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PROPOSALS FOR THE IMPROVEMENT OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN INDIANA

JAMES J. ROBINSON.*

The general assembly of the state of Indiana soon will convene in regular session. A part of its work will be to consider proposals for the improvement of the administration of criminal justice in Indiana. The purpose of this article is to set out certain proposals which have been receiving the consideration of lawyers, judges, prosecuting attorneys, and of other citizens of Indiana and of other states. Many of these proposals have been endorsed by the Committee on Criminal Procedure and Judicial Administration of the National Crime Commission,1 by the Survey Committee of the Missouri Association for Criminal Justice,2 and by committees of the American Law Institute.3 The Indiana State Bar Association's Committee on Criminal Jurisprudence, also, has endorsed many of these proposals, and will submit appropriate bills to the legislature at the forth-

* See Biographical note, p. 256.
1 Hadley, Outline of Code of Criminal Procedure, (1926) XII American Bar Association Journal, 690. The thirteen men participating in the preparation of this Outline, under the chairmanship of Ex-Governor Herbert S. Hadley, of Missouri, included men with experience as governors, attorneys general, prosecuting attorneys, judges, defense counsel and as expert writers and teachers in the subject of criminal law and procedure.
2 Thompson, The Missouri Crime Survey, (1926) XII Amer. Bar Assn. Jour., 626. Moley, Editor, The Missouri Crime Survey (1926). The legislature of Missouri meets in January, 1927. Popular subscriptions of about $65,000 have been applied to a state-wide survey of the crime problem in Missouri. The resulting collection of facts, figures and recommendations will be placed before the legislature.
3 (1925) The American Law Institute Proceedings, Vol. III, pp. 144 to 154, 441 to 524. Hon. Herbert S. Hadley is active also in this work. Professors William E. Mikell and Edwin R. Keedy, two leading authorities on criminal law and procedure, are in charge of the Institute's work of drafting a model code of criminal procedure. William Draper Lewis, Director of the Institute, at the meeting of the Indiana State Bar Association, on July 9, 1926, described the work of the Institute on this subject. (1926) Proceedings Indiana State Bar Association, II Indiana Law Journal, 68, 69.
coming session. The order in which these proposals are presented in this article is principally the order in which the present constitutional and statutory provisions appear in Burns' Annotated Indiana Statutes, 1926.

I

Proposal Number One is an amendment to the Constitution of Indiana (Article 1, Sec. 13; Sec. 65, Burns 1926) to give the general assembly a limited power to modify the petit jury system.

The present constitutional provision is: "In all criminal prosecutions, the accused shall have the right to a public trial by an impartial jury * * *"

How does this provision work in practice? No attack is intended upon the principle of the petit jury system. Until some more practical method is developed for handling any questions of fact in criminal cases, we shall keep and use the petit jury. But does the present system work so perfectly that it is impossible for the general assembly to improve it? May it not be advisable to give to the general assembly power to modify the petit jury system as need appears?

As a precedent, we have the present provision of the constitution giving the general assembly the power to modify (or abolish) the grand jury system. In the Constitutional Convention, in 1850-1851, there were many delegates who opposed

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4 The Indiana State Bar Association, at its annual meeting at Michigan City, on July 9, 1926, passed the following resolution: Resolved, that the incoming president, as soon as may be, appoint a committee of such number as in his judgment may seem fit, to draft a revision of the criminal code of Indiana, or propose amendments thereto and submit the same to the Board of Managers and, with the approval of the Board, submit the same to the membership and present to the General Assembly for enactment as much thereof as may have the approval of a majority of the membership and the approval of the Board. (1926) Proceedings of The Indiana State Bar Association, II Ind. Law Journal, 85.

By the end of July, President William A. Pickens had appointed a committee of seven, which has been at work since that time. The members of this committee are: Judge James A. Collins, Chairman, Indianapolis; George O. Dix, Terre Haute; Frank H. Hatfield, Evansville; Joseph Andrew, Lafayette; Judge Will M. Sparks, Rushville; Gus Condo, Marion; and James J. Robinson, Bloomington. The committee is known as the committee on Criminal Jurisprudence. The committee's approval of certain proposed amendments is indicated in this article. The committee asks the opinion of the lawyers of Indiana upon each of these proposals. The proposals approved by the Board of Managers and by a majority of the bar will be submitted to the General Assembly for enactment. Each lawyer of Indiana will be asked to state his opinion on these proposals, somewhat changed in some cases, and on other proposals, all of which, with a referendum ballot blank attached, will be distributed among the lawyers of the state.
the inclusion of this provision. But other delegates insisted that the common law grand jury system was unnecessarily ponderous and costly, and that the assembly should have the power to devise a cheaper and simpler and more speedy method of starting criminal prosecutions than by indictment by a grand jury of eighteen or twenty men, called in from their work to deliberate, at the public expense, not only on serious crimes, but even on trivial criminal charges. The convention finally gave to the general assembly the power to modify or even to abolish the grand jury system. (Constitution of Indiana, Article 7, Sec. 17; Sec. 184, Burns 1926). The general assembly wisely has used this power so that the mere sworn statement (affidavit) of an individual, approved by the prosecuting attorney, is sufficient for starting a criminal prosecution in all cases except murder and treason; and the indictment charging these two offenses, or any other offense, is now returned by a grand jury composed not of eighteen or twenty members, but of only six members, five of whom control the body. In this way Indiana, seventy-five years ago, prepared to dispense with the necessity generally for the ponderous grand jury indictment, and with the later circuitous charge by information. Even today twenty-four states and the federal government are bound to the common law grand jury system substantially the same as Indiana was bound seventy-five years ago. Ten states and the federal government still have the twenty-three-juror grand jury. Not until this year did New York state, for example, venture toward the simplified Indiana system. No prosecuting attorney, judge, lawyer, juror or taxpayer in Indiana today would consider going back to the common law grand jury system, nor even to the information system. In fact, Proposal

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5 (1850) Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850. The grand jury proposals were bitterly and oratorically debated for many days on the floor of the Convention. Delegate Hovey, of Posey, on October 24, 1850 (Report, p. 204) said, “The Grand Jury system is without a parallel in the history of nations or of man. Kingdoms have been overthrown, empires have mouldered into dust, but the Grand Jury, amid all the changes of a thousand years, has stood as firm and immovable as the pyramids of Egypt. Viewing it, sir, in this light, I am opposed to laying rude hands upon it, and making hasty alterations.” Another speaker referred to the Grand Jury as “the palladium of our liberties.”


Number Five in this article recommends further abandonment of the old system by changing the present statute so it will permit the filing of an affidavit even while the Grand Jury is in session.

Now, in regard to our common law petit jury system, may not the general assembly find in it some features which are as ponderous and as costly, in money, in time, and in loss of swift and sure effectiveness, as the common law grand jury system was?

