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President's Address

Robert Ralston

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THE PRESIDENT'S ADDRESS.¹

ROBERT RALSTON.²

The work which has been done by the Institute in the past year appears in the reports of the Committees, which will come up for discussion this morning. I would suggest that the appropriate Committee consider the advisability of framing a law to regulate the sale of fire-arms in the different states. Many crimes are directly due to the habit which is common among certain citizens and aliens of carrying revolvers and other deadly weapons. Unless a uniform law on this subject is passed by the various states, the traffic in fire-arms cannot be regulated, because a person in a State where their sale is prohibited can purchase weapons in an adjoining State. In New York there is such a statute, but men cross the river to Jersey City, buy their fire-arms, and return to New York. The Committee of the Institute might co-operate with the Commissioners on Uniform State Laws for the purpose of drafting and securing the adoption of such legislation.

In recent years probably no subject has been so much discussed by speakers at meetings of Bar Associations and by writers in law journals and other periodicals as the unsatisfactory administration of the criminal law in the United States. Some years ago Mr. Taft said: "It is not too much to say that the administration of the criminal law in this country is a disgrace to our civilization." This remark has since been frequently quoted with approval. When the statement was made Mr. Taft probably had in mind some of the notorious trials, which if they represented the usual methods pursued in this country, would fully justify the statement. It must be remembered, however, that there are forty-eight states in the Union, and if he meant that in each one of those states the administration of the criminal law is a disgrace to our civilization, the statement was entirely too broad. Indeed, if the conditions which he was referring to were carefully investigated, I believe it would be found that the administration of the criminal law is satisfactory in many of the states, and that it is in comparatively few of them that such a condition as he described

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1. Read at the Seventh Annual Meeting of the Institute at Salt Lake City.
 2. Judge of the Court of Common Pleas, Philadelphia.

exists. At least it is from comparatively few states that such complaints are heard.

Many criticisms of criminal procedure in the United States have been made, and many remedies suggested. It must be borne in mind that there is no one system of criminal procedure in this country, but that the practice varies greatly in different states. The matters which have been the principal subjects of criticism are the following: The quashing of indictments or granting of new trials on account of some disqualification of a grand juror, or some technical error in the indictment or at the trial; the great length of time consumed in selecting juries; the methods of examining expert witnesses; the constitutional prohibition against compelling the accused to testify, and the usual prohibition against commenting upon his failure to testify; the abuse of their privileges by lawyers; the methods of the judges in charging juries; the premature discharge of the jury before they have agreed; delays by appeals and the taking of writs of *habeas corpus*.

A number of writers and speakers, Mr. Taft among them, have commended the English system of trials, and while some have criticised the administration of the criminal law in England, none, so far as I know, have found fault with the system itself. A few years ago a Committee of the Institute investigated the method of procedure in England, and the result of their labors will be found in their reports which are published in the Journal of the Institute. In considering the defects of the so-called American system, it may be useful to point out the methods pursued in England, so that we may determine whether fault is to be found with our system or the way in which it is administered.

In some states the evidence heard by the grand jury is stenographically reported, and all matters relating to the formation of the grand jury, and the state of mind of the grand jurors may be inquired into, and if it is found that one of the grand jurors was in a state of mind which disqualified him to act as a trial juror, the indictment will be set aside. In England by the common law, a defendant had a right to challenge the array of grand or petit jurors, and to challenge a grand juror for cause, and I suppose this right still exists, although it is seldom if ever exercised. In Pennsylvania a defendant may challenge the array of grand or petit jurors, but must do so before he pleads. It is provided by the Act of February 21, 1814 (6 Sm. L., 111) that no verdict shall be set aside or judgment reversed for any defect in the summoning or drawing of jurors, but a trial or a plea shall be a waiver of all such errors and defects. If the defendant before pleading shows good cause for quashing an array of petit jurors, the court has

