U.S.
NATIONAL COMMISSION
ON LAW OBSERVANCE AND ENFORCEMENT

REPORT
ON
CRIMINAL PROCEDURE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1931

For sale by the Superintendent of Documents, Washington, D. C. - - Price 10 cents

LETTER OF TRANSMITTAL

JUNE 9, 1931.

Mr. PRESIDENT:

I beg to transmit herewith an eighth report of the National Commission on Law Observance and Enforcement, treating of criminal procedure.

I have the honor to be,

Very truly yours,

GEORGE W. WICKERSHAM,
Chairman.

To the PRESIDENT OF THE UNITED STATES.

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CRIMINAL PROCEDURE

PRELIMINARY

In his inaugural address (March 4, 1929) the President, speaking of the present commission, then proposed, said:

> Its purpose will be to make such recommendations for reorganization of the administration of Federal laws and court procedure as may be found desirable.

Again, in his address at the annual luncheon of the Associated Press (April 22, 1929) preliminary to a statement as to this commission, he said:

> Every student of our law enforcement mechanism knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal; that our judiciary needs to be strengthened; that the method of assembling our juries needs revision; that justice must be more swift and sure. In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society.

Thus we have a clear mandate to put criminal procedure well to the front of our investigation into the enforcement of law in the United States.

As the subject was one with which a majority of the members of the commission had an intimate acquaintance from many points of view, from experience on the bench, or as public prosecutors, or in the trial of criminal causes, or in teaching criminal law and procedure, or in more than one of these capacities, it was not thought necessary to employ experts to make special investigations. But in addition to the personal knowledge and experience of the commissioners, representing substantially every part of the country, the following materials have been utilized:

1. The Model Code of Criminal Procedure of the American Law Institute and the commentary thereon. The com-

mentary is a quarry of information as to legislation and judicial decision with respect to criminal procedure in the several States.

2. Report on the American Law Institute's Code of Criminal Procedure by a subcommittee of the committees on American Law Institute and on Criminal Courts and Procedure of the New York County Lawyers' Association (March, 1931).

3. American Law Institute, Report to the Council by the Committee on a Survey and Statement of the Difficulties in Criminal Justice (Herbert S. Hadley, William E. Mikell, John G. Milburn), April 1, 1925.

4. The surveys of criminal justice and reports of crime commissions and similar bodies in the past decade listed specifically in our Report on Prosecution on pages 47 to 49 and 257 to 265.

5. Answers to a questionnaire sent to judges and prosecutors at the inception of our work.

6. A great mass of suggestions in letters and statements addressed to us by volunteers from every part of the country.

7. The voluminous literature of reform of criminal procedure which has appeared in the past 30 years.

8. The books setting forth the current criminal procedure in England, Canada, and Australia.

9. The British judicial statistics bearing on the work of the English criminal courts.

10. The reports of criminal trials in Great Britain and the United States in the past 30 years.

11. Memoirs and reminiscences of English and American criminal trial lawyers in the last half of the nineteenth century and in the present century.

12. American law reports since 1900 with respect to decisions on points of criminal practice.

I. THE IMPORTANCE OF PROCEDURE

In the report on prosecution we called attention to the relatively less importance of procedure and relatively greater importance of administration in any program of improvement of American criminal justice. This is brought

out strikingly in the surveys of criminal justice analyzed and discussed by Mr. Bettman in the paper appended to that report. Indeed, as one studies American criminal justice in operation, it becomes clear that the three factors, personnel, administration, and procedure, must rank in the order named when judged with respect to their influence upon the results achieved. This conclusion is fortified by experience of codes of civil procedure. Since 1847 civil procedure has been completely and continuously overhauled by legislation in almost all American jurisdictions. In the result it has appeared that more depends upon a well chosen bench with secure tenure than upon improved statement of the law and improved procedure. In jurisdictions with a vigorous administration of an archaic procedure, better results have been had than in those with a feeble judicial administration of a modern procedure. Taking the country as a whole, improvement in the mode of choice and tenure of judges, prosecutors, and officials connected with enforcement of law through the courts, and working out of better administrative methods, must be given relatively greater stress in a program of improvement than reform of procedure.

Yet reform of American criminal procedure is by no means to be neglected. If good results have been obtained in spite of an archaic procedure through strong administration, we may be confident of obtaining the best results when there is strong administration of a modern procedure. At any rate there are abundant evidences of the bad results of the feeble administration of an archaic procedure.

Moreover, when it is pointed out that the majority of prosecutions in the State courts do not come to the stage of trial, it does not prove that criminal procedure and particularly trial procedure, are unimportant factors in the administration of criminal justice. Rather, it goes to show that because of the condition of American criminal procedure and of the difficulties confronting prosecutors they are impelled to dispose of as many cases as possible out of court. Likewise the procession of offenders in the Federal courts, subjected to light fines and short imprisonments, is no proof of an efficient prosecuting system. Instead it is evidence of the prevalence of a practice of bargain penalties

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forced upon prosecutors by the exigencies of the system with which they must work.

A satisfactory procedure is particularly important in order to maintain public faith in criminal justice. While it is true that relatively most of the bad features of our criminal justice to-day are in those things which take place out of court, yet what goes on in court is much more in the public eye than what is done administratively out of court. It occupies more space in the press. It attracts more general and interested attention and is the chief basis of the popular conception of law enforcement. It is of the highest moment for a wholesome public attitude toward enforcement of the criminal law that what goes on in court go on in such a way that the public believes it well adapted to and effective for its purposes.

It is impossible to carry on the work of criminal justice without a somewhat elaborate, refined, and even technical procedure. The assertion of some to-day that the quest for certainty, uniformity, and impartiality is futile is refuted by the whole course of legal development, which has tended more and more to insure them. Because these things are not absolutely attainable it does not follow that we should not strive for them nor that they may not be attained to a high degree. Public confidence is essential to the proper working of any governmental institution, and can only be maintained by insuring them so completely for practical purposes that people generally feel secure against arbitrary, capricious, or biased official action no less than against private aggressions. Thus criminal procedure is intimately related to necessary fundamental guaranties. A certain amount of prescribed procedure is called for to guarantee deliberation and fairness as well as to make the public conscious that what is done in the course of prosecution goes on deliberately, rationally, and fairly. It is important also as enabling the courts to dispatch a large volume of business with a minimum expenditure of time. Much more may be done under orderly procedure than by loose and disorderly methods. The latter are out of place under the conditions in the crowded courts of to-day. More than one of the recent surveys of criminal justice brings this out strikingly.

We do not mean, however, that the abuses which have come to be conspicuous in American criminal procedure may be defended or should be tolerated. Some of these abuses are historical in origin, due to survival of institutions and doctrines and rules after their reasons or the conditions which justified them have disappeared. Many of them, for example, are due to conditions in the formative period of American law which no longer exist. Some are involved in the difficulty of a just balance between the general security and the individual life, which is a persistent problem of all administration of justice. From time to time the body of procedural law must be reexamined and reshaped or even in large degree replaced in order to meet the demands of new situations presented by social life. In the United States civil procedure has been overhauled completely. Criminal procedure has never had any such thoroughgoing revision. Much has been done in parts of the field by one jurisdiction or another. But such partial reshapings are not enough. We must look forward to a complete reshaping adapted to the conditions of lawbreaking and law enforcement in twentieth century America.

Historically, Anglo-American methods in every field of the administration of justice have been judicial in contrast with the administrative methods which have prevailed in continental Europe by derivation from Rome. Hence our procedure has not lent itself to many things which are coming to be familiar through the development of administrative methods in connection with governmental agencies of every sort in the present century. This is manifest especially wherever it becomes important to employ expert assistance from outside of the law and to utilize the resources of modern science. One of the problems of improving our criminal procedure is how to adapt it to the need of informing the tribunal as to matters of science or special expert knowledge, while preserving the guaranties which are the product of experience of English-speaking peoples and are imbedded in our constitutions. This adaptation can not be achieved satisfactorily by patchwork tinkering. To be effective it must be brought about by careful reconsideration of the several steps in procedure from end to end.

II. PETTY OFFENSES AND INFERIOR COURTS

1. IMPORTANCE OF PETTY PROSECUTIONS

There has been little appreciation of the importance of magistrates' courts and police and municipal courts in the system of criminal justice. It is only in the present century that there has been a beginning of adequate provision for petty prosecutions. Even where modern municipal courts have been set up, there has been a tendency to take advantage of their better organization and simpler procedure to impose upon them an increasing burden of civil litigation, more appropriate to the superior courts, to be carried at the expense of the work for which magistrates' courts primarily exist. But it is in the latter that the administration of criminal justice touches immediately the largest number of people. Apart from all other considerations, arbitrary methods, incompetent magistrates, tribunals governed by petty politics, and slovenly proceedings, at the point at which the great mass of the population come in contact with law enforcement, give a bad impression of the administration of justice as a whole and most seriously affect respect for and observance of law generally.

In addition to the preliminary examination as a stage in the prosecution of major offenses, and the relatively unimportant petty prosecutions which were in the jurisdiction of magistrates in the formative era of our institutions, in the large city of to-day they have to deal with traffic offenses, involving the public safety to a degree far beyond anything which formerly came before magistrates, and a multitude of police regulations, required by the conditions of urban life. These new types of offense have given a new and much greater significance to the inferior courts. The bulk of prosecutions for felony involve preliminary examination before a magistrate, and in our report on prosecution we pointed out the need of thorough sifting at the beginning of such prosecutions, and the ill results at later stages where there is perfunctory or incompetent investigation at this point. Moreover citizens come before these tribunals as complainants and witnesses at preliminary hearings much more frequently than before the superior courts. Great

numbers of citizens who have no other contacts with the courts come before these tribunals in traffic cases. Probably the chief point of contact of the ordinary law-abiding citizen with the criminal law is in connection with police regulations. To do their work properly and to command the respect which will give to the average man a right attitude toward criminal justice, these tribunals should be manned by strong judges, equipped as befits agencies of the justice of the state, and conducted with dignity.