The present constitutional provision secures to the accused in all criminal prosecutions on charges trivial or otherwise, the right to trial by an impartial jury, which means trial by the common law jury of twelve members, and also that all twelve must agree on a verdict in order to acquit or to convict.9 The courts hold that even if the defendant in a criminal case consents to be tried by a jury of less than twelve, and is found guilty by such a jury, the defendant may thereupon appeal to the Supreme Court and secure the reversal of the conviction.10

The Proposal is to amend the present constitutional provision by substantially the following provision: The general assembly shall have the power to modify the petit jury system. To this provision may be added the following constitutional limitations: first, by providing that in all felony cases, a five-sixths verdict (ten votes) shall be sufficient to convict or to acquit, except in cases where death may be the penalty imposed, in which cases the verdict must be unanimous; and, second, by providing that in misdemeanor cases triable before a jury, the jury shall consist of six, and a five-sixths verdict (five votes) shall be sufficient to convict or to acquit.

Should the general assembly be empowered to abolish the common law requirement that all the jurors must agree in order to reach a verdict? Lawyers agree that the present unanimity rule apparently very seldom in court causes a miscarriage of justice. Very seldom does one juror unjustly or corruptly obstruct justice in a criminal trial. At least that is the general opinion of lawyers.

But the chief object of the criminal law is deterrence. Public opinion holds that one reason for the failure of the criminal law to do a better job of controlling criminals is that prospective law-breakers have no fear of the criminal courts; that they do


10 Allen v. State, (1876) 54 Ind. 461.
not expect to get caught; and that they do expect, should they get caught, they would not be convicted.

Now, is there any sound basis for this state of public opinion? We may do well at this point to take an inventory of the crime situation in Indiana. Less than six thousand names appear on the registers of all of Indiana’s jails and penal institutions on an average day in the year, according to the official Year Book. Many of these names are repeated, during each year, and during successive years. Yet this small number is largely responsible for an annual expenditure, by the three million people of Indiana, in taxes paid out for penal and reformatory institutions, for police protection, and for handling criminal cases in court, of more than six million dollars. And this amount may be roughly, but conservatively, estimated at between one-fifth and one-tenth of the total annual crime cost and crime loss to the people of Indiana. For instance, almost three thousand automobiles are stolen each year; one condition which, although about five-sixths of the cars are eventually recovered, helps to swell the crime bill of the state. So we have a situation, in this state, in which one person in each five hundred, as a convicted prisoner, may be said to represent an expenditure of one thousand dollars in taxes directly spent for penal purposes; and the total annual crime loss is estimated at from ten dollars to twenty dollars for each man, woman and child in the state.

These figures may indicate various things. First, to some they indicate that we do not catch, and convict, and imprison a very high proportion of our law breakers, and that our criminal laws, therefore, do not deter many from crime. Second, to some the figures indicate that, although in their opinion we do imprison a high proportion of the law breakers, we make a poor record in deterring and controlling this relatively small number of chronic and repeating criminals. Such figures as we have, therefore, do indicate that public sentiment has some grounds for its opinion that prospective law breakers have slight fear of our courts of law. Each of the proposals in this article is designed to tighten up and speed up and make more certain the action of our courts in doing justice in criminal matters.

Now, as to the petit jury, while it is true that few cases are known where one juror corruptly or unjustly obstructed justice at the trial, what about the petit jury system as a deterrent

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11 (1925) Year Book of the State of Indiana for the year 1925. Other statistics in the same paragraph of the text are based upon the Year Book compilations.
outside the court room? Is it not true that law breakers do not greatly fear the petit jury? Why is it that, as a general rule, although the prosecution is willing for the trial to be by the judge alone, the accused nearly always asks for a jury, especially if the evidence clearly shows guilt? Is not one reason for the great waste of time and money in picking juries, the fact that the accused frequently is trying to get at least one man on the jury who, the accused hopes, will "hang" the jury? How does defense counsel occasionally, even in a plain case of guilt on a certain charge, try to cause the prosecutor to agree to accept a plea of guilty to a less serious charge? Is it not true that defense counsel accomplishes this result occasionally by threatening to ask for a jury trial on the original charge, with the result that the prosecutor compromises in order to save the state the expense and uncertainty of a jury trial? The jury should be no more of a threat to the state than to a guilty defendant.

The truth is that the state now goes into a criminal trial, even into a petty misdemeanor case, with jury odds of twelve to one against the state and in favor of the defendant. The state must win the affirmative vote of all twelve of the jurors. The defense need get but one juror. At least, this is the way the prospective law breaker argues. Then he goes ahead and breaks the law; he murders, he robs, he rapes, he commits various felonies and misdemeanors.

The proposed change would be fair to the state, and it might help to deter the potential criminal. The proposal would also be fair to the accused on trial. Under the present law, if the state convinces only two jurors of defendant's guilt, the jury "hangs," and the accused has to stand trial again. Under the proposed provision, in such a case the accused would be acquitted. And the state and the witnesses, as well as the defendant, would thereby be spared the expense of another trial, resulting from the "hung" jury.

The chief argument against modification is probably the contention that the state must exercise excessive caution for fear an innocent man is convicted. However, this argument applies especially to capital cases, and the proposal leaves the present rule untouched in capital cases. In civil cases modifications of the common law jury are common.

The rule of unanimity, as a general and universal rule, helps to weaken the deterrent effect in criminal cases of the petit jury system. The rule of unanimity failed under the Articles of Confederation, and it is not in modern favor in any human enterprise other than in the criminal court room. So, for our
criminal court rooms, the general assembly might be able, if empowered to do so, to work out modifications which would help to make real our Constitution’s guarantee of speedy and complete justice. Autocratic power in one juror in a criminal trial, used either for the state or for the defendant, is just as dangerous, and just as likely to breed trouble, and just as undemocratic in principle as autocratic power anywhere else.

This proposal is endorsed by the Indiana State Bar Committee, and in substance, by the National Crime Commission Committee. A few states have had similar provisions for several years.

There is no provision in the Constitution of the United States conflicting with this proposal, nor with any other proposal set out in this article.12

II.

Proposal Number Two is an amendment to the Constitution of Indiana (Article 1, Section 19; Sec. 178, Burns 1926) to end the present view of the jury’s powers as to the law. The present provision is: “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” The proposed amendment would strike out the section.