power to quash the array, issue a special venire and proceed with the trial: (*Comm. v. Shew*, 8 Dist. Reps. 484). A challenge of a grand juror for cause must be made before the indictment is found, and will not be regarded as a sufficient reason to quash the indictment: (*Rolland v. Comm.*, 82 Pa., 306; *Comm. v. Craig*, 19 Pa. Sup. Ct., 81). Consequently, unless there is substantial reason for challenging the array or a particular grand juror, the defendant has little to gain by doing so. In the fourteen years that I have been on the bench I have never known a challenge to be made to a grand juror or any question to be raised on account of a defect in the summoning or empanelling of the grand jury. Many writers are of opinion that proceedings should be begun by information instead of indictment. An information filed after a defendant has had a preliminary hearing before a magistrate and has been held for court would in ordinary times probably not result in any injustice. The duties of a grand jury consist in passing upon bills of indictment, many of which it ignores because there is not sufficient evidence to warrant the prosecution. It also visits the various institutions of the county and since many grand jurors are summoned in the course of a year (there being in Philadelphia a new grand jury each month), many citizens are brought into contact with the courts and thereby acquire more or less knowledge of the practical administration of justice. There is always a possibility that a situation may arise when a grand jury would be most useful, and were it to be abolished there would be nothing to take its place. For instance, if we imagine a prosecution against persons powerful in the community, by reason of wealth or political influence, it might be impossible to induce a district attorney friendly to them to present an information against them, indeed there might be no other way of bringing them to justice than by the finding of a bill of indictment by a grand jury. On the other hand, if the same powerful interests were desirous of prosecuting and ruining citizens who had ventured to oppose them, a magistrate could be found who would hold them for court, and the district attorney would present informations against them which a grand jury, if they were presented to them in the form of indictments, would ignore. I can see no great advantage in doing away with the grand jury, and I can imagine cases where it might be of the greatest value.

It is not unusual even at the present day to hear of a verdict and judgment being set aside on account of some technical error in the indictment, although admittedly the prisoner has had a fair trial, and has been convicted on evidence which leaves no doubt whatever of his guilt. When we find a seeming absurdity in the common law, if we look further into the matter we usually discover

that it was not due to a lack of common sense on the part of the judges, but that it was adopted for some purpose which seemed sufficient at the time. The reasons for hair-splitting technicalities in criminal procedure arose from the humanity of the judges who were disposed to hold the Crown to the strictest rules in order to avoid the punishment of death which followed almost every conviction of felony. Thus, where the testimony showed that the prisoner aimed his gun at a bird and fired, and the bird dropped, upon its being suggested to the jury that no one saw the shot hit the bird, and that it might have died of fright, the prisoner was acquitted. So, on a trial for larceny, although it appeared that the watch stolen was worth many guineas, the judge instructed the jury to fix its value at less than a shilling. Nothing could apparently be more absurd than these rulings, and yet the judges who tried those cases were not fools; they simply would not, if they could avoid it, send a man to his death for killing a bird or stealing a watch. But the punishments for crime have been ameliorated and technicalities have long since served their purpose. Today lawyers and laymen are shocked when they hear that an appellate court has set aside a conviction on the ground that a meaningless word or even a letter has been omitted from an indictment, or that the indictment is defective for some other equally technical reason. Many instances of such reversals may be found in numerous articles in the Journal of the Institute. I will mention only a few cases.

In *Goodlove v. State*, 92 N. E., 491 (1910), the indictment charged the accused with having killed one "Percy Stuckey, alias Frank McCormick;" the evidence showed that the defendant killed a person commonly known as Frank McCormick, but it was not shown that the Frank McCormick who was killed and Percy Stuckey were one and the same person. The Supreme Court of Ohio held that this was a fatal variance.

In *Grantham v. State*, 129 S. W., 839 (1910), the defendant was charged with burglary of a certain house occupied by six persons named in the indictment. The proof showed that the house was occupied by the first five persons named but not by the sixth. The Court of Criminal Appeals of Texas set the verdict aside on account of this variance. The same Court set aside a trial because the indictment concluded with the words "against peace and dignity of State," omitting the word "the" which should have immediately preceded the word "State;" *Thompson v. State*, 15 Texas App., 39 (1883).

In *State v. Campbell*, 210 Missouri Reports, 202 (at page 226) (1907), where there was a similar omission, the Supreme Court of Missouri in a very long and learned opinion followed the ruling of the

Texas Court and said: "It is not a satisfactory solution of this proposition to say we know what was intended or meant by the conclusion in the case at bar, or that it was a mere matter of form. The proposition confronting us is not what the pleader meant to say, but what did he say, and do the terms used in concluding the indictment in this case substantially conform to the requirements prescribed by the Constitution? * * * In our opinion the conclusion prescribed by the Constitution of this State is not only one of form, but as well one of substance."

