those who ruled over the destiny of the French nation. So far from this proving to be the case, however, we find that during the period immediately leading up to and culminating in the first Empire, the discussion on the three points referred to above, recommences, and that in Napoleon's Code, published in 1808, all the good done by the previous discussions and provisions is abrogated, and the old vicious secret procedure is reintroduced, for by Article 73 of the Code of Criminal Procedure, it is provided, that witnesses against the prisoner shall be examined by the Juge d'Instruction, in the presence of his Registrar, *but in the absence of the prisoner.*"

"It is in regard to the preliminary inquiry in matters criminal that the greatest divergence is found, and this is fundamental, and as pointed out above, traceable to the influence of the Church in France and to the ancient rights and liberties of the people in England, existing long before, but declared and confirmed by Magna Charta and the Bill of Rights.

"In England, criminal proceedings may be initiated in a variety of ways, *videlicet*: (1) By arrest by a private person without warrant, such person having seen another in the act of committing a treason, a felony, or a dangerous wounding, or engaged in signaling to a smuggling vessel, committing an offense under the Vagrant Act, the Larceny Act, 1861, the Coinage Offenses Act, 1861, or by night, any indictable offense whatever. (2) A police constable may arrest in any of the above cases, and in addition any person whom he reasonably suspects of having committed or being about to commit any indictable offense, without warrant.

"Where arrests are made in either of these ways, the accused is taken to the police station and the inspector or sergeant in charge takes the charge (if it is properly supported) and brings the case before the magistrates in open court at the earliest possible opportunity, generally the day following the arrest. In addition to the above methods of commencing criminal proceedings there

are the following: (*a*) by information, which is a written complaint made on behalf of the Crown and filed in the King's Bench Division; (*b*) a presentment or written accusation of crime presented on oath by a coroner's jury or grand jury; (*c*) by bill of indictment to the grand jury; and (*d*) by summons to appear; but whichever of these methods of commencement be adopted, the accused person must be tried in open court and ultimately (if the magistrates commit him for trial), by a jury of his countrymen. The French Code of Criminal Procedure, however, provides only one method of commencing criminal proceedings, and that is the one referred to in Article 1 of this particular code, which enacts that the right of commencing proceedings only belongs to the officials upon whom it is conferred by the law. Article 6 confines this to the Ministére Public, and his action must be preceded by a complaint of the party aggrieved, or by an official denunciation to the authorities by the proper authorities of the country where the offense was committed. Further, by Article 6, the proceedings must be initiated at the instance of the Ministére Public of the district in which the accused resides, or of the place where he may be found. These proceedings once commenced, the matter is handed over for investigation to an examining magistrate, who is given power by Article 59 to perform all acts attributed to the Procureur de la République, which means that in the examination of the accused and of persons who can give evidence against him, this examining magistrate has almost plenary powers. In exercising his powers and jurisdiction he can deal with the matter entirely privately, with closed doors, and is required by Article 73 to hear each of the witnesses separately, *in the absence of the accused,* assisted by his clerk or registrar.

"Until Madame Steinheil's case brought this matter prominently before the public, the accused was not entitled to be assisted by counsel before the examining magistrate, but by a law recently passed, this protection was extended to the accused, although no alteration was made in the provisions of Article 73, nor in the system of holding the preliminary inquiry in private. From the point of view of enabling the examining magistrate to get at the truth, of course there is much to be said in favor of the practice of delaying publication of particulars, until such time as all parties concerned in the perpetration of the alleged crime have been caught in the net, but it is quite obvious that this system of conducting judicial inquiries behind closed doors is open to grave abuse, and although it may in some cases work well in a country where the people are used to it, it would never be put up with in England, where we have been for so many years used to more open and generous methods, and where it is an axiom that every person is assumed to be innocent until he has been found guilty in due form of law."