In civil cases in Indiana the jury determines the facts; the judge determines the law. The practical experience and viewpoint of the juror are considered as his qualifications for answering questions of fact. The training and experience of the judge are regarded as qualifying him to settle, for the jury, questions of law. But in criminal cases, our constitutional provision, as interpreted by our courts, gives to the jury the authority—if not the capacity—to determine both questions of law and questions of fact. A layman may be surprised occasionally to hear the defendant’s lawyer in a criminal trial reading to the jury from technical books of the law and asking the jury to consider the statute under which the defendant is being prosecuted to be unconstitutional, and therefore, to find the defendant not guilty. Or sometimes counsel will argue that the statute is bad and ought not to be enforced, asking the jury to nullify an act of the legislature. Moreover, the court will be heard to instruct the jury that they are to determine both the law and the facts in the case. Every lawyer of criminal trial experience knows how successfully able counsel for the defendant can confuse a jury, and raise so-called “reasonable doubts” on the law, and sometimes “hang” the jury by arguing to this untrained tribunal difficult points of law. Indeed, cases are not unknown where

defense counsel knowingly has read overruled cases to the jury and has represented them to be ruling cases. One objection which is sometimes heard against the present provision is that, under it, a defendant of wealth may hire a "battery" of the ablest counsel to expound and argue the law to the jury, whereas the defendant of no financial ability to employ such able counsel gains no such advantage. The present rule, therefore, is charged with promoting inequality before the law, and with making one criminal law for the rich and another criminal law for the poor. In favor of the present rule, some say that the rule is a "safety valve," by which the jury may, "on general principles," free a defendant who has violated a statute which ought not to be enforced against him. But the jury may acquit on the facts as arbitrarily as on the law. And in deserving cases, the judge often has the power to prevent the inequitable application of a law, by suspension of sentence, or otherwise. To ask for twelve men the power to nullify the statutory enactments of the general assembly is to open up a dangerous jurisdiction. For seventy-five years this provision has been throwing confusion into the administration of criminal justice in Indiana.13

The reasons for the provision are probably historical. It is the opinion of Judge Ewbank, of the Supreme Court of Indiana, that the provision was adopted from the law of England regarding criminal libel, and has been misinterpreted; that it was a provision aimed against the judges' efforts to compel juries to return special verdicts in libel cases, and really means: "In all cases the jury shall have the right to apply the law to the facts and to return a general verdict of guilty or not guilty." In other words, the judge was to have full powers to tell the jury what the law was, but the judge was not to be permitted merely to ask the jury: "Did the defendant do this act?" and then himself to proceed to find the defendant guilty or not guilty.

Another, and probably related, explanation is that the Indiana constitutional convention, during the democratic years of 1850 and 1851, desired to protect the people against the government, and also to reform the law and to simplify it so that any juror, unaided, could understand it. Both of these reasons are now clearly obsolete.

The present provision, as interpreted, helps to paralyze the trial judge, under the pains and penalties of reversal, if he seems to encroach upon the jury’s field of decision, even though the jury need not pay any attention to what he says, and probably did not do so. The provision is hard to sustain, either on grounds of reason, or of practical considerations, or of historical origin.

This proposal is endorsed by the Indiana Bar Committee.

III.

Proposal Number Three is the repeal, in the Constitution of Indiana, of Article 7, Section 21; Sec. 188, Burns 1926. This would empower the general assembly and the courts to control the admission and practice of lawyers at the bars of the respective courts.

The section now provides that “Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.”

The present provision has a historical basis, rather than a legal or logical one. In 1850 and 1851, as shown by the minutes of the debates of the constitutional convention, there was strong public sentiment against lawyers, and a strong desire to reform and to simplify the law, so that every man could be his own lawyer. Like the provision which was interpreted as allowing the jury to determine the law in criminal cases, this provision should be dropped, along with the other “Law Reform” schemes which fell flat without simplifying the law in the complete manner which was planned.

The present provision is misleading as to the actual professional standing of the Indiana bar. It is believed by many who have observed the bar of other states where there are strict requirements for admission, that the Indiana bar is not excelled in such states. In fact, some of the most serious charges are made against individual lawyers in certain large cities in states where the examination requirements are very high. But such considerations merely increase the responsibility of each member of the Indiana Bar to work for a repeal of this section 21, probably at a special election, at which other amendments may be considered. To meet the present and future necessities of the profession and of the state, the repeal should be secured as soon as possible. If the lawyers and courts of Indiana are to help

14 See (1926) 1 Ind. Law Jour. 209, “Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-1851,” by present writer.
the people of the state to get better administration of criminal justice, the legislature and the courts must have power to determine and to control the chief officers of the courts of justice, the attorneys at their bars.

This proposal is endorsed by the Indiana State Bar Association and by its Committees on Jurisprudence and Law Reform, on Legislation, and on Criminal Jurisprudence.

The rest of the proposals in this article deal, not with constitutional amendments, but with statutory changes.

IV

Proposal Four is the amendment by the legislature of certain statutes (Secs. 2111, 2113, 11037 et al.) to place upon the defendant the burden of perfecting his appeal, and promptly, from a conviction of crime in a justice of the peace court, city court, or municipal court. This proposal is endorsed by the Indiana Bar Committee.

At present, after conviction in such courts, the defendant may take an appeal to the circuit court, or to the superior or criminal court. All that the defendant has to do to take such appeal is to file a small appeal bond in the lower court. By statute the lower court, (but this often means the prosecuting attorney), then has to prepare a transcript of the proceedings and file this in the court to which appeal is taken. In practice, in many counties, the filing of the appeal bond often means the end of the case. Defendants often file the appeal bond, not because the conviction is erroneous, but with the expectation that the busy prosecutor will fail to prepare the transcript and to get the case set for trial in the higher court. And if the prosecutor, at his own expense of time and stenographic help, does prepare the transcript and does get the case set for trial in the higher court, the defendant, when the trial day eventually comes, by permission of the court can dismiss his appeal and submit to the original judgment. In this way he has gained perhaps several months of delay without cost to himself. On the other hand, the prosecutor may refuse to perfect the appeal because he sees that the cost will be disproportionately great to the state. Again the defendant wins by evading the judgment against him. It is estimated that many thousands of dollars in fines are

15 A typical case is one in which an automobile driver cut across the left corner of an intersection at high speed and crashed into another car. The violation of several motor vehicle laws was plain. Defendant's attorney thereupon demanded jury trial in city court. For the trial of this misdemeanor case, twelve unwilling farmers and business men were brought
thus lost to the state each year. But this cost to the state is small when compared to the nullification of the deterrent effect of the criminal law upon prospective law-breakers. The present law helps to make it optional with the convicted defendant whether or not he shall obey the court’s judgment.

The amendments proposed would place upon the defendant the responsibility for perfecting his appeal or causing it to be perfected, as in appeals to the Supreme Court. A proposed statute for effecting such amendment provides that the trial court shall proceed to execute its judgment unless defendant shall comply strictly and promptly with provisions prescribed by the statute.

Such a statute would protect the rights of a defendant taking an appeal in good faith, and would also protect the interests of the state, which are now frequently lost by default.

V.

The fifth proposal is the amendment of Sec. 2150, Burns’ 1926, which reads as follows: “Prosecution by affidavit. All public offenses, except treason and murder, may be prosecuted in the circuit or criminal court, by affidavit filed in term time, in all cases except when the grand jury is in session or a prosecution by indictment or affidavit for the same offense is pending at the time of the filing of such affidavit.” The Indiana Bar Committee recommends an amendment of this section.

The present law, when a grand jury is in session, often promotes congestion in cases awaiting formal charges, and delays the release under bond, or delays the trial, of arrested persons. The grand jury’s time may be so engrossed with a special investigation that it does not have time to pass upon the accumulating cases. The prosecuting attorney should be permitted to file affidavits in these other cases. Merely because a grand jury happens to be in session is no reason why the prosecution should be tied down by the common law restrictions.

