



1935

# A Study of the Report of the Committee on Criminal Law

Roy Mitchell Moreland  
*University of Kentucky*

Robert E. Hatton Jr.  
*University of Kentucky*

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### Recommended Citation

Moreland, Roy Mitchell and Hatton, Robert E. Jr. (1935) "A Study of the Report of the Committee on Criminal Law," *Kentucky Law Journal*: Vol. 24 : Iss. 1 , Article 3.  
Available at: <https://uknowledge.uky.edu/klj/vol24/iss1/3>

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# A STUDY OF THE REPORT OF THE COMMITTEE ON CRIMINAL LAW

BY ROY MORELAND\* AND ROBERT E. HATTON, JR.\*\*

The report of the Committee on Criminal Law, adopted at the 1935 annual meeting of the Kentucky State Bar Association, urged the passage of the following sections from the American Law Institute's Model Code:<sup>1</sup>

- 238. Right to try where offense committed within State.
- 282. Number of peremptory challenges.
- 308. Appointment of expert witnesses by Court.
- 309. Fees for expert witnesses.
- 312. Trial where joint defendants, and a provision taken from the Michigan Statute that "alibi or insanity be pleaded in advance."<sup>2</sup>

It is the purpose of this paper to examine in detail each provision and to discuss each from the standpoint of feasibility and effectiveness.

## I.

### RIGHT TO TRY WHERE OFFENSE COMMITTED WITHIN STATE.

"Any person who commits within this state an offense against this state, whether he is within or without the state at the time of its commission, may be tried in this state."

This provision is intended to reach situations where part of the act occurs within one state and part in another. It is not limited in its scope to crimes of violence but extends to crimes unaccompanied by physical force, such as conspiracy, extortion and others. It has been urged that such a provision would result in a dispute over jurisdiction between the states in which the component parts of the crime occurred, and increased cost. Far from this, it is the belief of the writers that it will tend to eliminate disputes and cut down costs. If the alleged criminal

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\*Roy Moreland, A. B., Transylvania College, 1920; LL. B., "with distinction," University of Kentucky College of Law, 1923; J. D., University of Chicago Law School, 1928. Professor of Law, University of Kentucky College of Law; contributor to various legal periodicals.

\*\*Robert E. Hatton, Jr., A. B., Marshall College, 1925; LL. B., University of Kentucky College of Law, 1935.

<sup>1</sup>Proc. Ky. State Bar Association (1935), p. 161.

<sup>2</sup>Mich. Comp. Laws (1929), Sections 17313, 17314.

is in either state then that state, having such a provision, could punish him and thus obviate the necessity of costly rendition proceedings.

As between counties such a provision already exists.<sup>3</sup>

It is believed that such a statute is not open to objection upon the ground of constitutionality. Section 11 of the Kentucky Constitution provides: "In prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage."

Eight states, Arizona, Minnesota, Montana, Oklahoma, South Dakota, Utah, Washington, and Wisconsin, having constitutional provisions almost identical with our own<sup>4</sup> have passed and upheld the following statute: "The following persons are liable to punishment under the laws of this State,—all persons who commit in whole or in part any crime within this State."<sup>5</sup> Wisconsin's Statute differs somewhat: "Whenever a person, with intent to commit a crime, does any act, or omits to do any act within this State in execution, or part execution of such intent which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State."<sup>6</sup>

Seven other states having constitutional provisions substantially similar to Kentucky's have passed like statutes extending the scope of their jurisdiction,<sup>7</sup> but two of these, Texas and Vermont, are identical in result to that of Arizona.

<sup>3</sup> Ky. Crim. Code, Sec. 21: "If an offense be committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the jurisdiction is in either county."