In *State v. Woodward*, 191 Missouri, 617 (at page 630) (1905), the Court said: "The charge in this information may thus be briefly stated: 'That the defendant unlawfully, willfully, feloniously, premeditatedly, on purpose and of his malice aforethought, did strike and beat him, the said Ed. Pedigo, at and upon the right side of the head of him, the said Ed. Pedigo, with the club aforesaid, and inflicting and giving to him, the said Ed. Pedigo, in and on the right side of the head of him, the said Ed. Pedigo, one mortal wound,' etc. We might stop here to inquire with what instrument was the mortal wound given. It correctly charges the manner of the assault by striking and beating the said Ed. Pedigo at and upon the right side of his head with the club aforesaid; then follows the charge, connected by the conjunction 'and,' inflicting and giving to said Pedigo one mortal wound. It is left to conjecture under the form of this charge, whether the mortal wound was inflicted and given by the club, or whether, in addition to beating and striking him with the club aforesaid, he also, by some other means, inflicted and gave the mortal wound. If we were permitted to indulge in presumptions, it might be said that the infliction and giving of the mortal wound charged in this information was the result of the use of the club in the manner alleged, but under the well-settled rules of law in respect to pleading in criminal cases, this cannot be done." After further reasoning of the same general character the Court concluded that the information was fatally defective and the judgment was reversed.

These decisions were made notwithstanding the fact that a statute of Missouri provides that no indictment shall be deemed invalid, nor shall a trial or judgment be stayed or altered for any defect or imperfection which did not tend to prejudice the rights of the defendant upon the merits. In spite of a similar statute the Supreme Court of California set aside a trial because the letter "n" was omitted from the word "larceny" in an indictment, *People v. St. Clair*, 55 Cal. 524; 56 Cal. 406 (1880), and in another case an indictment charging that "Lee Look" had murdered "Lee Wing,"

was held insufficient because it did not aver that Lee Wing was a human being, *People v. Lee Look*, 137 Cal. 590 (1902).

By the common law in an indictment for murder it was necessary to set forth particularly the manner of the killing and the means by which it was effected. In *Rex. v. Kelly*, 1 Mood. C. Cas. 113 (1825), the indictment charged that the prisoner struck the deceased with a piece of brick. On the trial it appeared that he struck with his fist, and that the deceased fell upon a piece of brick which caused his death: Held, that the cause of death had not been correctly stated, and the prisoner was discharged. In *Rex. v. Martin*, 5 C. & P., 128, the indictment charged that the wound was inflicted by a blow with a hammer, held in the prisoner's hand, and it appeared that the injury might have resulted from a fall against the lock of a door: Held, that if the death was occasioned by a fall against the lock of a door produced by the act of the defendant, the indictment was not sufficient. In *Rex. v. Hughes*, 5 C. & P., 126 (1832), the indictment charged an attempt to murder by shooting with a pistol loaded with a leaden bullet. No evidence was produced to actually prove that the pistol was loaded with a leaden bullet: Held, that the indictment was not sufficiently proved and the defendant was acquitted.

To remedy this condition of the law the Statute 14 and 15 Victoria, chap. 100 (Aug. 7, 1851), was passed, which recited as follows: "Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: And whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: And whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his 'defence':" It then enacted that the court might amend such variances and that every objection to any indictment for any formal defect apparent on its face should be taken by demurrer or motion to quash before the jury was sworn and not afterward.

In Pennsylvania the Commissioners to revise the Penal Code in their Report said: "The history of criminal administration abounds with instances in which the guilty have escaped by reason of the apparently unreasonable nicety required in indictments * * * The

reason which led to the adoption of these technical niceties has ceased and with the cessation of the reason the technicalities themselves should be expunged from our system." The Act which they recommended was passed in 1860 and provided among other things, as follows: Every indictment shall be deemed and adjudged sufficient which charges the crime substantially in the language of the act of assembly prohibiting the crime, if such there be, or if at common law, so plainly that the nature of the charge may be easily understood by the jury; every objection to an indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer or motion to quash, before the jury is sworn, and not afterward, and every court before whom any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended; if on the trial there shall appear to be a variance between the indictment and the proof, if the court shall consider such variance not material to the merits of the case, it may order the indictment to be amended; in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased.