The amended section may be substantially as follows: “All public offenses, except treason and murder, may be prosecuted in the circuit or criminal court, by affidavit, filed at any time,
but, if not in term-time, only with the consent and approval of the court, in all cases, except when an affidavit or indictment for the same offense is pending."

VI

The Sixth Proposal is the amendment of Sections 2193 and 2194 of Burns 1926, and all related statutes which provide for the forms and forfeiture and collection of criminal bonds. The present procedure is technical, deceptive and difficult for the state. If the state provides for the release on bond of those charged with crime, the bond should be a bond, and should secure the state. Now "straw" bondsmen deceive the state at the beginning of the proceedings; and the requirement that the prosecutor, even after the forfeiture, must win a difficult suit to collect the bond, often thwarts the state at the other end. The annual loss to the state on uncollected bonds amounts to many thousands of dollars, though in Indiana no record of the exact amount is kept. The Missouri Crime Survey disclosed that in Missouri, during a two-year period ending in 1924, forfeitures of felony bonds totalled almost $300,000; that of this amount $26,000 was reduced to judgment; and that about $1,500 was actually collected.\textsuperscript{16} In Chicago recently the state's attorney stated in the newspapers that $5,000,000 in forfeited bail bonds was being lost by the state by failure to collect.

The amendments would require that every bond be in writing and be sworn to by the bondsmen under the penalties of perjury; that the bondsmen in the written bond make full disclosure of his financial condition, describe his property, state the amount of his debts and obligations including, by name and amount, every other bond on which he is surety or principal; and shall state also who, if anyone, has indemnified him, and what collateral, if any, he has received, and from whom. The bond shall be conditioned that in case the defendant should not appear, the court shall thereupon declare the bond to be forfeited, and shall forthwith enter a rule nisi, and after notice to bondsmen, may proceed to enter judgment on the bond against the principal and sureties, and certify said judgment to the Clerk for record. Execution shall issue within ten days after said judgment is entered, or in case of cash bail, the clerk shall apply the same to satisfaction of the judgment, unless within such ten days the bondsmen shall produce the defendant, pay all costs, and satisfy the court that defendant's absence was not with their connivance.

\textsuperscript{16} Thompson, The Missouri Crime Survey, (1926) XII A. B. A. Jour. 626, 628.
This amendment in substance, is endorsed by the National Crime Commission and by the Indiana Bar Committee. A similar provision is now the law in New York. (1926. Laws of New York, Ch. 478, Sec. 595.) The provision marks a return to a procedure like the common law procedure of estreat as Blackstone describes it. The present law is a fraud upon the state. Criminals are repeatedly indicted and are repeatedly released on bond, so that they continue to "walk the streets", as the prosecutor of Marion County complains. Again the defendant with money gets the advantage of the criminal law, in its bail provisions. Statutes should make plain that release on bail is a privilege granted by the state under its constitution and laws, and that the state's rights must be respected and will be protected.

VII

The Seventh Proposal is the amendment of Section 2202 to simplify the forms of indictments and affidavits. In Indiana, as in Illinois and other states, the legislature has multiplied statutes in an effort to simplify indictments, all to little effect. Still prosecutors labor to draw indictments correctly; still defense counsel attack such indictments; still many hours in court are consumed in arguing the technical sufficiency of indictments, while jurors and witnesses wait; still two or three hundred words of common law jargon are used to say what is usually more clearly said in two or three dozen words; and even then the courts of appeal occasionally are compelled to reverse convictions because of indictments in which the only fault is technical. This question of overcoming technicalities aroused agitation in England lasting for years, and during a part of this time the English people were so angry at what they considered to be obstructive tactics of lawyers that many districts refused to elect lawyers to be their representatives in Parliament. But the English people have provided for a simplified indictment. It contains the title of the action, the name and statute numbers, if any, of the crime charged, and a brief statement of the particulars of the offense. A bill of particulars may be required of the prosecution whenever needed to make the charge more clear to defendant. Forms are included in the English Act, and

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18 Burns' Ind. Stat. 1926, Secs. 2202 to 2208, 2214 to 2219, 2223 to 2225.
rule-making powers are given to proper judicial bodies to be exercised as needed. Liberal powers of amendment are provided.20

It has been suggested that such improvements in the United States can be secured only by making their promotion "somebody's business," and that the states' attorneys general should be empowered and equipped to formulate and propose needed improvements in this respect.21

This proposal for simplified indictments is endorsed by the Indiana Bar Committee, by the National Crime Commission, by the Missouri Association, and by the committees of the American Law Institute.

VIII

The Eighth Proposal is to amend Sec. 2210, Burns 1926, to allow the joining, in the same affidavit or indictment, of counts or charges of more than one felony, or of more than one misdemeanor, or both counts of felony and counts charging misdemeanors, where all concern the same party or parties defendant and all arise out of, or are concerned with, the same transaction. The statute would further provide that the state would not be required to elect during the trial on which count to proceed unless the court believed that unfair advantage would be taken of the defendant unless such election were required.

The fundamental distinction between a felony and a misdemeanor in Indiana is merely a matter of the difference in punishment. By Sec. 2027, Burns 1926, felonies are all offenses which are punishable by death or by imprisonment in the State Prison, and misdemeanors all other offenses. If a criminal trial is an investigation by the state to find out whether or not the defendant committed offenses against the law of the state in a certain single transaction or occurrence, why not avoid multiplicity of prosecutions by settling the whole question completely and economically in one trial? The English people have reasoned out the matter in that way.22

20 Public General Statutes, 5 and 6, Geo. V. Ch. 90. Indictments Act, 1915; Pub. Gen. Stats., 15 and 16, Geo. V. Ch. 86. Criminal Justice Act, 1925.
22 See note 20.
IX

The Ninth Proposal is to amend Sections 2225, clause 10, in case the Seventh Proposal herein is not followed by simplifying the terminology of indictments. The clause now reads: "No indictment—shall—be—quashed—... Tenth. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." To this provision add, these words: "including any omission of words such as ‘feloniously’, ‘unlawfully’, and similar technical terms. Provided that such words are not specifically stated in the statute defining the offense; and provided sufficient facts are stated to show that the act was criminal in its nature, or to make it appear that the offense forbidden by the statute in fact was committed". There is no sound reason why the legislature may not provide that such words may be omitted in such cases without destroying the legal effect of the indictment. The Indiana Bar Committee endorses this proposal.

X

The Tenth Proposal is to amend Sec. 2232 providing for the arraignment of a defendant, by adding to the section these words: "Provided that: the trial, judgment, or any other proceedings in the case, shall not be stayed, arrested, set aside, reversed or in any manner affected, by the failure of the record to show an arraignment and plea or either of them, unless the record shows that defendant before the trial objected to entering upon the trial for lack of such arraignment and plea, and saved exceptions to the overruling of such objection."