<sup>4</sup> *Ariz.*, Const., 1892, Art. II, Sec. 24, "In which the offense is alleged to have been committed"; *Minn.*, Const., 1857, Art. I, Sec. 6, "County or district wherein the crime shall have been committed"; *Mont.*, Const., 1889, Art. III, Sec. 16 (same as Minn.); *Okla.*, Const., 1907, Art. II, Sec. 20 (same); *S. D.*, Const., 1889, Art. VI, Sec. 7 (same); *Utah*, Const., 1895, Art. I, Sec. 12, also Art. VIII, Sec. 5; *Wash.*, Const., 1889, Art. I, Sec. 22 (like Ariz.); *Wisc.*, Const., 1848, Art. I, Sec. 7 (like Minn., except that "offense" is used instead of "crime").

<sup>5</sup> *Ariz.*, Rev. Code, 1928, Sec. 4490; *Minn.*, Gen. Stat., 1923, Sec. 9909 (1); *Mont.*, Rev. Code, 1921, Sec. 10730 (1); *Okla.*, Stat., 1931, Sec. 1796 (1); *S. D.*, Comp. Laws, 1929, Sec. 3582 (1)—see also Sec. 4505; *Utah*, Rev. Stat., 1933, Sec. 103-1-41 (1); *Wash.*, Pierce's Code, 1929, Sec. 8689 (1).

<sup>6</sup> *Wisc.*, Stat., 1933, Sec. 353.29.

<sup>7</sup> *Calif.*, Pen. Code, 1931, Sec. 27 (1); *Idaho*, Code, 1932, Sec. 17-202; *Nevada*, Comp. Laws, 1929, Sec. 9951; *New York*, Bender's Penal Law,

In complicated crime situations in which the constituent acts of the crime occur in different states, to assert that the authority of a state over a crime ends at the state line is of no aid in settling jurisdictional questions. The modern criminal has little concern for political boundaries except insofar as they may aid in effecting his criminal purpose. Legislatures recognizing this are evidencing an unmistakable trend away from the strictly territorial concept of criminal jurisdiction and beginning to approach the problem from a more realistic angle. Public sentiment and the general safety demand that the territorial concept be liberalized to meet the requirements of the new era in criminal operation.

## II.

### NUMBER OF PEREMPTORY CHALLENGES.

It is recommended that Sections 203 and 204 of the Kentucky Criminal Code relating to the number of peremptory challenges be repealed and that Section 282 of the Model Code herein set out be adopted:

"The Commonwealth and the defendant shall each be allowed the following number of peremptory challenges: (a) Ten, if the offense charged is punishable by death or imprisonment for life. (b) Six, if the offense charged is a felony not punishable by death or imprisonment for life. (c) Three, if the offense charged is a misdemeanor."

Kentucky, North Carolina, Tennessee, and West Virginia<sup>8</sup> alone of all the states, allow the defendant more than twice the number of peremptory challenges allowed the Commonwealth.

There seems to be no valid reason for such disparity. The modern trend in criminal procedure is to place the defendant and Commonwealth on equal terms. Responsive to this trend the legislatures of 24 states have equalized the number of per-

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1931, Sec. 1930; *Texas*, Baldwin Code Cr. Proc., 1926, Art. 193; *North Dakota*, Comp. Laws, 1913, Sec. 9206 (1); *Vermont*, Session Laws, 1925, p. 164.

<sup>8</sup>*Ky.*, Cr. Code, 1932, Secs. 203, 204 (defendant 15, Commonwealth 5 in case of felony, 3 each in case of misdemeanor); *N. C.*, Code, 1927, Sec. 4333-4 (defendant 12, Commonwealth 4 in capital offenses, defendant 4, Commonwealth 2 in all other offenses); *Tenn.*, Code, 1932, Sec. 10020 (defendant 15, Commonwealth 6 in capital cases, defendant 8, Commonwealth 4 in all other felony cases, defendant 3, Commonwealth 3 in misdemeanors); *W. Va.*, Code, 1931, Ch. 62, Art. 3, Sec. 3 (in cases of felony jurors struck off from panel of 20. Defendant 6, state 2, no other kind of peremptory challenges).

emptory challenges allowed in all cases.<sup>9</sup> Five more discriminate only in capital cases or certain, few specified crimes.<sup>10</sup> Three more discriminate only in offenses punishable by death or life imprisonment.<sup>11</sup>