Unhappily the old-time police court has too often furnished the model even for municipal courts organized in the present century. In too many cities little or no provision is made for men of the caliber demanded for the work to be done. Too often the judges are chosen at elections for short terms, are compelled to campaign for nomination and election, and thus are subjected to politics. The surveys of criminal justice everywhere have shown the ill effects of this system at the very root of criminal justice. The legal profession has very little interest in petty prosecutions which to-day are chiefly the concern of the lowest stratum of the profession. Also the public has assumed that a petty judge is good enough for petty cases. But what is of little profit to the lawyer may none the less be of much profit to the law. The importance of petty prosecutions for the sum total of criminal justice can not be measured by the amount of the fine or duration of imprisonment in the average of such cases. They must be looked at with reference to their place in the scheme of criminal justice as a whole and the part played by them and by the offenses to which they relate in the whole process of urban life.

2. PETTY OFFENSES IN THE FEDERAL COURTS

In the year ending June 30, 1930, according to a memorandum supplied to us by the Bureau of Prisons of the Department of Justice, 62 per cent of all Federal prisoners received during the year were committed for sentences of less than six months. The average sentence for all Federal prisoners received during the year was 117 days or just under four months. There seems to be no means of ascertaining how

many of those convicted in the Federal courts last year received fines of less than $500. But a report made to the subcommittee on courts shows that in the district court for Connecticut one-half of the fines imposed were under $225 and 78 per cent were under $325. Thus it is evident that petty prosecutions have at least come to bulk very large in the work of the Federal courts. This condition, however, is a result of legislation of the present century. The Federal courts were not organized with an eye to criminal business of this sort and have been conducted for over a century with reference to a different type of causes. The grave consequences of this growth of petty prosecutions in the Federal courts are discussed on pages 55 to 57 of our report on Enforcement of the Prohibition Laws of the United States. In that report, also (pp. 67 to 68), and more fully in our preliminary report and report supplemental thereto (71st Cong., 2d sess., H. Doc. 252, pp. 9–12, 17–25), we considered the question of Federal police tribunals, of provision for petty prosecutions with the present organization of the Federal district courts, and of procedure in Federal petty prosecutions. What we have said heretofore on these subjects need not be repeated.

3. PETTY OFFENSES IN THE STATE COURTS

There are no reasonably complete or reliable statistics as to the relative volume of petty prosecutions in the States. But in such urban localities as publish full and well-compiled statistics, the average proportion of such prosecutions to prosecutions within the jurisdiction of the superior courts is about 7 to 3. It should be noted, however, that the number of causes which go to the superior courts is swollen by appeals from convictions before magistrates, often resorted to because the crowded criminal dockets of those courts make possible or even require bargains with the prosecutors whereby the accused escapes with a lesser penalty than that imposed in the lower courts, or, even, through delay and loss of evidence or dispersion of witnesses, compel dismissal. If allowance is made for these cases, in which the system of double appeals from magistrates' convictions, with its resulting advantages to the accused, tends to a congestion of appealed petty cases in the superior courts, an analysis of such statistics as are at hand indicates a proportion of 9 to 2.1. Moreover, in our large cities the work of these tribunals in connection with domestic relations may have an intimate bearing on the causes of crime. It may be a large factor in the preventive justice which we must increasingly develop. When it is added that all but a minute fraction of prosecutions for felony involve preliminary examination before a magistrate, the importance of courts of summary jurisdiction in the State polity is manifest.

Magistrates' courts were the first to be organized in America and the first American law books were books of practice before justices of the peace. At the end of the sixteenth century, on the eve of colonization, the English system of justices of the peace had taken on the form which it kept substantially till the present century. In origin the justices of the peace were administrative rather than judicial officers. Their function in the beginning was to keep the peace. They kept their administrative functions, but developed also as a part of the judicial organization. As their work came to be organized it included, in addition to much of local administration, preliminary examination of accused persons, a considerable superior criminal jurisdiction, and an exclusive petty jurisdiction. Keeping the peace involved, what to-day we should call criminal investigation. In time the function of criminal investigation was set off from their judicial tasks. In the end it was turned over to a specialized administrative agency. But at the end of the sixteenth century, the Lord Chief Justice of England, as the highest conservator of the peace, was expected on occasion to do something very like what we now in the United States expect of a prosecuting attorney. At the time of colonization a differentiation was still far distant. Preliminary examination of accused persons had its beginnings in statutes of the sixteenth century. From a present-day standpoint it was partly a police and partly a judicial examination, and in England it did not become definitely judicial till the nineteenth century. Hence as

it came to us, it had its original twofold character. But our American insistence on the separation of powers led us to make it judicial. Unfortunately it became judicial before the development of the modern police system. As the magistrates' examinations were judicial, all examinations of accused persons were subjected to the guaranties attaching to judicial proceedings, and so in a measure the system compelled an extra-legal practice of examinations by prosecuting attorneys and police.

By the time of colonization, the principal judicial work of the justices of the peace in England had become organized in courts of general sessions or quarter sessions held for the whole county, with jurisdiction of all crimes but treason, although in practice difficult cases were sent to the assizes to be tried by the superior justices. Later petty sessions were set off. In these a certain number of justices had power to impose penalties under the provisions of statutes. Also there were borough courts exercising criminal jurisdiction under charters. It was usual to make the mayor and some of the aldermen justices of the peace, and often the charter gave authority to hold courts of quarter sessions. In important boroughs there was usually a recorder who was a lawyer and in practice became the real judge.

In the United States we took over the idea of laymen conducting preliminary examinations and administering justice as magistrates in petty causes. In some States we took over the idea of municipal criminal courts in which the mayor or aldermen sat as judges, sometimes with a recorder as judge also. In many States we took over the system of concurrent jurisdiction in county and municipal tribunals, which, indeed, only disappeared in New York in the present century and still obtains in some parts of the land. In some States also we took over the administrative features of the English system, so that the justices of the peace, or their analogues, have general administrative functions hardly compatible with efficient handling of judicial work under the conditions of to-day. With respect to organization of courts, the chief legacy of the colonial period is the

system of numerous local petty tribunals manned by laymen which still obtains, except as superseded by modern municipal courts in some of our largest cities.

Organization of inferior courts has come to vary greatly in the different States. Generally, but not everywhere, there are justices of the peace, commonly one for each of the ultimate local political subdivisions. There are still in some places courts of mayors or aldermen or equivalent officials. Police courts for municipalities, with a magistrate's jurisdiction and jurisdiction over petty police offenses, were formerly general but are coming to be superseded by municipal courts with a better organization. In some parts of the country there are local criminal courts with magistrates' jurisdiction. In many States, concurrent with the local justices of the peace and the municipal petty courts, there are county courts, with a concurrent magistrate's jurisdiction extending over the whole county. A few States have a higher type of inferior courts, organized in districts. In the present century there have come to be municipal courts in many large cities, some of them exceptionally well organized. But taking the country as a whole, our inferior courts are conspicuously the least satisfactory part of our judicial system.

Except in a few jurisdictions in which the inferior courts have been completely reorganized, dignity long since ceased to attach to the position of magistrate. The old-time country squire, a leader in his community, exercising a sort of patriarchal jurisdiction, is as much in the past as the conditions in which he administered justice. Election in a self-sufficient neighborhood, in which everyone knew the squire, was a very different thing from election in the city of to-day. The short tenure, the mode of choice, the want of dignity in the position, and the manner of compensation very generally by fees, lent themselves to a low personnel which for the most part made these tribunals petty in fact as well as inferior in name. Nowhere is a proper organization more called for. With modern conditions of transportation there is no need of a magistrate at every man's back

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door.. About all that is left of the fee system of compensation is in inferior courts in different parts of the country. Wherever it remains, it ought to be abolished and magistrates with salary and a modern organization into a unified court should be substituted.

Even in the modern municipal courts in some of our large cities, the physical conditions and decorum are often those of the old-time police court of a small town when the police magistrate knew the town drunkard, as did all his neighbors, and could dispose of his case offhand with the assurance of one who knew. The methods of the rural magistrate are out of place without the personal knowledge on the part of the court and the community which they presuppose. Without this check, there are opportunities for questionable influences in the case of real offenders, and there is danger of irreparable injury to the occasional offender who is not able to command such influences. The bad physical surroundings, the confusion, the want of decorum, the undignified offhand disposition of causes at high speed, the frequent suggestion of something working behind the scenes, involved in the casual conferences of magistrate and politician lawyers, not audible to the public in attendance—in short the atmosphere of the inferior criminal courts—create in the minds of observers a suspicion of the whole process of law enforcement which, no matter how unfounded, greatly prejudices respect for and observance of law. Even in jurisdictions in which the judges of these courts are appointed and are distinctly above the average for the country generally, they are sometimes permitted to practice in other courts and their professional connections are sometimes such, or appear to be such, as to give rise to unfortunate suspicions. Taking the country as a whole there has been and continues to be scandal in connection with these inferior tribunals in noteworthy contrast with the almost uniformly clean record of the superior courts during a century of immersion in politics. After starting out well, few of the more recently organized municipal courts have been able to maintain the requisite high type of personnel, nor are they likely to be able to do so until the bar and the public become thoroughly alive to

the importance of these tribunals for an efficient administration of justice.