Under the present law, the prosecutor or court may fail to notice, before trial opens, that the written record does not show that the defendant entered a plea of "not guilty" to the charge. Even though the defendant then proceeds in the trial to make his defense and to act in every respect as though he has pleaded not guilty, still, if the defendant is convicted, he may appeal to the Supreme Court and the conviction will be reversed because the record does not show such formal plea of "not guilty". This state of the law frequently leads to some maneuvering by the defense to get such an error into the record. At any rate every competent defense lawyer is, of course, in protecting his client's interests under the law as it is, alert to take legal advantage of such flaw in the record. If the state neglects to care for its own interests by legislation, no lawyer feels that he can be fair
to his client if he overlooks such a flaw. Between 185823 and 192424 no less than eleven convictions have been reversed on this ground. Individual members of the court, however, repeatedly have complained because they were compelled by authority to reverse the conviction on account of such technical error25 and have refused to establish such a precedent in justice of the peace cases.26 The United States Supreme court formerly held to the present Indiana rule,27 but that court has overruled its previous rule, and now refuses to reverse because of such omission.28 The latter opinion condemns reversal upon such a technical error and says that the defendant should be condemned, and not rewarded, for proceeding to trial without plea and then later claiming the advantage of such formal irregularity.

Lack of such a provision has cost the people of Indiana many thousands of dollars in new trials in addition to the cost in loss of respect for the criminal law each time that these reversals occur. The proposal is endorsed by the Indiana Bar Committee.

XI

The Eleventh Proposal is the amendment of Section 2235, to require a defendant filing his affidavit for change of judge to file such affidavit at least ten days before the date set for trial. This would prevent the abuse of this statute as a mere means of delaying the trial. There is strong sentiment for additional requirements that the defendant set out in his affidavit specific facts showing the prejudice of the judge against him or against his case; to require defendant also to file the affidavits of three other affiants also setting forth facts showing such bias; to permit the prosecuting attorney to file counter-affidavits; and upon the issue so raised, the court shall exercise its discretion in granting such change, and in the event of an adverse ruling, the defendant may except to the ruling of the court and present the same to the Supreme Court upon appeal by a separate bill of exceptions. But it is believed by many that the bar would not now approve the passage of such additional requirements.

Many lawyers state their belief that the present statute is probably the most abused statute in the criminal code. As

23 McJunkins v. State, (1858) 10 Ind. 140.
26 Weir v. State, (1888) 115 Ind. 201. Rule condemned by Zollars, J.
George O. Dix, Esq., ex-president of the State Bar Association, recently said, these affidavits often are false and are used merely for delay. The present law gives any defendant the absolute right, by filing his sworn statement that the judge is prejudiced against him or his case, to "throw the judge off the bench". It is a not uncommon occurrence in criminal courts for defendants to come into court on the date set for trial, and to file frivolous motions for continuances. These the judge overrules. Then the defendants draw out previously prepared affidavits in which the defendant states that he believes that the judge is prejudiced against him or his case. If there is a rule of court requiring that such affidavits be filed a certain number of days before the trial, the affiant also states that he did not learn of the prejudice in time to comply with the rule of court. When proper application is made, the judge must grant it. The judge then has to delay the trial until a new judge can be agreed upon by the state and the defendants, as provided by the statute. Defendants thereby secure delay, which is the great keystone principle of criminal defense, and the great factor in preventing the swift and sure justice which criminal law must achieve if it accomplishes its object of deterrence from crime. Trial is postponed. Witnesses and jurors again journey home-ward, wondering why the law allows such perversion, and such a reward to perjury.

The proposal will prevent the postponement of the trial for delay. If the prejudice actually exists and is not discovered until within ten days of the trial date, perhaps the burden should be put on defendant to make a showing both of the prejudice and of its late discovery. But such late "discoveries" are so rare, that it may not be wise to provide an exception for them. And when it is clear that such an affidavit will not secure delay, the abuse of the change-of-judge affidavit will decline and perhaps cease.

If the abuse should continue, it would strengthen a considerable demand for a repeal or for the more drastic modification of the statute. The statute is much more liberal to the defendant than the corresponding provisions in other states. The state is given no right to file an affidavit for change of judge on grounds of prejudice.

XII

The Twelfth Proposal is an amendment to Section 2239 to require defendant in a capital case, as in others, to file his motion

\[29\] Shaw v. State, (1925) 196 Ind. 39.
for a change from the county five days before the date set for trial, or later by permission of the court; to set up facts showing such prejudice; to file also the affidavits of three other competent affiants setting up such facts; to allow counter-affidavits to be filed by the prosecuting attorney; and on the issue so raised, to leave to the discretion of the court the granting of a change of venue from the court in capital cases, the same as in other cases, subject to review by the supreme court.

The reason for this proposal is to avoid the present practice of taking changes of venue from the county in capital cases, not because the prejudice actually exists, but in order to secure delay, and perhaps to profit from the demoralization which may sometimes result to the state's case. The expenses of the state and the inconveniences of the state's attorneys and of witnesses are heavily increased. Delay is often secured. Congestion of cases in outlying counties is sometimes achieved.

The abuse of claiming such change as an absolute right in capital cases warrants the state in requiring defendants to make a showing that such prejudice does exist, and leave the matter to the reviewable discretion of the trial judge. The sacrifice of thousands of dollars of taxpayers' money, and a loss, by prospective murderers, of respect for the state's criminal law, is the price already levied by the present statute. No loss to justice is probable under the amendment; in fact the contrary is reasonably probable.

XIII.

The Thirteenth Proposal is an amendment to Section 2250, and also a complementary amendment to Section 2251, to require that affidavits for continuances be filed five days before the date set for trial, or to sustain the burden of proving on the date set for trial that the party could not have filed the affidavit before the date set for trial; and further to remove the requirement that the prosecuting attorney, or the defendant, in order to avoid continuance, admit "the truth" of the facts which the opposite party in his affidavit for continuance alleges that he can prove by the absent witness. The amendment should provide that the prosecutor, or the defendant, admit that "the absent witness will testify to the facts as true" as in a civil case (Sec. 438, Burns 1926); then give the other party the power to impeach the witness as though the witness were present and so testified. Some think a constitutional amendment of the confrontation clause would be necessary for this last clause.

The reason for this proposal is obvious. The present law can not be supported by reason, and in practice it promotes
dilatory continuances. The amendments place the same burden on the state that they do on the defendant.

The proposal is endorsed by the Indiana Bar Committee, as to the five-day limitation.

XIV

The Fourteenth proposal is an amendment to Sections 2255 and 2256 to reduce the number of peremptory challenges: in capital cases from 20 to 10; in other felonies from 10 to 5; and in other prosecutions to leave the number at 3. If the jury commissioners will provide well-qualified jurors, there should be no need of the present number of peremptory challenges; that is, of challenges for which the challenger cannot assign one of the fifteen statutory causes for challenge. A defect in our procedure has been the waste of days or weeks in impaneling a jury. Peremptory challenges help to kill this valuable time. Col. Charles L. Jewett, in the address already referred to, twenty years ago, urged the abolition of peremptory challenges, calling them an "abomination." If the jury commissioners are not able to submit respectable panels of jurors, statutory requirements should fix qualifications for jurors.