In *Commonwealth v. Tassone*, 246 Pa., 543, the indictment charged that the crime was committed on October 31, 1914. On April 27, 1914, six days after the prisoner had been convicted of murder of the first degree, his counsel moved in arrest of judgment on the ground that the indictment on which he had been found guilty charged the offense as having been committed more than six months after the trial. On May 20, 1914, on motion of the District Attorney the Court permitted the indictment to be amended by changing the date to October 31, 1913. The Supreme Court held that the amendment was proper.

These and other provisions of the Pennsylvania Act of 1860 are substantially the same as those of the English Statute of 14 and 15 Victoria, chapter 100. Thus in England and Pennsylvania technical objections to indictments were practically abolished. Since such objections must be made before trial, and if sustained, result merely in an amendment of the indictment, little or nothing is gained by raising them.

One of our Committees has prepared an elaborate draft of a statute upon this subject which was approved by the Institute at its last meeting. This draft contains forty-one sections, and will probably cover any questions which are likely to be raised. It also

provides for simplicity in indictments. In my own opinion it does not make much difference whether indictments are drawn in the quaint language of long ago, or in concise and simple words, so long as they clearly indicate what the charge against the defendant is. The real remedy for the evil of technicalities will be found in statutes similar to those of England and Pennsylvania, providing that all objections to an indictment must be made before trial, and the indictment amended, if the judge before whom the question is raised deems it necessary. It might also be a good idea to further provide that no exception to, or appeal from, the ruling of the judge passing upon the sufficiency of the indictment should be allowed. Such a statute would be advisable because lawyers will not raise technical questions if they know they can gain nothing by so doing, and when a judge pronounces an indictment sufficient we may rest assured that if he has made a technical mistake it is of such a character that it cannot prejudice the defendant in the slightest degree; while on the other hand, if he regards an indictment as technically defective he will order it to be amended.

Judgments are also reversed for errors and omissions in the record, which one would suppose might easily be corrected without sending the case back for another trial. For example in *Crain v. United States*, 162 U. S., 625, the record set forth an indictment, the appearance of the accused, the selection of a jury, a trial by the jury, and the finding of their verdict, but did not show that the accused was ever formally arraigned, or that he pleaded to the indictment. The Supreme Court of the United States set the conviction aside in a very long and elaborate opinion in which it cited a number of early English authorities on the importance of arraigning the prisoner, and his pleading, and wound up by saying: "It were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

The importance of an arraignment in early days was owing to the fact that when trial by jury was beginning to supersede the more ancient trial by ordeal, the judges were not sure that they had the right to try a man by a jury unless he consented to it; consequently a prisoner having pleaded not guilty was always asked how he would be tried, to which he replied "By God and by my country," a form which is observed to this day in Pennsylvania. As a prisoner could not be tried unless he "put himself upon the country," as it was called, it followed that if he remained mute or refused to plead, he could not be convicted, and consequently his estates could not be forfeited to the Crown. Some prisoners tried the experiment of not

pleading and in consequence a Statute was passed in 1275 which provided that when a person refused to plead, he should be sent to the prison "*forte et dure*," which meant that he should be imprisoned until he starved to death. This was subsequently transformed into the "*peine forte et dure*" by which if a man refused to plead he was laid upon his back and a weight of iron set upon his body as great as he could bear, and greater, and he was given only bread and water on alternate days until he died.

In 1658 Major Strangeways refused to plead and made no secret of the reason, namely, that his lands would be preserved for his heirs. A portion of the mass of iron and stone laid upon him was placed anglewise over his heart, and when it was discovered that the weight was insufficient to crush the life out of him, the attendants added the weight of their own bodies. This scene lasted eight or ten minutes. When it was over the bruised and mangled body was exposed to the public gaze. (Pike, *History of Crime*, Vol. II, 194, 195.) This punishment was abolished by statute, 12 George III, chap. 20 (1772). In Pennsylvania the Act of 1791 provides that when persons refuse to plead, a plea of "not guilty" shall be entered upon the record, and I presume the law in other states is the same. Consequently where a trial has taken place, and the defendant has been fairly convicted his interests cannot be prejudiced by amending the record so as to state that he pleaded "not guilty," whether in fact he did so or not, since if he had not pleaded the trial court would have entered that plea for him.