As to procedure in the inferior criminal courts of the States, there is relatively little to be done. Chiefly, improvement must be sought in the personnel, tenure, and mode of choice of the magistrates. Neighborhood quarrels, petty depredations, small-scale predatory activities, very serious to the participants or victims, and often most irritating in a crowded urban community, are not to be dealt with effectively by the contentious procedure which has developed for and is appropriate to the superior courts. It has been a universal experience that such cases are best disposed of summarily by a strong magistrate with a large measure of discretion applying to them his common sense, but within the limits of the law. This involves conferring large powers, as between man and man, on magistrates who to-day are seldom of the requisite caliber. The power of passing upon conduct and appraising its moral aspects untrammeled by many rules, is a royal one. It requires a magistrate equal to exercise of royal powers, if it is to be employed wisely and well. In tribunals or causes where there is not a defined, contentious procedure, with both sides represented by competent counsel, the fundamental guaranties may be made effective only by putting on the bench magistrates who understand these guaranties and how and when to give effect to them on their own motion. It is important not only that justice be done but that those who come before the tribunals or take part in or watch the proceedings, feel it is done. The casual arbitrariness characteristic of proceedings in the inferior courts, to a greater or less extent everywhere, contributes to suspicion of and disrespect for law.

Next to organization of the courts and better personnel, the matters most deserving of attention are the overburdening of our inferior courts with matters which in the rest of the world are confided to administration, the excessive resort to arrest as a mode of beginning minor prosecutions, and the system of double appeals.

In nineteenth-century America we sought to make the courts do the bulk of what to-day we have been learning to do through administration. In particular we cast upon courts a heavy burden of what is more appropriately administrative work. Particularly prosecutions were relied on to do what would have been done better by administrative inspection and supervision and adjustment. It is worth while considering whether much of traffic regulation in the city streets could not be achieved more effectively, and with less annoyance to the parties and expenditure of public time and money, by administrative agencies rather than by magistrates' courts. Certainly such things as violations of parking rules need come before criminal tribunals only in exceptional cases.

In some jurisdictions civil suits for penalties in which arrest is not involved are used ordinarily for breaches of municipal ordinances. In England summons, rather than arrest, is used regularly for minor prosecutions, and this practice obtains in some States, although even in those States arrest is employed too indiscriminately. At common law all prosecutions began with arrest and this is the staple method of beginning petty prosecutions in the United States. The practice of summons in such cases should be introduced wherever it is not provided for, and its use should be extended everywhere. Indiscriminate exercise of the power of arrest is one of the most reprehensible features of American criminal justice.

One of the most significant improvements in connection with the municipal courts set up in many of our cities in the present century is the provision for doing away with two trials on the merits in minor prosecutions through reviewing proceedings in those courts, in cases within their summary jurisdiction, only for errors of law. In some of these courts an appellate division has given them a specially effective organization. The inferior courts should be so organized and so manned that they may be trusted to do the work in their sphere as we trust the superior courts to do the work in theirs. Instead of retrial of all cases where the accused has the means to appeal, a modern organization of courts

would provide for general visitatorial powers over the inferior tribunal, exercised by responsible superior judges. The system of double appeals from magistrates' courts and retrial of the facts in a superior court as a matter of course, gives a great and unjust advantage to delinquents of means or delinquents with an organization behind them.

The absolute right of having any conviction before a magistrate retried before a jury in a superior court, which obtains in so many jurisdictions, clogs the dockets of the higher courts with long lists of minor cases awaiting jury trial and has much to do with compelling wholesale dismissals and bargain penalties. It adds to the overburdening of jury trial which makes citizens generally seek to avoid jury service. It deprives the convictions in magistrates' courts of efficacy as to those who can appeal. It interferes with the proper disposition of the primary business of the superior courts. It has had much to do with the growth of a system of disposition of prosecutions out of court. In some jurisdictions it has almost paralyzed administration of the laws as to serious traffic violations. It should be done away with everywhere. But provision of courts equal to their tasks must go along with this change.

Another significant improvement, introduced in some of the municipal courts set up in the present century, deserves to be adopted in all inferior urban courts and to be developed further. More and more we must put the emphasis upon preventive justice; and preventive criminal justice is emphatically the field of the inferior criminal tribunals. It was a great step forward when the municipal court of Chicago set up a bureau of information where the citizen could ascertain something of his rights and duties instead of being compelled to guess, subject to prosecution if he guessed wrong. The conception of such a tribunal not as a mill for grinding through prosecutions but as a bureau of justice has great possibilities for law and order in the city of to-day. But it calls for an adequate personnel both as to the magistrates and as to the administrative officials. Without this, no improved organization or machinery will effect much.

III. PROCEDURAL PROTECTIONS OF THE ACCUSED

1. THE STAGES IN A CRIMINAL PROSECUTION

Reduced to its lowest terms, the essentials of a criminal proceeding are: (1) To bring the accused before or within the power of the tribunal, (2) a preliminary investigation to insure that the cause is one which should be prosecuted, (3) notice to the accused of the offense charged, (4) opportunity to prepare for trial, procure witnesses, and make needed investigations, (5) a speedy trial, (6) a fair trial before an impartial tribunal, and, (7) one review of the case as a whole by a suitable appellate tribunal. Criminal procedure should be as simple and direct as is consistent with these requirements.

For historical reasons a criminal prosecution has come to involve much more. In a general view, the stages are as follows: A prosecution may begin with *arrest*, which may be upon or without a warrant. If the arrest is upon warrant, the warrant issues upon a sworn charge, generally called a *complaint*, but in some jurisdictions styled an information. If it is without warrant, a sworn charge is filed when the person arrested is brought before a magistrate. If the prosecution is one in the summary jurisdiction of the magistrate, trial is proceeded with in the inferior court with conviction and sentence or acquittal. In case of conviction, an appeal to and retrial in a superior court is generally provided for as a matter of right, although, as set forth above, some jurisdictions have limited review of such convictions to questions of law. If the prosecution is not in the summary jurisdiction of the magistrate, there is a *preliminary examination* in order to ascertain whether there is probable cause for maintaining it. At this examination the accused may be discharged or may be bound over to await the action of the grand jury or of the district attorney in States where indictment is no longer required. After arrest, or after binding over, or after indictment, or again pending appeal, the accused may be admitted to *bail*, i. e., may be released from custody upon giving security for appearance in court at the required time. Next follows presentation

of the case to a grand jury, which may find there is no probable cause for the prosecution to go on, or may find an *indictment* or formal accusation. Instead of this, in a growing number of jurisdictions, the public prosecutor may file an information, or formal charge made by virtue of his office. But a prosecution may also begin at this point by a grand jury finding an indictment against persons not bound over by magistrates. In that case arrest follows the indictment.

Next in order come *arraignment*, or a formal reading of the charge to the accused in open court, and the *plea* or pleas of the accused. At common law he may demur to the indictment or information, i. e., challenge its sufficiency in point of law, or plead to the jurisdiction (by a written pleading) or plead in abatement (also by a written pleading) that the grand jury was irregularly constituted or that its proceedings in finding the indictment were fatally irregular. To-day the latter objections are usually raised by motion to quash. If the indictment is found to be insufficient in point of law or fatal irregularities are shown, the prosecution is brought to an end and a new one must be instituted. Or, instead, the accused may plead in bar (again by a written pleading) that he has been previously acquitted or convicted or put in jeopardy for the same offense. Or he may plead orally to the merits, pleading guilty or not guilty. If the former, sentence follows. If the latter, the next step is *trial*.

Trial in our system involves the impaneling of a jury, the presentation of evidence, argument by counsel, and the charge of the court. Then follows the *verdict*, which may find the accused guilty or not guilty. If the latter, there is judgment of acquittal and the accused goes free. No further proceedings against him are permitted after that verdict. If he is found guilty, the accused may attack the proceedings by certain *motions after verdict*. He may challenge the jurisdiction, or the legal sufficiency of the indictment or information, or the regularity of the proceedings on the record, by a motion in arrest of judgment; or he may attack the regularity of the trial, for matters not appearing

on the record, by a motion for a new trial. Some jurisdictions allow all questions to be raised by the latter motion. If the record is held free from error or the motion for a new trial is not granted, *judgment and sentence* follow, and after sentence, in a number of jurisdictions, there may be a motion in mitigation of sentence. This practice, which has recently obtained the sanction of the Supreme Court of the United States, very generally leads to modification or diminution of the sentence as originally imposed. Finally, there is *review* of the conviction in an appellate court. At common law this took place by writ of error and was for errors of law only. But a number of jurisdictions allow a review of the evidence to ascertain whether it suffices to sustain the indictment or information and verdict. In some States there is a simpler mode of review upon exceptions, and in a growing number, a review by appeal, which may follow the lines of the error proceedings at common law but on the other hand may be made much simpler. In England there is an appeal on the whole case. In the United States for the most part review is confined to examination of the proceedings in order to ascertain whether prejudicial errors have taken place, and too often nothing more is determined than that the rules of the game have been complied with.

In our Report on Prosecution we have pointed out how these several stages have developed and taken shape along with a system of constitutional guaranties and mitigating devices, chiefly as protections to accused persons, and as a result of contests between the courts and the Crown in Stuart England at the time of colonization, when we took over English institutions. But they developed and took shape, also, with reference to a time when all serious crimes were punishable with death. They must be reviewed and reconsidered with reference to their functioning under the quite different conditions of criminal justice to-day.

2. RESTRICTIONS ON ARREST

At the outset the liberty of the citizen is secured by important legal restrictions upon arrest. These restrictions are both common law and statutory. The common-law

rules took form in the seventeenth century. In the latter part of the sixteenth century it was arguable that a justice of the peace could not issue a warrant of arrest for a felon till after indictment. The rules on this subject, as we now know them, were stated by Sir Matthew Hale in the latter part of the seventeenth century.

Thus, not only do they speak from the age of contests between courts and crown, but what is more significant, they long antedate police organizations and in their very language are made to fit a system of maintaining the peace which has long been obsolete. By the common law, arrests might be made either by a private person or by a peace officer. Arrest by private persons is a modified survival from the middle ages. It is seldom employed to-day and the rules on the subject need not be considered. As to arrest by peace officers, it might be made for a felony committed in the officer's presence, or in case a felony had been committed and there was reasonable ground for believing that the person arrested had committed it, or in case of reasonable ground to believe a felony had been committed and that the person arrested was the perpetrator. As to the last proposition the law has been variously modified in many States and as a rule by no means always for the better. As for misdemeanors, the general rule was at common law that there could be no arrests without a warrant, the exception being where a breach of the peace was committed in the officer's presence. Largely the statutes on the subject are merely authoritative formulations of the common law. But 37 States have extended the power of arrest without warrant to all misdemeanors committed in the officer's presence.