This proposal is endorsed by the State Bar Committee.

XV

The Fifteenth Proposal is an amendment to Section 2257, which states the causes for challenge, by omitting from the Second clause the words "or reading reports of their testimony" (the testimony of witnesses of the transaction) as ground for challenge for cause. The mere fact that a juror has read a newspaper account of a witness's testimony at a preliminary hearing should be no absolute ground for challenge, if the juror, on his oath, says he can act fairly and impartially according to the evidence introduced at the trial. In these days of universal reading of newspapers, it is becoming increasingly difficult to impanel a jury under the present rule.

XVI

The Sixteenth Proposal also is to amend Section 2257, at clause fifteen, to reduce the period of "twelve months immediately preceding the trial" to "six months immediately preceding the trial" as cause for disqualifying a juror who is not a member of the regular panel, for previous service on a jury. This
clause was aimed at the professional juror. It has outlived its usefulness, as most courts are no longer troubled by the professional juror. The rule is difficult of application, also, and frequently delays the trial while jury records covering a whole year are being searched. However, there is a question as to the importance of this proposal and the preceding one.

XVII

The Seventeenth Proposal is an amendment to Section 2265 by adding a reciprocity clause, agreeing to send Indiana citizens into other states which will enact a reciprocal statute, for service as witnesses in criminal cases. This statute is especially valuable in border counties. Now, by stepping across the line into another state a witness may evade process. Thereby criminal cases are lost or die. Corruption is encouraged by such a condition. New York has had such a statute for some time, and recently has extended its application to Canada, and other countries. (1926. New York Laws, Ch. 415; Sec. 618-a.)

This proposal is endorsed by the State Bar Committee.

XVIII

The Eighteenth proposal is important. It amends Section 2267, clause 4, by striking out all after the word "behalf", so that it ends the present futile requirement that the jury shall not consider the defendant's refusal to take the witness stand in his own behalf. The amendment would also permit comment by counsel and court upon such refusal. Under the present law a defendant may exercise his constitutional privilege not to testify. The abolition of the privilege is not suggested here, although many think it does more harm than good. But everybody knows that the jurors do consider such refusal as indicative of guilt. They reason that an innocent defendant wants to testify. To tell the jury not to consider defendant's refusal to testify for himself is equivalent to asking the jurors to ignore their common sense. Moreover, both the court and the prosecuting attorney now must avoid any reference to such refusal before the jury, on penalty of reversal. The prosecution may occasionally evade this "taboo" by suggesting that "no evidence has come from the defense in denial" of certain facts. Fiction and pretense characterize this whole situation, and the situation should be changed to recognize truth and reality and public policy. Public confidence may thus be strengthened. Ohio and New Jersey permit reference to defendant's failure to testify. The proposal is endorsed by the National Crime Commission, by the
Missouri Survey, and by committees of the American Law Institute, as well as by the Indiana Bar Committee.

XIX

The Nineteenth Proposal is an amendment to Section 2274 to give the state the same rights as the defendant now has in the taking of depositions, perhaps limiting the right geographically to the county. The defendant now may take the deposition of any witness for the state, although the state has no such right, until defendant has invoked it. The defendant is thereby said by this statute to waive his “constitutional right to object to the taking of depositions of witnesses by the state” so that the state may then take the depositions of the defendant’s witnesses. But it is a question whether or not the proposal involves a constitutional right, so that a constitutional amendment (to Art. 1, Sec. 13) would be necessary. There is authority that defendant’s constitutional right to meet the adverse witnesses face to face is secured by providing that defendant shall be present at the taking of the deposition, with full powers of cross-examination, face to face with the witness, at that time, and not necessarily at time of trial. However, a constitutional amendment might be the safest procedure.

The great evil of the present rule is that state’s witnesses are often caused to disappear, or to “forget”, or to change their stories while waiting for the trial, or they may die while waiting. The state is as much entitled as is the defendant to get these witnesses “on record”, even though they were not witnesses before a grand jury, and to secure perpetuation of their testimony, and to find out what the testimony of defendant’s witnesses will be. This proposal would help to shorten trials, and often to avert them altogether. Every legitimate right of the defendant could be preserved, and the state’s rights would be upheld.

This proposal is endorsed by the State Bar Committee, and, in substance, by the National Crime Commission Committee (Their Section X).

XX

The Twentieth Proposal is to repeal Sec. 2300 which now gives defendants jointly charged with felony the absolute right to separate trials; and to enact this statute, proposed by the com-

mittee of the National Crime Commission (their proposal No. VIII) in the following words: Defendants charged with conspiracy or any other crime such as riot and affray, that require joint action, shall be tried jointly, and all defendants jointly charged by indictment or affidavit with crimes which may be jointly committed but do not require joint action shall be jointly tried unless in the opinion of the trial court, the interests of justice require that one or more be tried separately. Or some may prefer the new New York statute, in these words: Defendants, jointly indicted, may be tried separately or jointly in the discretion of the court. (1926. Laws of New York, Chap. 461, Sec. 391.)

A provision should be added to prevent evasion of this proposed statute by the filing of separate motions for a change of judge, in which case separate trials are secured. Such a provision would be to amend Sec. 2235, or the proposed section, or both, by providing that in case one or more defendants jointly indicted with others, wish to file an affidavit for a change of venue from the judge, all shall join in such affidavit and the change shall be granted jointly and not separately. (Or discretion might be left in either judge.)

The present law puts a premium on wholesale crimes by gangs. If a dozen bandits capture, terrorize and loot an Indiana town, and are jointly indicted for the crime, and if each demands a separate trial, the present statute compels the court to grant to each one a separate trial. Thus a second raid is made upon the taxpayers of the community, who are forced to furnish a dozen different juries, and as witnesses to attend a dozen different trials, repeating a dozen times the same testimony about the same transaction. Some witnesses may be brought a dozen times from great distances at public expense. One excuse for such a proceeding is that defendants of good reputation would be prejudiced in a trial jointly with defendants of bad reputation. Whenever such good reason appears, the court, under the proposal, would grant separate trials for cause shown.

This proposal is endorsed by the committees of the National Crime Commission, of the Missouri Association, of the American Law Institute.

XXI.

The Twenty-first Proposal is to amend Section 2801, which fixes the order of trial. The amendment should be to make the

31 Neely v. State, (1924) 194 Ind. 667.
order of the defendant's statement of his defense the same as in a civil case (Section 584, Burns 1916). That would require defendant to make his statement just after the opening statement by the prosecution or not at all. Now, the defendant may wait until he hears the state's opening statement and evidence before making an opening statement himself. The state is thereby forced to introduce its evidence in ignorance of the line of defense, whereas the defendant does not have to decide whether his defense will be alibi, or self-defense, or accident or something else, until after he has heard the state's evidence. Here again the state is handicapped, and opportunity is given to the defense to frame its defense at the trial, and still to get the benefit of making a strong opening statement at the end of the state's case, and as an introduction to the defendant's own case in chief.