No doubt such decisions as those mentioned have done much to bring the administration of the criminal law into disrepute, and the members of the Institute ought to do all in their power to procure the passage of legislation in states where it is necessary which will effectively do away with such technicalities.

On the very threshold of the trial we are met with the serious criticism that too much time is consumed in selecting a jury. In the cases of *Neil Brown*, *Gilhooley and Shea*, tried in Chicago, it took three, nine and a half, and thirteen and a half weeks, respectively, to select a jury. In the case of *Calhoun* in California, it took ninety-one days, and other instances of similar delays might readily be mentioned. (JOURNAL, Vol. I, 531.) To remedy this evil it has been suggested that counsel be required to finish the examination of a juror within a certain number of minutes—say five—and that they shall ask only certain questions. This would probably not be a practical or satisfactory solution of the difficulty. Indeed the matter is one which it will be very difficult to regulate by statute. In England the prisoner has the right of challenge, but it is rarely exercised.

In Pennsylvania a juror is seldom challenged except in trials for murder, in which the Commonwealth and the prisoner are each allowed twenty peremptory challenges. The jurors are usually examined on their *voir dire* to discover if there is good cause for challenge; for instance, the counsel for the Commonwealth inquires whether or not the juror has conscientious scruples against capital punishment which would prevent his rendering a verdict of murder in the first degree, whether he knows the prisoner or any of his family, and similar questions. Counsel for the prisoner asks whether or not the juror has read or heard about the case, and has formed an opinion. If the juror says he has an opinion which, however, he can disregard, and try the case on the evidence alone, his opinion is no ground for challenge. In some states such an opinion is held to be good cause for challenge. In Pennsylvania it seldom takes more than a few hours, rarely more than a day, to select a jury in a murder case. The great length of time consumed in some trials is due to the latitude in asking questions allowed counsel. The examination and cross-examination of jurors should be controlled by the trial judge in the exercise of his discretion, and his rulings should not be reversed on appeal except for manifest error in overruling a challenge for cause by the prisoner. Unless the trial judge has this power and exercises it firmly, the delay in the selection of juries is likely to continue to be a blot upon the administration of justice.

Another cause of criticism is the manner of examining expert witnesses. The hypothetical question, taking hours or days to read, is sheer nonsense, and should not be permitted by the trial judge, who should control the examination of the witnesses, and see that it is conducted reasonably and sensibly. Where an expert witness has been present throughout the trial, and has heard all the testimony, he can be asked his opinion of the prisoner's mental condition, assuming the testimony to be true. Where insanity is set up as a defense, much difficulty would be avoided if the trial judge would bear in mind that after all the question to be decided is not whether the prisoner is insane from a medical point of view, but whether he is responsible according to legal standards. A man may be insane in the opinion of the doctors, and yet, if he knew what he was doing, and its consequences, and that his act was punishable by law, he is responsible whether he is insane or not. Some persons have even gone so far as to urge that the defense of insanity be abolished, because, they say, an insane man who has committed a murder is likely to do it again if he has a chance, and for the protection of society he should be executed or imprisoned for life. Some writers have suggested that instead of the verdict usual in this country of "not guilty, on the

ground of insanity," it would be better to substitute the English verdict "guilty but insane," and thereby avoid the scandals which have been brought about by prisoners who have been acquitted on the ground of insanity constantly taking out writs of *habeas corpus*, claiming that they have been restored to reason.

Very valuable work upon the important subject of insanity and responsibility for crime has been done by a Committee of the Institute, and a statute has been drafted embodying its ideas and recommendations.