In case of an arrest not within these legal limits, the officer making it is liable to a civil action for damages. Also he is liable to discipline. It is true that in case of persons of no influence or little or no means the legal restrictions are not likely to give an officer serious trouble. On the other hand one who has the means and the inclination may cause an officer serious trouble if he goes beyond the legal limitations, especially if political influence can be put in the scale to insure administrative disciplinary action. Thus capricious exercise of the power is invited, and, as Colonel Woods

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has pointed out, officers are led to do nothing in cases of doubt, as the only safe course. Because of these difficulties under which police officers labor, magistrates frequently tend to uphold arbitrary police action arbitrarily, in the supposed interest of law and order.

It must not be supposed that the burden which these rules impose upon a conscientious officer is light or merely theoretical. To determine, when inclined to arrest without warrant, whether the offense is a felony or a misdemeanor requires not a little knowledge of law in these days of legislative felonies. The rules as to what constitutes an offense in the officer's presence are somewhat technical and there are decisions in the reports where officers have been held for what to the ordinary man would appear an eminently sensible course of conduct. Again, in making an arrest, the officer may use necessary force, even to killing, in the case of felonies. But what is necessary is something which will be tried after the event. The officer has the burden of justifying his action, and is liable beyond what he succeeds in justifying. Also, he must be assured that the offense is a felony.

In this connection Colonel Woods says:

> The inevitable result of this sort of thing is that the policeman learns by experience and by the wise advice of his elders that his best course is to play safe, to keep out of trouble, to think before he acts, and think especially how any action he might take would affect him personally. He can never afford to lose sight of either penalty, the chance of being taken to court on either a civil or criminal charge, and the danger of being put on charges before the trial deputy commissioner of the department. He may dodge Scylla only to be sucked into Charybdis. And the discipline of the department is no joke. If he is dismissed from the force he loses not only his job, but all his accumulated rights to a pension; and a good bit of his savings probably goes to pay the legal expenses of his trial. The mistakes that get a policeman into trouble are usually those of action. The temptation is, therefore, to do nothing; to see nothing; not to be there; and if there by some unhappy chance, to look the other way; to step around the corner.

Thus, when dealing with those likely to make trouble there is the strongest temptation to inaction. On the other hand the books are full of examples of exceeding the legal limits

in dealing with those not likely to make trouble. The net effect is obviously unfortunate. It is of the first importance that the officers charged with enforcement of the law themselves obey the law. But it is no less important to have legal rules governing their action consonant with the practical exigencies of enforcement, so that they shall not be driven to exceeding their powers in order to do what is expected of them, or subjected to harassing liabilities in the practical execution of their duties. Not the least cause of nonobservance of law is to be found in the screwing up of legal requirements beyond the limits of practicable observance. The rules applicable to arrest and its incidents should be restated with reference to the conditions in the cities of the present century.

3. PRELIMINARY EXAMINATIONS

In this connection the chief need is competent magistrates, properly organized, and a proper organization of the prosecutor's office. So far as procedural improvements are called for, reference may be made to the model code of criminal procedure of the American Law Institute and the commentary published therewith.

4. INDICTMENT OR INFORMATION

As to the requirement of indictment by a grand jury, reference may be made to our Report on Prosecution (pp. 34–37, 124–126).

The technical rules with respect to stating the charge against the accused, applicable alike to indictments and informations, will be considered in a later part of this report. At this point it is enough to say that the requirements as to indictments grew up at a time when the only review of a criminal proceeding was by writ of error for errors apparent on the face of the record, that is, of the indictment, recital of trial and verdict, and the sentence. Hence the indictment at common law had to do much more than apprize the accused as to what was charged against him. It had to set forth a complete case against him sufficient on its face and without more to sustain the

judgment of conviction and sentence. Moreover when the forms of indictment became settled there were no such means of establishing what was tried as are now available everywhere. Hence for the protection of the accused against subsequent prosecution or jeopardy for the same offense it was necessary to insist upon a particularity in stating the charge which is not called for to-day. There is no longer reason for requiring more than such notice of the offense charged as will assure a fair trial.

5. BAIL

Grave abuses as to bail are reported from almost every part of the land. There is general complaint that admission to bail is a perfunctory routine, that the amount is fixed capriciously or with reference to arbitrary schedules with no real consideration of the circumstances of the particular case, that there is frequent carelessness as to security, that professional sureties flourish in connection with the criminal courts and are often permitted to assume an aggregate of liability which makes their bonds worthless, that forfeitures are not enforced or are feebly and occasionally enforced, and that on the whole there is no effective security for appearance in cases where such security is needed.

Bail is as old as the criminal law itself. The need of such a system is evident. Indeed there is the more need of it where arrests are as numerous and indiscriminate as they have come to be so generally in the United States. At common law the superior courts have an unlimited and unquestioned power of admitting to bail which has existed from the earliest times. The power of magistrates, for American purposes, goes back to a statute of Philip and Mary (1554) which is common law with us. In England it was the subject of further legislation in 1826 and again in 1848. There is a great variety of constitutional limitation, legislation, and regulation in the several States, which has achieved relatively little permanent improvement.

It is evident that the difficulties in our cities lie deeper than the statutory provisions. Perfunctory administration will defeat any legislation. The causes of the unsatisfactory

workings of the bail system in so many parts of the country are to be found, in varying degrees in different localities at different times, in (1) the lack of sufficiently strong magistrates or administrative officials to administer the system wisely and discriminately; (2) too much pressure of work to enable it to be done intelligently, due to the excessive number of arrests in comparison with the prosecutions which are carried out to trial for the offense charged; and (3) the influence of politics, particularly active in this connection, and the bane of inferior courts in all connections. It must be borne in mind that it is in those courts and after preliminary examination that bail is chiefly arranged.

As to what may be done by legislation, we may refer to the Model Code of Criminal Procedure of the American Law Institute.

6. JURY TRIAL

For historical reasons, trial by jury in criminal cases has been regarded chiefly from the standpoint of a safeguard of the accused. Indeed nineteenth-century discussions of the criminal jury put the chief stress upon the power of rendering general verdicts as a mitigating agency and on the dispensing power of juries as a protection to the individual citizen as against oppressive laws or oppressive enforcement of law. America was colonized by Englishmen who had had a bad experience of seventeenth-century English legislation and seventeenth-century law enforcement under the Stuarts, and had been taught to think of the jury as standing between them and royal tyranny. Again, on the eve of the Revolution, the local jury in more than one colony was a safeguard against enforcement of obnoxious legislation by royal governors. Thus, from the beginning of American law, we have thought of the jury in terms of the seventeenth-century contests between the courts and the Crown and in terms of the eighteenth-century contests between the colonies and royal authority, rather than as an effective tribunal for ascertainment of the facts in criminal prosecutions.

Moreover, the jury in a homogeneous pioneer or rural community functioned under circumstances much more favorable for good results than those which obtain in the

heterogeneous diversified urban industrial community of to-day. The strong point in the common-law jury as a fact-finding agency was that it brought to the solution of controverted questions of fact and the weighing of conflicting evidence neighborhood knowledge of men and things, the common sense of everyday men with reference to everyday things. No such knowledge is possible in industrial communities where "there is residential turnover in some districts of 80 per cent in five years." No such everyday opinion and general understanding can form in "an intermingling of over 50 nationalities and races * * * white, black, and yellow," such as is to be found in greater or less degree in our large cities. The resulting strain on jury trial is reflected in complaints as to the inefficiency of juries in almost every part of the country.

Another circumstance which has been making against the efficiency of jury trial in criminal cases is the excessive demand upon the time and energy of the citizen in proper performance of civic duties in the city of the twentieth century as compared with the rural community of the past. Frequent elections, often with very long lists of officials to be elected and of candidates for each office, grand juries and trial juries in almost continuous session throughout the year, with service upon them in no way adjusted to the exigencies of callings or businesses, call for more than the citizen may reasonably be expected to do under the stress of competition in urban life. It is highly inconvenient for those who are best qualified to do what is demanded for the best results in criminal cases. Hence there is constant heavy pressure to be excused on the part of those best fitted for jury service. When elected judges, frequently holding for relatively short terms, are subjected to this pressure, often reenforced by political influence, it can not be expected that a high standard of competent juries may be maintained. The difficulty is increased in some States where the legislature by statute has given exemption from liability to jury duty to so many classes and categories of persons as to remove from possibility of service the best qualified citizens, thus narrowing the body from which selection must be made to the least

intelligent, experienced, and competent part of the community. There is a great variety in the modes of selecting the panel in the different States. But taking our cities as a whole, none have succeeded in bringing about enduring improvement. It seems clear that stronger trial judges, emancipated from politics, and less demand for public service upon the time of the citizen, give more promise of insuring service upon juries of the citizens best qualified to [illegible] further tinkering with the statutes governing selection of the panel.

At the trial, selection of trial juries from the panel has come to take an inordinate time and cause an inordinate expense in all hotly contested cases in the great majority of jurisdictions. Elaborate examinations with reference to the qualifications of each juror, as the foundation for challenges, in which each side endeavors to secure every advantage in the personnel of the jury, taken advantage of by intelligent members of the panel eager to escape service, often require many successive panels to be drawn and summoned and days of examination before all challenges are exhausted and the 12 who are to serve can be selected. This wasteful proceeding does not result in better juries, as is shown by experience in those jurisdictions where the practice does not obtain. Indeed, on the whole, it results in weak and even ignorant juries for the cases where strong and intelligent juries are most required. Examination of the panel as to their qualifications, conducted by the court instead of by counsel, a practice obtaining with the best of results in some of our older jurisdictions, has proved entirely sufficient to insure impartial juries, has insured a higher level of jurors, and has obviated much delay and expense. It should supersede the practice of examination by counsel. But it calls for strong trial judges, with secure tenure, able to withstand the urgency of counsel seeking to obtain advantages in the composition of the jury.