The last session of the New York legislature passed a similar statute. (1926. Laws of New York, Chapter 417, Sec. 388.)

The State Bar Association endorses this proposal.

XXII

The Twenty-second Proposal is to amend the fourth clause of Section 2301, which provides for the closing arguments in criminal cases, by making the last sentence read as follows: "If the defendant or his counsel refuses to argue the case after the prosecuting attorney has made his opening argument, the prosecuting attorney shall then make his closing argument."

The State Bar Committee endorses this proposal.

The present provision is so unfair to the state and has helped to cause so many miscarriages of criminal justice in Indiana that it is here set out in full, as follows: If the defendant or his counsel refuses to argue the case after the prosecuting attorney has made his opening argument, that shall be the only argument allowed in the case.

How does this provision work in practice? At the end of a criminal trial, the state, having the burden of proving the charge, is entitled by the general rule to open and close the final argument. This statute in effect may be used by defendants to change that general rule. For the state, a good final argument is often decisive. In it the state's attorney can summarize and analyze the evidence, reconcile discrepancies in the state's case, and point out flaws in the defendant's defense. In this way the jury is helped to understand the state's position. If the object of a trial is to help the untrained jury to get at the truth of the dispute, no part of the trial is more valuable than the final argument for that purpose. Especially is this true where the rule of
"reasonable doubt" has been kept uppermost in the minds of the jury. In important cases where there are often two or three lawyers on each side, the prosecution frequently saves its most experienced and able counsel for the final closing argument. Picture the situation, therefore, when junior counsel opens for the prosecution. At the end of his argument defense counsel can say, "We waive argument for the defense". Often this is said in a manner to indicate that the prosecution has really not made a strong enough case to cause the defense to trouble to answer it. As a matter of fact the defense frequently knows that the jury is "up in the air", and that the state's able closing arguments would help to clear up the jury's "reasonable doubts." Therefore the defense adopts "gag rule"; the state cannot even point out to the jury what is very often the true situation, namely, that the defendant's refusal to argue the case is a confession of weakness. Frequently this tactical strategy results in an acquittal for a guilty defendant, or in a "hung jury"—equally acceptable.

Why should not this absurd provision be taken out of the statutes?32

XXIII

The Twenty-third proposal is to add at the end of the first sentence in Section 2302, which deals with "reasonable doubt," these words: "But the effect of this presumption of innocence shall be only to place upon the state the burden of proving the defendant guilty beyond a reasonable doubt, and the court shall so instruct the jury."

The committee of the National Crime Commission endorses this proposal, in substance, and suggests that it is aimed against the over-emphasis on the presumption of innocence in the decisions of a number of states. Frequently the impression arises that Indiana juries are confused on this subject, and verdicts are erroneous as a result. This provision would add clearness and certainty to criminal trials. In this way work of great authorities like Thayer and Wigmore would be put to greater practical use in the interest of justice.

32 This is the same question with which Colonel Jewett closed his treatment of this provision in his address in 1906. He tells of the "ludicrous" success with which he, as defense counsel, made use of this provision, in a Crawford County "whitecap" case, tried before Judge Reinhard fifteen years before. He shows how this, and similar "jokers," in the Indiana criminal code, had led to so many miscarriages of criminal justice that citizens, in desperation, resorted to "whitecapping," and invoked the jurisdiction of "Judge Lynch."
XXIV

The Twenty-fourth proposal is an amendment to sections 2252 and 2253 to refuse discharge because defendant has been under indictment for three terms of court, without trial, unless defendant has requested the court to set his case for trial within one year after arraignment, and three terms of court have elapsed without trial after such request.

This also is an effort to place a little more responsibility, and a little less honorary privilege, upon a criminal defendant. It is the suggestion of an Indiana circuit judge, and has been approved by the State Bar Committee.

XXV

The Twenty-fifth Proposal is to amend the provision as to stays of execution, Sections 2352 to 2355, so as to place in the court which rendered the judgment the power not only to arrest the defendant, but also to enter judgment for the amount of the stay against the replevin bail, and to certify the same to the clerk, who shall record the same as a lien on the judgment debtor's property, and shall issue execution forthwith. And the replevin bail agreement shall be so conditioned.

This provision is analogous to the prior recommendation herein (Proposal VI) regarding appearance bonds. The same arguments apply here which applied there. The state should either stop taking replevin bail, or realize on it when forfeited. It is estimated that the amounts now due and owing the state of Indiana in unpaid fines, uncollected from the replevin bail, amount to hundreds of thousands of dollars. Self-executing provisions of this sort will decrease political interference, and will add speed and certainty to this stage of criminal proceedings.

The State Bar Committee endorses this proposal.

XXVI

The Twenty-Sixth Proposal is to amend Section 2382, which now gives one year after judgment or ruling on motion for new trial within which an appeal may be taken, so that the statute will give one hundred and eighty days for appeal.

A recent New York statute makes the time for taking appeals thirty days. (1926. Laws of New York, Chapter 416, Section 521.) Perhaps this proposal should recommend a shorter period than six months.

The proposal is endorsed by the State Bar Committee.
XXVII

The Twenty-seventh Proposal is to amend Sections 2383 to 2391, which govern the release of defendant on bail during appeal, so that in the case of a defendant who had been previously convicted and imprisoned for felony, or twice convicted of misdemeanor, prior to the present conviction, the trial court shall have discretion to refuse or to admit defendant to bail pending appeal, if the court is satisfied that the present conviction is without error. Appeal to Supreme Court justice from trial court's refusal of bail should be allowed.

This act would not apply to many people, but it would deter those few who are following the policy of accumulating convictions, while remaining at liberty on bonds of appeal from each successive conviction. It would help the court to protect society from dangerous convicts. Bail is a privilege, and any state which abuses its power to grant this privilege and thereby endangers the lives and property of its law-abiding element, deserves condemnation.

XXVIII

The Twenty-eighth Proposal is to add to Section 2394, which requires the court of appeal to disregard technical errors, the following provision: On hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure, unless after an examination of the record before the court, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

This addition will help to enforce the legislature's intention as expressed in the present statute. It is endorsed by the committee of the National Crime Commission, and is substantially the provision in the Constitution of California (Art. VI, Sec. 4 1/2). It is directed against the peculiarly American doctrine that all error in criminal cases is presumed to be prejudicial error. However, some think it is already law in Indiana.

XXIX

The Twenty-ninth Proposal is to amend sections 7732 and 11839 which fix a prosecuting attorney's salary at $500 per year plus fees; and to provide for prosecuting attorneys a reasonable salary.

This fee system for payment of a prosecutor is absolutely indefensible. On the floor of the Constitutional Convention seventy-five years ago it was severely denounced. It had been de-
nounced before then and it has been denounced ever since. In
criminal trials today, defense lawyers occasionally are heard
saying “Gentlemen of the jury, this prosecuting attorney does
not believe my client is guilty. The prosecutor just brought
this prosecution to get the five dollar fee there is in it for him.”
And convicted defendants pay their costs, and particularly the
prosecutor’s fee, as though the prosecutor were a creature for
their bounty. The prosecutor’s office is the key office in law en-
forcement. The Constitution should be amended (Art. 7, Sec.
11) so that the general assembly could provide that the prose-
cutofor might hold office longer than two years, and might serve
alarger district than one judicial circuit, if the legislature so
provide. The office should be made more attractive in tenure,
and in salary.