The constitutionality of such a provision seems hardly open to serious question. The provisions in the constitutions of all of these states correspond to our own Section 7. "The ancient mode of trial by jury shall be held sacred and the right

<sup>9</sup> *California*, Penal Code, 1931, Sec. 1070 (20 each if punishable by death, 10 each otherwise); *Colorado*, Mills Anno. Stat., 1928, Sec. 4257 (15 each if capital offense, 10 each otherwise); *Connecticut*, Gen. Stat., 1930, Sec. 6478 (25 each if capital, 15 each if punishable by life imprisonment, 8 each if punishable by imprisonment in State Pen., 4 each in all other cases); *Florida*, Comp. Gen. Laws, 1927, Sec. 8303 (10 if capital, 8 other felonies, 3 misdemeanors); *Idaho*, Code 1932, Sec. 19-1916 (10 each if capital, 6 otherwise); *Illinois*, Cahill's Rev. Stat., 1933, Ch. 38, Sec. 765 (20 if capital or life, 10 if imprisonment over 18 mos., 6 all other offenses); *Indiana*, Burn's Ind. Stat., 1933, Secs. 9-1502, 9-1503 (20 each if capital, 10 if punishable by state prison, 3 otherwise); *Iowa*, Code, 1931, Sec. 13836 (8 if capital or punishable with life, 4 in other felonies or certain misdemeanors, 2 in other misdemeanors); *Louisiana*, Code Cr. Proc., 1932, Art. 354 (12 if capital, 6 otherwise); *Massachusetts*, Gen. Laws, 1932, Ch. 234, Sec. 29 (12 if capital or life, 2 otherwise); *Mississippi*, Code, 1930, Sec. 1277 (12 if capital, 6 otherwise); *Montana*, Rev. Code, 1921, Sec. 11955, Supp. 1927, Sec. 11956 (10 if death or life, 8 if unlimited sentence, 6 if limited to a year); *Nevada*, Comp. Laws, 1929, Sec. 10942 (8 if capital or life, 4 otherwise); *New York*, Code, Cr. Proc., 1931, Sec. 373 (20 if capital, 20 if more than 10 years, 5 in all others); *North Dakota*, Sess. Laws, 1927, p. 373, Sec. 10804-5 (20 if first degree murder, 10 if term in pen, 6 all others); *Ohio*, Code, 1932, Secs. 13443-46 (6 each in capital cases, 4 each in other cases). (In 1930 Ohio allowed defendant 16 and state only 4.); *Oklahoma*, Stat., 1931, Sec. 2993 (9 if capital, 5 if punishable in state prison, 3 in others); *Pennsylvania*, West Stat., 1920, Sec. 8158, 20 each; *South Dakota*, Comp. Laws, 1929, Sec. 4853 (20 if capital or life, 10 if state prison, 3 in all other cases); *Texas*, Code Cr. Proc., 1925, Art. 615 (15 capital), Art. 634 (10 if non-capital); *Utah*, Rev. Stat., 1933, Sec. 105-31-15 (10 if capital or life imprisonment, 4 in other felonies, 3 in misdemeanors); *Vermont*, Gen. Laws, 1917, Secs. 2252-3 (6 each); *Virginia*, Code, 1930, Sec. 4898 (4 if felony, 1 if misdemeanor); *Washington*, Pierce's Code, 1929, Sec. 9365, (12 if capital, 6 if penitentiary offense, 3 otherwise).

<sup>10</sup> *Delaware*, Sess. Laws, 1918-19, p. 633, Sec. 4822 (6 each if non-cap. offense); *New Hampshire*, Pub. Laws, 1926, Ch. 368, Secs. 11, 12 (3 each in non-cap. offense); *New Jersey*, Comp. Stat., 1910 Cr. Pr., Secs. 80, 81 (10 each except in case of treason, murder, burglary, forgery, or subornation of perjury); *Wisconsin*, Stat., 1933, Sec. 35703 (12 each if non-cap. offense); *South Carolina*, Code of Laws, 1932, Sec. 1002 (5 each except in murder, manslaughter, burglary, arson, rape, grand larceny, perjury or forgery).