It should be added that the difficulty in obtaining impartial juries in important criminal cases is enhanced by what often amounts to trial of the case in advance in the press. Not stopping at a narrative of what has taken place in the preliminary examination, newspapers have assumed to set

forth in advance the evidence to be adduced by prosecution or defense or both, and even in some cases to invite their readers to form judgments upon the evidence so presented and communicate them for publication. The English courts have effectively stopped this practice, as an intolerable interference with the due course of justice. Also, one strong American court has visited it with punishment for contempt. But it goes on in greater or less degree in the majority of our jurisdictions and in one the extralegal prejudging of the case was carried so far, in an important prosecution for murder, as to exhibit publicly a purported reconstruction of the murder pending prosecution. Such things are the more serious with us because in so many jurisdictions trial judges are not permitted to charge juries effectively and there are no sufficient means of counteracting the effect of suggestions produced upon the jurors before the trial. Undoubtedly the power of their judges to guide juries toward an intelligent weighing of the evidence makes it possible for the British courts to dispense with the preliminary examination of the panel by which American lawyers set so much store.

As to peremptory challenges, with respect to which the law in too many States gives a grossly unreasonable advantage to the accused, we may refer to the model criminal code of the American Law Institute and the commentary in which the laws of the several States are collected and the details are discussed.

Another cause of inefficiency is to be found in the extravagant powers confided to juries in many of the States. We shall consider in another connection statutory restrictions on the power of trial judges to charge juries. In a number of jurisdictions juries are made judges of the law in criminal cases, thus inviting them to dispense with rules of law instead of finding the facts. The juror is made judge of the law not to ascertain what it is, but to judge of its conformity to his personal ideals and ascertain its validity on that basis. In many States, in certain classes of prosecutions, the assessment of punishment is left to the jury. Thus the question whether or not accused committed the act charged is confused with the question what ought to be done to him, and the triers of fact are diverted from their primary inquiry. A study some years ago of the assessment of punishment by juries in homicide cases showed that picturesque murder, however heinous, was visited with imprisonment, while murders no more heinous but lacking in the picturesque element, were visited as a rule with the death penalty. Overburdening juries by adding to their task of finding the facts tasks of finding the law and of assessing the punishment, have made for loss of faith in the common-law mode of trial in the jurisdictions where these practices obtain. It is significant that there is most satisfaction with criminal juries in those jurisdictions which have interfered least with the conception of a trial of the facts by jurors unburdened with further responsibility and instructed as to the law and advised as to the facts by the judge.

It is worth while to note some of the reasons for the extravagant powers of criminal juries in so many of the States. Colonial tribunals were largely manned by laymen and lay judges obtained in some States till well into the nineteenth century. There was no substantial difference in training, competence, experience, or intelligence between judge and jury. Also the colonists had had a bad experience of judges in the political and religious prosecutions in the nadir of English justice under the Stuarts. In some colonies there had been a bad experience of royal judges, and after the Federal Constitution there was a bad experience of masterful federalist judges. All these things tended toward a régime of free rein to juries, congenial to pioneer modes of thought, and reenforced by the dominance of the trial lawyer in the politics-ridden courts of the last century. The effects are seen to-day in a decadence of jury trial. The civil jury is obviously losing ground everywhere. The spread of commercial arbitration, the taking of large areas of controversy out of the domain of the courts, the requirements that a jury be demanded expressly or it will be deemed waived, the requirement in some jurisdictions that one who demands a jury in a civil case pay for it in advance, and the provisions for majority verdicts tell a plain story. Indeed in recent years there has been a widespread agitation against jury trial which should be compared with the almost uni-

versal faith in juries in the last century. Recently this agitation against the traditional mode of trial has spread to the criminal jury. Waiver of jury trial in criminal causes has made steady progress and its constitutionality is now established. Repeated failure of juries to agree in recent conspicuous criminal trials has brought about agitation for majority verdicts in prosecutions. Many are now urging abolition of the criminal jury.

Waiver of jury trial in criminal cases is considered on pages 24 and 127 of our Report on Prosecution and it is there recommended that the practice be established wherever that improvement remains to be made. Jury trial is very expensive in time and money and ought not to be resorted to where the parties are satisfied to try the cause to the court. Looked on as a guaranty to the accused, he should not be compelled to take shelter behind it if he does not choose. Looked at as a mode of finding the facts, jury trial costs too much in public time, public money, and inconvenience to the citizen to be resorted to needlessly. On the other hand, we feel strongly that the jury is on the whole an eminently suitable tribunal for criminal cases. The causes of dissatisfaction are in the overburdening of trial juries with tasks not part of their fact-finding function, the restrictions on the trial judge in so many of the States, which deprive the jury of the judicial guidance which the system presupposes, and the feebleness and timidity of judges in jurisdictions where the bench is dependent on politics or the powers of the judge have been suffered to fall into abeyance. The remedy for the conspicuous abuses of jury trials in American criminal justice is to be found in less use and more rational use of the jury, in confining the jury to the work of fact-finding, in vigorous judicial direction and control of the selection of trial jurors, and above all, in strong trial judges free from politics and empowered and inclined to make the trial an effective instrument for its purpose.

7. THE PRESUMPTION OF INNOCENCE

One of the most important of the procedural protections of the accused is the presumption of innocence. The prosecution must prove its case beyond reasonable doubt. Until guilt is so established, the law assumes innocence. Much has been said against this doctrine in recent lay discussion. But such cases as that of Adolf Beck in England, and there have been too many such cases in all jurisdictions, show the danger of setting the legal machinery for speedy and assured conviction of those whom the police bring to it. In the Beck case the police, in perfect good faith, on what seemed to them clear evidence, believed in the guilt of the accused and shaped the investigations and prosecutions accordingly. In the end it proved that a man innocent beyond question had to undergo two convictions and two imprisonments. It must be conceded, however, that a mass of artificial rules grew up in nineteenth-century America about the doctrines of presumption of innocence and proof of guilt beyond a reasonable doubt and gave rise to academic technicalities which were at their highest point of development in the last quarter of the nineteenth century. In the present century the whole tendency of the courts has been increasingly in the opposite direction. There is no need of doing more than calling attention to the change of attitude of appellate courts in this connection.

8. EXEMPTION FROM QUESTIONING AND FROM COMMENT BY COUNSEL OR COURT ON FAILURE TO TESTIFY

This procedural protection is discussed fully in our Report on Prosecution on pages 25 and 26 and our recommendation with respect to it will be found on page 38 of that report. It is mentioned here only for the sake of completeness.

9. REVIEW BY THE TRIAL COURT

After a verdict of guilty, accused may, by motion in arrest of judgment, challenge the jurisdiction of the trial court, or the legal sufficiency of the indictment or information, or the sufficiency of the record on its face to sustain the conviction. This proceeding goes back to the days of mechanical trials when regularity of the record on its face was all that could be inquired into by way of review. The scope of the motion in arrest of judgment has been much limited by legislation in different States. The model code of criminal

procedure of the American Law Institute proposes to retain it for four cases: (1) Where the indictment or information does not charge an offense, (2) where the court is without jurisdiction, (3) where the verdict is so uncertain that it does not appear therefrom that the jurors intended to convict accused of an offense of which he could be convicted under the indictment or information, and (4) where accused was found guilty of an offense for which he could not be convicted under the indictment or information. It seems to us that this motion might well be eliminated. It should be enough that questions of jurisdiction and of the sufficiency of the indictment may be raised once in the trial court and once on review. Questions as to the verdict could well be left to the motion for a new trial. Repeated raisings of the same question are productive only of delay and the multiplication of steps in procedure lends itself to the game of defense without serving any useful purpose.

In civil cases the motion for a new trial goes back to the seventeenth century. In England there are no new trials in cases of felony, but the Court of King's Bench formerly granted them on motion in cases of conviction of misdemeanors. In felony cases, if there is a fatal defect in the conviction, the English practice is to quash it and no further proceedings are possible as to that particular offense. In the United States, as things were in our formative era, it was a distinct improvement to grant new trials in all prosecutions where a prosecution failed for error at the trial or other difficulty not on the face of the record, which might be avoided or obviated at another trial. In the heyday of technical procedure in the last half of the nineteenth century, a great mass of detail developed as to new trials, and for a time they were granted lavishly. Also in many jurisdictions the motion for a new trial became of great importance not so much as a means of obtaining a new trial by the action of the lower court, as in order to serve as the foundation of review by an appellate court. Any requirement for the latter purpose should be done away with and the motion should be reserved for occasional cases where there is reason for applying to the trial court to correct an

error not already canvassed before it instead of taking an appeal. There should be no repeated raising of the same questions before the same court, such as goes on continually in our criminal procedure as it is. State legislation on the subject is fully set forth in the commentary to the model code of civil procedure of the American Law Institute.

10. REVIEW BY HABEAS CORPUS

In some jurisdictions a grave abuse grew up in use of the writ of habeas corpus as a mode of reviewing convictions. The proper function of the writ is to determine the legality of the imprisonment of one held in custody. Use of it by one judge or court to review conviction by another judge or court of concurrent jurisdiction should not be permitted. In part such things would be obviated by a modern organization of courts. Even more, they would be obviated by insuring a bench of sufficient strength and courage to resist such applications and confine the proceeding to its legitimate purpose.

11. REVIEW BY APPEAL

Finally, the accused may have a conviction reviewed by an appellate tribunal. The scope and practice of review of convictions will be considered fully in a later part of this report.