Some critics would do away with the immunity from testifying which the accused now enjoys under the Constitution of the United States and the Constitutions of the different states; others would not go so far as this, but would permit the prosecuting attorney to comment upon the prisoner's failure to testify and ask the jury to draw inferences of guilt therefrom. An amendment to the Constitution of Ohio adopted September 3, 1912, provides that the failure of the accused to testify may be considered by the Court and jury and may be made the subject of comment by counsel. (JOURNAL, Vol. III, 925.) We cannot compel the accused to give evidence against himself without fundamentally changing our whole system of criminal procedure. In all likelihood the people of this country are not yet prepared to give up the present system and adopt that of the continental countries. In order to attain speedy and certain justice it is not necessary to abandon the principle that the commonwealth must prove the accused guilty beyond a reasonable doubt, that is, such a doubt as makes a juror conscientiously hesitate to pronounce him guilty. If the evidence of the prosecution proves that the prisoner is guilty it is not necessary to comment on his failure to testify; if it does not prove it no comment can supply the deficiency. If jurors choose to draw an inference of guilt from a failure to testify there is nothing to prevent their doing so, and it is probable that it always produces an unfavorable impression upon them since every jurymen must wonder why the prisoner does not avail himself of the opportunity to deny the accusations against him. From my own experience I am of opinion that no comment upon the prisoner's failure to testify and no allusion thereto by counsel or the court should be permitted. I think it is better that the prisoner should be convicted on evidence and not on inference. Such comment is not permitted in England.

Sometimes in criminal trials a great deal of time is wasted by reason of the methods employed by counsel. Lawyers occasionally wander far from the issue in cross-examining witnesses, make long speeches in arguing upon the admission or rejection of testimony,

make objectionable and improper statements to the jury and enter into verbal tilts with their opponents. These are matters which cannot be corrected by legislation. They do not occur in English trials for two reasons: first, because the judge would not permit it, and second, because such conduct would subject the barrister to the criticism and disapproval of the bar. In England and in Pennsylvania where the English system has always prevailed, the trial judge has ample power to keep the examination and cross-examination of witnesses within proper bounds, and to compel lawyers to observe the amenities of the profession. There are a few reported decisions in which new trials have been granted on account of the remarks of an over-zealous district attorney, but such instances are rare. The members of the bar can be trusted to observe the traditions of the profession, and if in the excitement of a trial they momentarily forget themselves a word from the judge is usually sufficient to produce the desired result; if it does not, he has power to commit them for contempt, or to suspend them from practice or even to disbar them.

Probably no legislation that has been passed has done more to bring discredit upon criminal trials than those statutes which have restricted the powers of the trial judge in charging the jury. In some states he is not permitted to comment on the testimony, in others he must reduce his charge to writing and give it to counsel before they begin their arguments, in others counsel may write out a charge, and if it is correct in law, the judge must read it to the jury. So also the practice very generally prevails of submitting a great many points to the trial judge which he must affirm and read to the jury or refuse. In some states points are handed up by both sides, in Pennsylvania they are submitted by the prisoner's counsel only. These points often contain statements of the law which are obviously correct, and which the trial judge has fully covered in his charge. They also frequently consist of long quotations from Supreme Court opinions, and sometimes are framed very adroitly, not for the purpose of instructing the jury, but with the expectation that they will be overruled by the trial judge and furnish a ground for reversal in the appellate court. After concluding his charge to the jury, one of our distinguished judges said: "I now have rather a difficult duty to perform. Thirty-three points have been presented to me, containing a statement of the law of murder in a great variety of forms, almost like the shifting of the kaleidoscope which, though the beads are the same, at each turn, presents a different aspect, and where it is rather difficult to know precisely or to recollect what the impression is." (Judge Hare in *Commonwealth v. McManus*, 28 W. N. C. 504). When the trial judge does read the points it is safe to say that the ma-