<sup>11</sup> *Maine*, Rev. Stat., 1930, Ch. 96, Sec. 95 (4 each for other offenses); *Michigan*, Comp. Laws, 1929, Sec. 17305 (5 each); *Nebraska*, Comp. Stat., 1929, Sec. 29-2005 (6 each if less than life and more than 18 months, 3 each for all other offenses).

thereof remain inviolate." Typical is that of North Dakota, "The right of trial by jury shall be secured to all, and remain inviolate, . . ." <sup>12</sup>

The advisability of such a provision is manifested in its wide spread adoption. It exists in 32 states. Kentucky trails the other 47 states in allowing the defendant 15 and the Commonwealth only 5 peremptory challenges. Judges, practicing lawyers, and Commonwealth attorneys have long since recognized Kentucky's backward position and are urging equality.

That the number provided for by the Model Code is adequate may be seen from a survey of the sections in footnotes 9, 10 and 11.

### III.

#### APPOINTMENT OF EXPERT WITNESSES BY THE COURT.

It is recommended that Sections 308 and 309 of the Model Code relating to the appointment of expert witnesses by the court be adopted in Kentucky.

There are no such provisions in the Kentucky Criminal Code. Section 156 relating to the impaneling of a special jury to try the insanity of defendant applies only where insanity has arisen subsequent to the time of the alleged offense.

Section 308 of the A. L. I. provides:

"Whenever on a prosecution by indictment the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant. If the court does so, the clerk shall notify the prosecuting attorney and counsel for the defendant of such appointment and shall give the names and the addresses of the experts so appointed. If the defendant is at large on bail, the court in its discretion may commit him to custody pending the examination of such experts. The appointment of experts by the court shall not preclude the Commonwealth or defendant from calling expert witnesses to testify at the trial and in case the defendant is committed to custody by the court they shall be permitted to have free access to the defendant for purposes of examination or observation. The experts appointed by the court shall be summoned to testify at the trial and shall be examined by the court and may be examined by counsel for the Commonwealth and the defendant."

Section 309 provides:

"When expert witnesses are appointed by the court as provided

<sup>12</sup> Const., 1889, Art. I, Sec. 7.

in the preceding section, they shall be allowed such fees as the court in its discretion deems reasonable having regard to the service performed by the witnesses. The fees so allowed shall be paid by the [county where the indictment was found].

This portion in brackets was deleted and the words "Commonwealth of Kentucky as other court costs are paid", substituted therein by a vote of the 1935 annual Kentucky State Bar Association.

There is now no statutory authorization for the payment of the expert witnesses called by the Commonwealth. It seems to be the practice in the majority of cases where expert witnesses are called by the Commonwealth to submit a claim for services to the fiscal court of the county wherein the indictment was found, which may allow or refuse the claim. It has then been recognized that the county is the proper unit to bear the expense. Although the case is brought in the name of the Commonwealth, yet looking at the matter realistically, it is the county which is primarily offended and the county which should bear the expense of the trial. For that reason the writers feel that Section 309 as originally stated is to be preferred. It would certainly be inconsistent to require the State to pay the court's witnesses when the county pays the State's witnesses. The objection to the section as originally stated was that an added burden would be placed upon the county. It is the writers' opinion that such would not be the result. Where counsel for both sides know that the court in its discretion may call unbiased and non-partisan experts in the role of "amici curiæ" they will be less likely to call partisan experts whose testimony will be of far less weight because partisan. Further, the calling of experts rests in the sound discretion of the court and it is not believed that the judge, dependent upon the county for reelection, will abuse this discretionary power.