IV. CRIMINAL PLEADING

1. LEGISLATIVE PRESCRIBINGS OF DETAILS OF PROCEDURE

About the middle of the nineteenth century the States began to regulate all the details of legal procedure, civil and criminal, by legislation. In part this was due to popular resentment of the disinclination of lawyers and courts to take up reform of the received English procedure and do the work of reshaping it to American conditions. In part it was due to the leadership of the legislature in the political life of the time and the faith in legislatures, as marked then as distrust of them is to-day. Experience has made it clear that this legislative prescribing of the details of legal

procedure was a mistake. American substantive law of civil relations, which was left to be worked out by the courts, with the aid of legislation where new starting points were needed, is one of the notable achievements of legal history. On the other hand, legal procedure, the work of legislatures, with the rôle of the courts confined to interpretation and application, is concededly the weak point in our administration of justice and is responsible for much which passes for inadequacy of our substantive law. In the present century we have left the procedure of administrative tribunals to be worked out by those tribunals. In the Federal administration of justice, procedure in equity, in admiralty, in bankruptcy, and in copyright cases has been left wisely to judicial development by rules of court.

In Federal criminal procedure legislation has interfered but little and has left the matter largely to judicial development of the common law, with the result that many things which embarrass prosecution in the State courts have never given trouble in the Federal courts. The process of legislative framing of detailed rules of procedure is dilatory, cumbersome, and uneven. The legislature can no longer be well informed on such matters, which are out of the experience of the average lawyer of to-day. The line of ultimate progress is to leave procedure of every sort to regulation by judicial rule making. With the growth of judicial councils, obviously far more able to give continuous, intelligent, and well-informed attention to such things than judiciary committees in the hurry of legislative sessions, the courts will be able to apply experience to meeting defects in procedure as experience discovers them, and to make and keep the rules adequate to their purposes. The idea that hard and fast legislatively imposed details of procedure are essential to the security of individual liberty, comes down from a time when the law to be administered by the courts was ill defined and the only check upon judicial action was to be found in rigid procedure. Regulation of procedure through rules of court should be taken for a goal. But in the meantime we shall have to resort to legislation to bring about immediately needed improvements.

2. INDICTMENTS AND INFORMATIONS

Under the system of reviewing the record rather than the case, it was requisite that the indictment or information contain everything necessary, when strictly construed, to uphold the judgment of conviction and the sentence. Thus the formal charge came to be much more than a notice to the accused of the offense for which he was to be tried. It was a complete statement of the case, more as a ground of a valid judgment than as a notice. In England a complete change has been brought about by providing for short indictments, stating the offense charged and specifying in brief phrase the acts constituting it in the particular case. If more is needed to enable accused to make his defense, it may be secured through demand for a bill of particulars. But if there has been a preliminary examination, accused knows well enough the nature of the charge and the evidence by which it is to be maintained, and if he has waived such examination he is not likely to be ignorant of these things. The system has worked well. A growing number of States have been moving in the same direction by legislation, and the model code of criminal procedure of the American Law Institute is drawn in the main upon this line. Unhappily, some States have rigid constitutional provisions as to the form and contents of indictments. Such things are out of place in a constitution and should be dealt with in general terms even in statutes. We recommend the provisions as to indictment and information in the model code of criminal procedure of the American Law Institute for general consideration.

3. PLEAS AND MOTIONS TO QUASH

In a majority of States legislation has much simplified the common-law pleas. It is proposed in the model code of criminal procedure of the American Law Institute to carry this still further by substituting a motion to quash the indictment for demurrers and all pleas except the oral pleas of guilty and not guilty. The matter is not of great importance, but we think the change a distinct step forward in the development of procedure and recommend it.

Not the least advantage of the accused is that he may prove any defense, except former acquittal or conviction or jeopardy, under a general oral plea of not guilty. In a civil case a defendant must plead specially all affirmative defenses. In a criminal case, while accused knows from the preliminary examination substantially what will be shown against him, the prosecution is often quite in the dark until the defendant's evidence comes in. Sometimes the prosecutor has to prepare on rebuttal what proves to be the real case. On account of the grave abuses which grew up a generation or more ago in connection with the defense of insanity in homicide cases, some jurisdictions by statute require insanity to be pleaded specially. But the practice adopted in the model code of criminal procedure of the American Law Institute would seem to be better, namely, to require a written notice of purpose to show insanity or mental deficiency to be filed at the time of the oral plea of not guilty or not later than a specified number of days before trial. We think also that this requirement of written notice in connection with a plea of not guilty should be extended to all affirmative defenses, e. g., justifications and excuses, such as self-defense, leaving as the scope of the plea of not guilty, the questions whether or not the acts charged took place and whether the accused committed them. Not only does the prosecution labor under an unfair disadvantage as things are, but trials are unduly protracted by the necessity on the part of the prosecution of anticipating every possible affirmative defense, not knowing which one will be advanced ultimately by the accused.

V. EVIDENCE IN CRIMINAL CASES

Much of what is complained of in respect of the law of evidence in criminal cases and its judicial applications relates to a condition which began to wane two decades ago and is distinctly ameliorated at present. So far as this condition still obtains in part in some localities it is not so much to be met by legislation as by an improved opinion in the profession and the pressure of the economic order which has been making the rules-of-the-game idea increasingly obsolete everywhere. Much also may be met without legislation by an improved personnel of the trial bench, equal to resisting the pressure from professional defenders, and by a stronger, more intelligent, and less mechanical administration of the rules as they are. However, four matters which have been much urged, deserve special notice.

1. SECURING THE TESTIMONY OF WITNESSES WHO ARE OUT OF THE STATE

One of the stock devices for defeating criminal justice is to procure, persuade, or intimidate material witnesses for the prosecution to go into another State beyond the reach of process for compelling their attendance as witnesses. Ten States have legislation whereby persons who are required as material witnesses in other States (or sometimes in neighboring States) may be summoned in the State where they are found and after a judicial inquiry, and under certain safeguards, required to appear and testify in a pending prosecution without the State.

There are obvious difficulties in this practice. Six of the ten States where it obtains are New England States where the conditions of area, distances, and transportation are such as to obviate hardships which would obtain in States of great area, long distances, and less complete systems of transportation. Suitable legislation will require careful study with respect to conditions in different parts of the country. The matter is now under consideration upon a draft of a uniform law approved by a joint committee of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Hence it seems expedient to do no more than call attention to the subject and refer to the action of those bodies.

2. DEPOSITIONS IN CRIMINAL CASES

In a civil case evidence which is not likely to be available at the trial may be preserved by taking the depositions of witnesses. This may not be done in a criminal case, as to which constitutions guarantee that the accused shall be confronted with the witnesses against him. Experience has

shown that there is here a guaranty of real value. Witnesses will say many things in the absence of an accused which they will not say to his face in open court. Yet much material and even at times crucial evidence becomes unavailable in criminal prosecutions because of this rule, and as was said above, advantage is often taken of it by running off dangerous witnesses. Hence it has been urged upon us strongly that there should be provisions in the statutes, State and Federal, for the taking of the testimony of witnesses, either for the prosecution or the defense, in the presence of the accused, to be used if the witnesses can not be produced at the trial. But testimony by deposition is at best unsatisfactory. Also, unless constitutional provisions are changed, the depositions would have to be taken in the presence of the accused and so would not be feasible in the cases of chief concern, namely, those in which witnesses are "run out of the State." Conceding that the situation is far from satisfactory, we are not able to make any specific recommendation.

3. EXPERT EVIDENCE

Public opinion has been much aroused as to expert evidence in criminal cases, and a great variety of proposals have been advanced in the different surveys, by different crime commissions, in communications addressed to us, and by writers, legal, medical, and lay. Also there has been much recent legislation. Chiefly the discussion turns upon expert evidence on the question of insanity at the time of commission of the act. It must be borne in mind that mental condition becomes an issue in two very different types of cases. In one type a psychopathic or mentally defective offender is before the court and there is a genuine question as to how far he comes within the limits of legal responsibility. In another type, a defense of insanity is set up as a handle for escape of a sane offender, whom, for some reason, a greater or less public opinion does not wish to see punished. Under the reign of the "unwritten law" idea in the last century, when and where public opinion condoned homicide in vindication of the honor of the offender or of

family honor, the ingenuity of alienists, employed as witness-advocates in such cases, worked out plausible theories of "irresistible impulse," "emotional insanity," "brain storm," and the like, which deceived only the willing-to-be-deceived, but enabled results to be reached consonant with public opinion. From these cases these doctrines spread to other cases, and in the waning of frontier ideas, courts and legislatures set out in the present century to curb the defense of insanity. There is danger that with our eye on the abuses in the one type of case we forget what is required for the other type.

At common law the question of insanity could come up at two different points: (1) At the time of arraignment or trial, with respect to the capacity of accused to take an intelligent part in his defense; (2) at the trial, as to the capacity of accused at the time of commission of the act. Many States now take advantage of the first to lay ground for intelligent investigation of the second, by committing the accused in any case, where insanity or defective mentality may become an issue, to a suitable institution for investigation. Some provide for this procedure where insanity at the time of committing the act comes in issue. Also, a number of States provide by statute for appointment by the courts of experts to testify at the trial, leaving it to the parties to bring in other witnesses if they choose, subject to limitation of the number in the discretion of the court. We think the carefully considered provisions of the model code of criminal procedure of the American Law Institute, approved by the American Institute of Criminal Law and Criminology, by the committee on jurisprudence and law reform of the American Bar Association, and by the committee on criminal prosecution and judicial administration of the National Crime Commission, do as much as may be achieved by legislation. Beyond this, the best assurance of correcting the manifest abuses which have grown up lies in other directions. We must rely chiefly on strong trial judges, enabled to charge the jury with respect to the expert evidence and guide them to an intelligent appraisal of it. Here is likely to be the best check on charlatans and quacks and witness-advocates. Next we must turn to better working

out of legal theories of responsibility and of methods of treatment of insane and feeble-minded delinquents. Most of what has been written from the medical standpoint on this subject is directed at these points rather than at the mechanics of expert evidence. Finally we should seek better ethical standards in the professions and develop a proper professional discipline. The habitual expert witness (or witness-advocate) is not infrequently a reproach to his profession.