majority of the jurors do not understand them. I venture to assert that if the jury were composed of twelve members of the bar, even of lawyers familiar with criminal practice, they would not be able to comprehend the subtle distinctions between the different points, and would not understand their application to the facts of the case. In short, such points are mere traps to catch the trial judge in error. Nothing can be more absurd than to grant a new trial because of the refusal of a point when the trial judge has said in his charge everything that is necessary and proper to be said. In my opinion no exception to or appeal from the refusal of a trial judge to affirm a point should be permitted. If the charge is correct and fully covers the case, it is sufficient; if it is incorrect, or if material matters which it should contain have been omitted, it should be reversed. As it is, judges in delivering their charges not infrequently seem to have the Supreme Court more in mind than the jury, and charge for the purpose of being affirmed, without much regard to whether or not they convey to the jury a clear understanding of the law. A charge may be absolutely correct in point of law, and yet impart little, if any real information to a jury. In England, the trial judge not only states the law, but also reviews the evidence and sometimes expresses his opinion of its effect. In Pennsylvania the system is the same; there are no statutes restraining or controlling the actions of the trial judge; it is his duty to sum up the evidence on both sides fairly and impartially, commenting upon its strong and weak points, pointing out the reasons which witnesses may have for telling what is false, and comparing their opportunities for observation. He frequently instructs the jury to acquit a defendant, and does not hesitate to express an opinion upon the facts if in his judgment the case requires it. In *Commonwealth v. Orr*, 138 Pa., 283, the Supreme Court in considering a charge said: "We find in some instances the expression of a decided opinion upon the facts, but in no case was there an interference with the province of the jury. We have said in repeated instances that it is not error for a judge to express his opinion upon the facts if done fairly; nay more, that it may be his duty to do so in some cases, provided he does not give a binding direction or interfere with the power of the jury." In *Commonwealth v. VanHorn*, 188 Pa., 164, the same Court said: "That a trial judge should abstain from comments on the testimony in such a case as this, could not possibly be expected. It would be a violation of his plain duty if he did." A judge should sum up in simple colloquial language and apply the law to the facts so that the jury can understand him. In a civil action to recover for negligence a judge will often say: "If you find that the plaintiff attempted to get off the car while it was in motion,

he cannot recover." That conveys a more definite idea to the mind of a jurymen than if he should say: "If the plaintiff was guilty of contributory negligence he cannot recover." So in a trial for murder the jury can better understand a trial judge who says: "If you find that the prisoner shot the deceased in the manner described by the witnesses, he is guilty of murder" than if he were to tell them that murder is the unlawful killing of another with malice aforethought.

The duties of a trial judge are well stated by Baron Bramwell, who, in his examination before the Homicide Law Amendment Committee, upon being asked if he did not think the definitions in the Act under consideration were confusing, said:

"I think a judge who knows his business never troubles the jury with needless definitions, but he deals with the particular case before him, and says, for instance, in the case which I have put: 'The first question that you have to consider is: (forgive a sort of model summing up), did the man die of the injuries which he received? The doctors prove he did. The next question is, did the prisoner commit them? As to which the evidence is so and so. Now you have to consider, if you are of opinion that he is, at least, guilty of having killed him, whether it is murder; and that depends upon the extent of the blows, and the place they were directed to. If you think he intended to kill him, and did, it matters not what means he used; but suppose he did not intend it, you must consider whether the means used were likely to do it.' If you observe, in that case you lay down no definition; you assume that the jury and you both know what the law is; or you tell them what the law is in that particular case. I frankly confess that if I had to give to the jury a definition, 'First of all, gentlemen, I have to tell you what homicide is, and then what criminal homicide is, and then what is not criminal homicide,' I expect the jury would be utterly bewildered. It is my duty, as a judge, to inform myself of the meaning of the Act, and not to trouble the jury with a definition, except so far as necessary."

Under the system which has been developed in England in the course of hundreds of years, and has always been the practice in Pennsylvania, a trial is not by jury and lawyers, in which the judge is a mere bump on a log, as he has been described to be, with no more power than a moderator of a religious assembly, but it is a trial by judge and jury, in which the judge is an important and powerful factor. I do not believe it is possible for a jury to acquire the same understanding of a case from written instructions that they get from an oral charge. It seems to me that it would be wise to restore to the judges the power that has been taken from them by statute. It might also be advisable to impress upon trial judges the idea that the

purpose of the charge is to give actual instruction to the jury and not merely to make a statement of the law which will stand the scrutiny of the appellate court. I think it will be found that those states in which the powers of the trial judge have been curtailed are the ones in which there exists the greatest dissatisfaction with the administration of the criminal law.