This proposal is endorsed by the State Bar Committee.

XXX

Proposal Thirty amends Section 12355 which provides that
the convict’s term shall commence from the day of his convic-
tion and sentence.

In practice this section is being used today in this way. The
defendant is convicted, and appeals to the Supreme Court, and
is released on bond. Again he violates the law, is convicted, ap-
peals to the Supreme Court, and is released on bond. Perhaps
there is a third and fourth conviction and appeal. Then, as the
appeals are decided, whenever there is a reversal, the defend-
ant of course is still ahead of the game. Then, when a convic-
tion is affirmed, the defendant dismisses his remaining appeals,
and under this section, serves all his standing sentences concur-
rently.

The section should be amended to provide that sentences im-
posed concurrently, or imposed subsequently but before the
serving of part or all of a sentence previously imposed, shall be
served successively in the order of their imposition, or in what-
ever order the court in its discretion shall determine.

This proposal is endorsed by the State Bar Committee.

Almost all of the thirty foregoing proposals have had the
special consideration and endorsement of one or more of the in-
dividual members of the State Bar Association’s Committee on
Criminal Jurisprudence. Most of the proposals are endorsed
by that committee. Other propositions for the improvement of
the criminal law have been considered by the committee.
One proposition which the committee as a whole failed to
recommend is the proposal to restore to the judge his original
common law right to comment upon the evidence and upon the
testimony and character of the witnesses. This right exists in eight states and in the federal courts. The Committee of the National Crime Commission especially recommends this proposal. Its advantages are clear but it has strong opposition. Perhaps a requirement that such comment be reduced to writing before delivery and be reviewable, would overcome some part of this opposition. The State Bar Committee endorses the plan to establish a State Crime Commission, and a Central Identification Bureau. A study of the pardon problem, and suitable legislation, are under consideration. The committee also expects to submit to the general assembly proposals for improving criminal law in other respects besides the procedural considerations.

The last considerable attempt of the people of Indiana to improve their criminal code was in 1905. The following year, Col. Charles L. Jewett, as president of the State Bar Association of Indiana, made the address at West Baden on "Our Code of Criminal Procedure". We have already referred to Col. Jewett's sound recommendations. In this address, Col. Jewett pleaded for the correction of seven of the abuses now set out in this article, endorsing in substance or in principle the following proposals endorsed in this article: No. VII, XIII, XIV, XVIII, XIX, XXII and XXVIII. In this address, Colonel Jewett said, "A disheartening feature of the situation is exhibited in the large portion of the Acts of 1905, taken up with criminal procedure. The members of the codifying commission are my personal friends, and therefore I say with regret that aside from acting as a capable committee on phraseology few things were done by this commission which can give the slightest excuse for the enactment of its report into law, although it had a wonderful opportunity for good."

Almost twenty-two years have passed since that effort of 1905 to improve the administration of criminal justice in Indiana. No similar effort has been made since then. There are many who believe that the general assembly of 1927, also, has "a wonderful opportunity for good"—an opportunity to help the people of Indiana toward a criminal code which will be good, and wise, and just. It is to be hoped that the members of this general assembly will have such courage and such support from the lawyers and the other citizens of Indiana that their work in amendment of the criminal code will entitle them to the gratitude of the state.
SUPPLEMENTARY NOTE.

Since the foregoing article was sent to the printer, it has become advisable to add certain proposals to the preceding list of thirty. These numbered additions will increase the completeness and definiteness of the referendum which the State Bar Association will conduct.

XXXI

The thirty-first proposal is that the state shall pay witness fees in criminal cases. At the present time, if the defendant is not convicted, or if he is convicted but fails to pay the witness fees which are taxed against him, the witnesses generally go unpaid for their time and expense required by their obedience to the state's subpoena. Critics call this a "dead-beat" policy on the part of the state. New York and other states provide for the payment of witness fees by the state. (New York code of criminal procedure, secs. 616, 617.) The Indiana Bar committee recommends similar statutes.

XXXII

Attention has been called briefly to the proposal, especially recommended by the National Crime Commission committee, by the Missouri Survey Committee, and by committees of the American Law Institute, to restore to the trial judge his original, common-law power to comment upon the evidence. The Indiana State Bar committee does not include this proposal in its list of recommendations. Most of the members of the committee are not sure that the proposal is feasible at present in this state, at least in the absence of certain supporting provisions which are found in the Constitution and statutes of certain states having this rule. The committee recognizes that to be the prevailing sentiment of the bar in substance. However, the committee would like to discover, in the forthcoming referendum, the opinion of the bar on the following modified proposal, to-wit: that the trial judge be restored to his common-law powers to comment upon the evidence and the credibility of witnesses, provided that such comment be reduced to writing and submitted to counsel before the argument, that such comment be reviewable on appeal, and that the court instruct the jury that the jury is finally to determine the facts, regardless of the court's comment.
XXXIII

The creation of a non-salaried Indiana State Crime Commission is proposed. It is fundamental that a physician can not prescribe intelligently for a patient unless the physician can find out the facts of the patient's condition. Authoritative statistics on crime in Indiana, as generally in the United States, are almost totally lacking. Improvement of certain existing evils demands, as a condition precedent, the laborious and intelligent collection of facts. The National Crime Commission recommends that each state create its own crime commission. The Indiana Bar committee concurs for Indiana in this recommendation, and is investigating the procedure. It is believed that existing officials should largely make up the membership of this commission, including perhaps the secretary of state, the attorney general, wardens of penal institutions, statistical experts and legal experts. Legislation may not be needed for realizing this proposal.

XXXIV

The Indiana Bar committee endorses the proposal to establish a Central Criminal Identification Bureau.

XXXV

A proposal to modify the indeterminate sentence law by prescribing maximum determinate sentences for thirty-two of the principal offenses, excluding murder and treason, is submitted with the recommendation of an Indiana judge of wide experience.

XXXVI

From the same source comes the proposal to amend Sec. 2316 to provide that the age of admission to the Indiana Reformatory be changed to read "from sixteen to twenty-five" instead of "between sixteen and thirty;" that in felonies, except treason and murder, if defendant is found to be between sixteen and twenty-one, he shall be sentenced to the Reformatory; and if between twenty-one and twenty-five, the court shall in its discretion sentence him to the Reformatory; if over twenty-five, sentence shall be to the Prison.

XXXVII

Sections 2290 to 2296 might well be amended to enact, in substance, the recommendations of the National Crime Commission committee, by providing that the Indiana procedure now prescribed for determining insanity at the time of the trial would also be extended to provide for determining insanity at the time of the commission of the act charged. The court would thereby appoint disinterested experts to help the jury, in addition to the experts paid by the state or the defense.