4. PROOF AS TO PRIOR CONVICTIONS OF HABITUAL CRIMINALS

Many have brought to our attention the fact that recent statutes as to habitual criminals are not enforced because of the difficulty or impossibility of proving prior convictions in other States. The difficulty here is not in the law of evidence but in the way in which records are made and kept. In the report of the California Crime Commission for 1931 (pp. 14, 15) this subject is well discussed and uniform State legislation is recommended. We concur and commend the subject to the attention of the National Conference of Commissioners on Uniform State Laws.

VI. THE CONDUCT OF TRIALS

A criminal trial in the common-law system means a trial by judge and jury. Such it has been at common law and such it is everywhere in the English-speaking world, except as so many of the States in this country have restricted the powers of the judge or suffered them to fall into disuse or conferred extravagant powers on trial juries. Experience has shown abundantly that these departures from the system of trial before judge and jury have been serious mistakes. The efficiency of a trial depends largely upon the joint action of and cooperation between the two, and upon the measure of control over the trial accorded to the judge.

In the first place it is important that direction of the proceedings be in the hands of the judge rather than of counsel, and that the judge have authority to direct them with a firm hand and exercise that authority. There is

more involved here than the mere advantage of keeping physical order and decorum. Different atmospheres in court rooms bring about varying results. A court so conducted as to afford an example of law and order is much more likely to enforce the law properly than one conducted in confusion and disorder. Respect or disrespect for the law depends very much upon the manner in which the court is conducted. It is not required that the judge be arbitrary to accomplish this end. Firmness and dignity suffice if accompanied by courtesy. The end of a jury trial being to enable the jury to reach a proper verdict, anything that works against that end being reached should be avoided. Diversions provoked by counsel must be minimized lest the jury lose the purpose of the trial in watching a contest between the lawyers engaged in it. If a jury trial is to be effective in expeditiously reaching a proper verdict, the trial judge must have the situation under his control and subject to his guidance, including litigants, lawyers, spectators, and court officers. Otherwise time is wasted, respect for the court lost, and a wrong verdict arrived at. The court must operate as a unit, and be subject to the control and direction of the trial judge, and the only purpose of the trial must be and appear to be to accomplish justice between the litigants and develop the truth. It is then that justice is done. The atmosphere of the court compels it. The trial judge must be clothed with authority to accomplish it.

Again, efficient conduct of trials requires that the judge have authority to give direction to the task of the jurors instead of leaving them to be diverted from the crucial points and confused as to their duties by the unchecked zeal of counsel.

Under a proper system of jury trial the judge should instruct the jury in a binding way upon the law and the jury should determine for themselves the facts. This general division of authority is for the most part recognized in this country. But a few States, as has been said, make the jurors judges of the law in all criminal cases, and a number do so in prosecutions for libel. Also, by legislation, which began in North Carolina in 1795, the trial judges in a majority

of the States are seriously restricted in their power of directing the jury. In most jurisdictions the judge may not comment on the facts or the credibilty of the witnesses, and is confined in his instructions to an abstract statement of the applicable law. In some jurisdictions he is permitted only to give such instructions as are requested and presented to him by counsel for the respective parties. In some jurisdictions he is required to reduce his instructions to writing and submit them to counsel for their criticism and exceptions. In some jurisdictions he is permitted on the one hand, as at common law, not only to instruct the jury orally in a general charge upon the law but also to apply the law concretely to the facts of the case, and to discuss with the jury the credibility of the evidence and of the witnesses, provided he cautions the jury of their right to disregard his expressed opinion as to the facts if the jurors see fit to do so. But in too many, exercise of this power has more or less fallen into abeyance.

Success of a trial means the attaining of a right result—a verdict in accord with the evidence and the law. A form of jury trial in criminal cases which excludes the judge from aiding the jury in reaching a correct result, must fail in this attainment. If the instructions of the court are merely statements of abstract law, whose relevancy to the facts of the instant case is left for the jury to deduce unaided, the jury are not interested in them, and are unable to make the proper application, and the instructions are without effect. If the trial judge is permitted to state the law of the case in connection with the facts of the case, the jury are interested, and the proper deductions are drawn for them by the Court. It is of vital importance to a jury trial that the judge be permitted to explain the pertinent law as applied to the concrete case the jury is asked to decide; even more important than the power of the trial judge to express an opinion upon the credibility of witnesses or circumstances, with the accompanying qualification that the jury may disregard his expression of opinion. A layman, who might get little out of a general discourse upon the law

unapplied to the facts of the case will benefit astonishingly by a concrete application of legal principles to actual facts. No harm can be done by permitting the judge to go that far, whatever may be thought of clothing him with power to express his opinion on the character and credibility of witnesses. A method of instruction which fails to register with jurors is a futile one. There may be a possibility of abuse in conferring this power of comment upon an incompetent or partisan judge, but the probability of benefit greatly exceeds that of harm. In the hands of properly selected judges, the chance of harm is negligible, and of good, substantial. Its exercise prevents the numerous failures to do justice arising from a jury's misconception of the cases submitted to them for decision.

In another connection we have pointed out the historical reasons behind these restrictions on the trial judge. These restrictions have been aggravated by the system of elective judges with short tenure which swept over the country after 1850 and even more in recent years by the choice of judges through direct primaries. Judges elected for short terms have too often lost control of trials. Counsel rather than judges have become the controlling force in the court room. Elective judges can not afford to antagonize and so take refuge in a passive attitude and tend to become mere umpires. They are likely to be disinclined to insist on expedition and on high standards of forensic conduct. Rather than imperil their positions, they tolerate continuances and postponements, evasions of jury service and long drawn out selections of juries, and the wranglings of counsel and ill treatment of witnesses, so unhappily characteristic of American criminal trials. It speaks for itself that these things are relatively unknown or much less serious in States where judicial tenure is permanent and secure.

It is expecting too much of a judge who is elected for a short term on a small salary, who loses his practice on taking office, and who will soon be confronted with the exigency of reelection and campaigning therefor, to exert the needed authority at the probable expense of incurring unpopularity

by so doing. His actions in excusing jurors, in keeping lawyers under proper restraint, and in many other ways condemn him to unpopularity if he does his duty. The remedy seems to be to select competent lawyers and give them a long tenure of office with adequate salaries. The independence coming from such measures would make of a trial judge more than a referee to rule on points of evidence. It would make him master of the situation and that is what is needed to restore the jury trial in criminal cases to a place of efficacy. Until steps are taken in the jurisdiction where the judges are now in politics to select competent judges and make them independent during their term of office and at its close, the courts of the country will not be what they should be. They can not be conducted successfully unless the judges are competent, impartial, and independent, regardless of reforms in procedural or substantive law. They can not be conducted successfully, if our judges are stripped of power to exert the proper authority to make them function effectively. It is also imperative that judges divorce themselves, when they qualify, from every kind of political influence or contact. Experience everywhere has demonstrated the incompatibility of the administration of justice and politics.

VII. REVIEW OF CONVICTIONS

In England a radical change as to review of convictions was brought about by the criminal appeal act (1907). Prior to that act there were three ways of obtaining review. One was by writ of error to review the conviction for errors of law apparent on the face of the record. A second was by the jurisdiction and practice of the King's Bench Division as to granting new trials in misdemeanor cases. The third was by reserving cases for consideration by the common-law judges and entering a judgment in the trial court in accordance with their conclusion arrived at after argument. In lieu of these the statute of 1907 established a court of criminal appeal, with a procedure as simple as that of an American trial court upon a motion for a new trial, with full

jurisdiction over questions of both law and fact, and authority to pass upon both the legality and the propriety of the sentence imposed. This substitution of a review of the case for a review of the record was a reform of the first moment.

In the United States we developed review of convictions along the first two of the three lines referred to. An increasing number of jurisdictions substituted a simple proceeding by appeal for the common-law writ of error. Others developed a relatively simple review by exceptions. But the staple American system is a motion for a new trial in the trial court followed, if that is denied, by a review of the record in an appellate court. In consequence our appellate procedure in criminal cases is shaped by a conception of enforcing the rules of the game rather than by one of reviewing the case.

Motions for new trials upon the ground of afterdiscovered evidence, or upon evidence of perjury committed by material witnesses on the trial discovered after judgment, in some jurisdictions have been held to be inadequate to prevent injustice. This was peculiarly manifest in the famous Mooney case in California, where, upon appeal to the Supreme Court of the State from the judgment of conviction of murder and an order of the trial court denying motion for a new trial, that court held that a new trial could not be granted upon matter not appearing in the record, even though the new matter consisted of evidence charging perjury on the part of a material witness for the State and although the Attorney General stipulated that the motion might be granted. Further application made to the trial court in the nature of an application for common-law writ of *coram nobis*, upon the ground that the prosecuting attorney had been guilty of fraud in withholding from the trial court information impeaching the testimony of certain witnesses for the State, also was denied upon the ground that under the California practice the court had no power to grant such a motion. The Supreme Court of that State held there was no judicial remedy open in such case. The only remedy was the exercise of executive clemency. Such a state

of the law is shocking to one's sense of justice. (People *v.* Mooney, 175 Calif. 666, 176 Calif. 108, 177 Calif. 642, and 178 Calif. 525.)

In a number of other States the statutes contain provisions authorizing a court to grant a new trial whenever it appears that the accused was in fact prejudiced in his defense upon the merits and that a failure of justice has resulted, or when from any cause the defendant has not received a fair and impartial trial. (See American Law Institute proposed Code of Criminal Procedure, Commentary, pp. 348–349.)