Some persons advocate a verdict by a majority or three-quarters vote of the jury, except in murder cases. My experience has not indicated that such a change is necessary, or that it would be an improvement. Jurors seem generally to agree in cases where they ought to convict. In some states a jury is discharged if they do not reach an agreement within twenty-four hours. In trials for homicide, especially where the case has been exploited in the newspapers, jurors will stand out and not come to an agreement if they know that they will be discharged in a comparatively short time. In Pennsylvania the jurors are kept together until they agree, and are not discharged until it is evident that an agreement is impossible. If they are discharged the prisoner cannot be tried again.

One great source of delay, and one which can be remedied by legislation, is the time consumed by appeals. In many states appeals are permitted at any time within three or six months or even longer. If an appeal is to be taken, there is no reason why it should not be perfected within ten days after sentence is pronounced. A simple form of notice of appeal should be adopted instead of the issuance by the Appellate Court of writs of error or *certiorari*, commanding the court below to send up the record. Formal bills of exception should be abolished. The English Court of Criminal Appeal, established in 1907, is composed of the Lord Chief Justice, and all the judges of the King's Bench Division, of whom three constitute a quorum. The decisions of this court are rendered promptly, and the cases are finally disposed of long before an appeal would be even begun in this country. It will be observed that the court is composed of judges of the King's Bench Division who attend to the business of the Court of Criminal Appeal in addition to their other work. If our Appellate Courts would hear criminal appeals separate from civil appeals, or delegate, say three of their number to hear them, and decide them before taking up civil business, the judges could for the time being give their entire attention to criminal cases, and doubtless dispose of them promptly. The printing of the record and the testimony might be dispensed with. It is no doubt a convenience to have everything in print, but the practice entails great expense and delay, and much is printed which is never looked at by the judges of the Appellate Court. A great deal of time and expense

would be saved, and appeals simplified, if the original record and typewritten copy of the testimony and charge of the Court were handed in to the Appellate Court. The trial judge always has a copy of the testimony and charge which might be sent with the official copy, and after the argument, the District Attorney could lend his copy to the Court. There is altogether too much formality and delay in the taking of appeals, and the whole practice should be greatly simplified.

It seems impossible to cure by statute the evil of having cases reversed for technical or immaterial errors. Such decisions are common in states where acts have been passed providing that no case shall be reversed unless the error complained of has prejudiced the substantial rights of the defendant. The courts have regarded every error as material, and consequently the statutes have had little effect. As I have said before, in my opinion, no appeal should be allowed from the decision of a judge refusing to quash an indictment.

After a case has gone through the almost interminable delays in the courts, it is by no means ended. Applications for pardon have become as much a part of routine procedure as appeals to the Supreme Court. Those whose duty it is to fix a day for execution often postpone it for a long time, and those who exercise the pardoning power frequently grant reprieves and put it off still further. In some states the governor can pardon only upon the recommendation of a board of pardons, but these boards fall into the habit of passing upon the propriety of the conviction instead of exercising their proper function of granting clemency, and interminable delay and uncertainty in the execution of the sentence of the court result from the unauthorized assumption of judicial powers. If a man is to be hung or electrocuted, it is better that it should be done promptly, not only on account of its effect upon the community, but also because it is more humane. It seems cold-blooded and cruel to keep a man in prison for two or three years, and then, after he has adjusted his life to his new surroundings, put him to death. It would be better on all accounts to execute him a short time after conviction, if he is to be executed at all. Great scandals have resulted from an abuse of the pardoning power, and it is difficult to see how they can be prevented by legislation.

Many of the matters which I have mentioned are under consideration by Committees of the Institute. It must be borne in mind, that while much can be accomplished by legislation, nevertheless no statute can be devised by which a criminal trial can be conducted automatically. No substitute can be found to take the place of the

learning and training of the Bar and Bench, influenced and guided by the honorable traditions of the profession.

The Institute has done most valuable work. Its Committees are studying and investigating the causes of crime, the methods by which it may be prevented or reduced, reforms in criminal procedure, the treatment of criminals, and many other kindred subjects, and the results of their labors are presented to the Institute in the form of drafts of statutes prepared with great care after mature consideration and reflection. Members are kept fully informed upon these subjects by the JOURNAL, the official publication of the Institute, which publishes the latest decisions of the courts, reviews of turrent literature, and by discussion and criticism arouses and maincains an interest in these subjects and exerts a great educational tnfluence.