The proposed code of the American Law Institute provides for the granting of a new trial, among other things, upon proof that new and material evidence, which, if introduced at the trial, would probably have changed the verdict or finding of the court, has been discovered, which the defendant could not with reasonable diligence have discovered and produced upon the trial, providing the substantial rights of the defendant have been thereby prejudiced; or, upon proof that the prosecuting attorney has been guilty of misconduct; or, when from any cause not due to his own fault the defendant has not received a fair and impartial trial. In our opinion, some such provision as this should be universally adopted; the ultimate court of appeal should have plenary jurisdiction to reverse the conviction and order a new trial whenever it is satisfied that the defendant has not received a fair and impartial trial.

Also, taking the country as a whole, we have much overdeveloped the mere procedure of a criminal appeal. There is no reason why such a proceeding should be more complicated or involve more procedural pitfalls than a motion for a new trial. It could well be treated as such a motion, or as a motion for a new trial or in the alternative for modification of the sentence, heard before a bench of judges instead of before the trial judge. This would have the advantage of eliminating the motion in the trial court as an everyday proceeding and retaining it only for exceptional cases. The excessive development of appellate procedure in the United States is due partly to the circumstance that our highest

courts in the original States were substituted for legislative appellate tribunals and so adopted very generally the analogy of the writ of error in the House of Lords instead of that of review of conviction for misdemeanors by motion in the King's Bench for a new trial. Another reason was that in many jurisdictions so large a proportion of convictions came to be taken to appellate courts that those courts became astute to dispose of the proceedings for review upon procedural grounds without looking into the cases. In the last quarter of the nineteenth century this overdevelopment of appellate procedure reached its meridian. There has been steady abatement of it in the present century. But there is still far too much.

VIII. CONCLUSIONS AND RECOMMENDATIONS

There are such differences in the details of organization of courts and in the details of criminal procedure, as well as in the general atmosphere of conduct of criminal causes in court, in the different States, that conclusions and recommendations of general applicability must be confined to relatively few salient points. A few jurisdictions are well in advance of the country at large as to the tenure and mode of selection of judges, or as to certain features of procedure, or as to the atmosphere of the forum. But it seldom happens that any jurisdiction is where it should be as to all of these things. Taking the country as a whole, we consider the following conclusions applicable.

1. Above all there is need of a change of attitude both in the legal profession and in the public as to the mode of choice, tenure, and personnel of the bench. There has been a noticeable growth of sentiment at the bar in the past two decades. Where scarcely a handful could be found a generation ago to advocate better modes of selecting judges, an increasing number of strong lawyers may now be found advocating a change. Moreover, bar associations have begun to assert themselves vigorously toward making the best of the present modes of choice. But even where judges are appointed for life, appointments are too much in politics.

Something more than a change in the mode of selection is called for. The public must be thoroughly conscious of the need of removing the administration of justice from politics and of insisting that appointments be made on the ground of conspicuous fitness alone, so that no appointing power will think of choosing a judge or magistrate on any other basis.

2. There should be a fuller and more general public appreciation of the importance of the inferior criminal courts and of the personnel, tenure, and mode of choice of magistrates and judges of municipal and petty tribunals.

3. There should be a modern organization of the inferior courts, wherever this reorganization remains to be brought about, and complete elimination of the fee system wherever it still obtains.

4. It is no less important to give power to judges and magistrates commensurate with their tasks. This presupposes choice of judges and magistrates equal to those tasks and to be trusted with the needed powers. But no amount of procedural machinery will produce an efficient administration of criminal justice at the hands of incompetent, weak, or politics-ridden judges. Most of the things of which there is general complaint depend not so much upon the machinery of judicial procedure as on the men who work it.

5. With respect to details of procedure we make no specific recommendation, but as a general reform, applicable to the whole country, the details of procedure should be left to rules of court, to be framed, amended, and revised, as experience dictates, by those whose task it will be to interpret and apply the rules, with the aid of those who will work under them in the courts, either in judicial councils, or some other mode of bringing the experience of the bar to the assistance of the courts. Procedural details should be governed by rules of court, not by rigid legislation drawn by one set of men and interpreted and applied by another.

As to recommendations, certain matters are of general importance over at least a great part of the country:

1. There should be a wider use of administration rather than arrest and prosecution with respect to police regulations. Those who have studied American police systems agree that too great a burden is put upon the police by leaving it to them to arrest or to ignore in such cases, with no provision for administrative adjustment.

2. There should be a more general use of summons instead of arrest as a mode of beginning petty prosecutions.

3. There should be but one review of convictions in inferior tribunals, and that on the whole case. Double appeals and retrials of the facts as of course should be eliminated.

4. The law as to arrests should be restated in the light of the conditions in the modern city.

5. The system of short indictments should be adopted where not in use.

6. Examination of jurors as to their qualifications to serve in a case coming on for trial should be conducted by the court rather than by counsel.

7. There should be a revision of the State laws as to challenges of jurors in criminal cases. In this connection we call attention to the recommendations of the American Law Institute.

8. Where not now permitted, there should be legislation allowing waiver of jury trial in criminal causes.

9. Motions in arrest of judgment should be done away with. Where the motion for a new trial is a necessary prerequisite of review, that requirement should be eliminated.

10. Notice of affirmative defenses should be required along with a plea of not guilty.

11. We concur in the recommendations of the American Law Institute as to expert evidence in criminal cases.

12. There should be a uniform State law as to ascertainment and proof as to prior convictions in other States in cases of habitual offenders. We commend this matter to the attention of the National Conference of Commissioners on Uniform State Laws.

13. We recommend restoration of the common-law powers of trial judges wherever these powers have been restricted by legislation, and exercise of these powers wherever they have fallen into abeyance.

14. We urge a system of review of a criminal case as a whole in one appeal, with a procedure as simple as that upon a motion for a new trial or mitigation of sentence in the trial court.

GEORGE W. WICKERSHAM,
Chairman.
HENRY W. ANDERSON.
NEWTON D. BAKER.
ADA L. COMSTOCK.
WILLIAM I. GRUBB.
WILLIAM S. KENYON.
FRANK J. LOESCH.
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JUNE 9, 1931.

STATEMENT OF MONTE M. LEMANN

The commission has heretofore found that in the past discussion of the subject of crime and the offender a relative overemphasis has been given to procedural questions.[1] Such questions have received wide and, upon the whole, adequate attention in professional and lay discussions. The more important of them are adverted to in the Report on Prosecution and Mr. Bettman's study appended thereto. In view of these facts, it has seemed to me that no useful purpose could be served by a report on criminal procedure, unless the Commission had some important new proposals to make, adequately supported by factual data and study. The report submitted by the Commission does not seem to me to contain such proposals. It would doubtless have been difficult in any event for the Commission to conduct the studies which would have been required to put forward such proposals, so supported, in view of the extremely wide range of the inquiry which the Commission was asked to undertake, especially considering the extent to which the procedural field has been canvassed in bar-association discussions and in the painstaking examination of the specialists who over a period of more than five years have framed the model code of criminal procedure for the American Law Institute.[2]

As I have indicated, in certain respects the report which the commission now submits on criminal procedure seems to cover ground already covered by Mr. Bettman's study, made a part of the Commission's Report on Prosecution.[3]

[1] Report on prosecution, p. 4.

[2] In its Report on Prosecution (p. 26) the Commission said: "As to procedural difficulties surrounding prosecution, the American Law Institute has had the subject under consideration for some years and has put forth a model code of criminal procedure, accompanied by full data as to details of practice in the several States. In view of this full presentation and because the most serious deficiencies in American criminal justice are in other quarters, we content ourselves with reference to the commentary accompanying that code."

[3] Compare the discussions in Mr. Bettman's report of the importance, organization, and methods of municipal courts (pp. 83, 115, 118, 142, 180), of the

In other respects the report presents recommendations on matters as to which Mr. Bettman (himself an expert in the field of many years' experience and study) found that further research was required before there would be adequate bases for recommendations.[4] In still other respects the report presents generalizations in which my limited knowledge, experience, and judgment do not enable me to join. I refer, for example, to such statements as those indicating that numerous elections and frequent jury terms without adjustments to exigencies of callings or business "call for more than the citizen may reasonably be expected to do;" that "taking our cities as a whole, none have succeeded in bringing about enduring improvement" in selecting jury panels; that there should not be further "tinkering with" statutes governing selection of jury panels;[5] that newspapers "in a majority of jurisdictions" undertake to try cases in advance; that trials are unduly protracted because prosecuting attorneys do not know what the defense will be; that district attorneys are compelled to dismiss prosecutions because of defects in the procedural system;[6] that trials *de novo* upon appeal give "great and unjust advantage to delinquents of means or with an organization behind them" and should be done away with everywhere; that magistrates frequently tend to uphold arbitrary police action because of difficulties under which police officers labor; that the election of judges through direct primaries has aggravated the restrictions on the power of trial judges. Such statements may be well founded, but no facts brought to my attention

judge's control of trials (pp. 123, 180), of waiver of trial by jury (pp. 24, 26, 180), of abolition of requirement of grand jury indictment (p. 180), and the Commission's own Report on Prosecution (pp. 34–37).

[4] Compare Mr. Bettman's discussion of the necessity for further research with respect to the issuance of warrants of arrests (pp. 86–89, 182) and his discussion of the problem of bail and the substitution of summons for arrests (pp. 89, 93, 184).

[5] Compare: The Selection of Jurors, a comparative study of the methods of selection and the personnel of juries in Philadelphia and other cities, by Clarence N. Callender, Philadelphia, 1924.

[6] This is not suggested in the Commission's remarks on this subject in its Report on Prosecution (pp. 18–20).

would permit me to join in their confident assertion. Without adequate factual inquiry, generalizations by the commission seem to me likely to serve no useful purpose.

MONTE M. LEMANN.

JUNE 9, 1931.

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