To realize the crying need of such a provision one has only to place himself in the predicament of the trial juror where insanity becomes an issue. Faced by a battery of experts called by both the Commonwealth and the defendant he can not know which to believe. At such a point the advice of strictly impartial experts would be a most welcome aid and guide. Realizing

this need the American Institute of Criminal Law and Criminology some years ago included such a provision in a Model Testimony Bill.<sup>13</sup>

"Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the Judge of the Trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the Judge does so, he should notify counsel of the witnesses so called giving their names and addresses. Upon the trial of the case the witnesses called by the court may be examined regarding their qualification and their testimony by the counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the Judge shall be allowed such fees as in the discretion of the Judge seems just and reasonable having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found."

In a vigorous attack upon the present system Professor Wigmore said:<sup>14</sup>

"What, then, is the cause of expert witnesses' partisanship, if it is found even where character and reputation exclude the cause commonly attributed?

"It is this: the *vicious method* of the law which permits and requires each of the opposing parties to *summon the witnesses on the parties' own account.*"

"The vicious method naturally makes the witness a partisan. He is spoken of habitually as 'my' witness or 'our' witness. In the Leob-Leopold case where the experts devoted long hours to the study of the defenses' case, consulted only with defenses' counsel, made preliminary reports to those counsel, cut down those original reports in their testimony, and answered only the questions that were asked by counsel, it was natural and inevitable that their testimony should take on a partisan color. Partly this would be unconscious. Partly it would be conscious, in that they came to sympathize with the only side known to them and in that they committed themselves to conclusions which it was hard to modify when grilled by hostile counsel.

"The method of the law is inherently bad. Its badness has long been known or suspected. The Leob-Leopold case merely gave a clear demonstration of it to the eyes of the world.

"What is the remedy? Very simple. *Let the expert witness be summoned by the Court, himself.* Let all subsequent proceedings be based on this theory, *payment by the State* (our italics)—consultation with counsel on either side if desired,—direct interrogation by the Court and cross-examination by both counsel if desired,—exchange of views beforehand with other experts, if any.

"This is the only method that will remove the scandal and mistrust that now attaches so often to expert testimony, whether in the medical or other sciences."

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<sup>13</sup> Quoted by Keedy, "Insanity and Criminal Responsibility" (1917), 30 Harv. L. Rev. 535, 537, Sec. 1. *Summoning of Witnesses by Court.*

<sup>14</sup> Wigmore, "To abolish Partisanship of Expert Witnesses as Illustrated in the Leob-Leopold Case" (1924), 15 Jour. Crim. Law 341, 342.



Indeed the very essence of scientific testimony should be its disinterestedness.

The American Bar Association in 1929 passed a far reaching resolution: "That there be available to every criminal and juvenile court a psychiatric service to assist in the disposition of criminals."<sup>15</sup>

#### IV.

##### TRIAL WHERE JOINT DEFENDANTS.

Section 312 of the A. L. I. Code provides:

Where two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials. In ordering separate trials, the court may order that one or more defendants be each separately tried and the others jointly tried, or may order that several defendants be jointly tried in one trial and the others jointly tried in another trial or trials, or may order that each defendant be separately tried.

Section 237 of the Kentucky Criminal Code provides:

"If two or more defendants be jointly indicted for a felony any defendant is entitled to a separate trial."

It is the belief of the writers that a repeal of the later section and passage of the Model Code provision would bring about a much needed reform in our criminal procedure. Useless expensive trials would be avoided, more uniform justice would be meted out, and needless delay would be avoided.<sup>16</sup>

<sup>15</sup> Am. Bar Assn. Report, 1929, Vol. 54 at p. 56.

<sup>16</sup> The following letter has been received from Mr. James Park, Commonwealth's Attorney for Fayette County, and was published in connection with a previous discussion of this section in 23 Ky. L. Jour. 430, 450:

"With reference to the matter discussed by us several days ago, I am strongly of the opinion that one of the most helpful things that could be done to improve criminal procedure in Kentucky would be the passage of an act by the Legislature permitting defendants, who are jointly indicted in felony cases, to be tried together, with the right given to the presiding judge to grant the separate trial if, in the exercise of his discretion, a separate trial is necessary in order to give a fair trial to the parties.

"It seems useless, expensive and an ineffective thing to do in a case where defendants are jointly indicted for felony that the Commonwealth must present the same witnesses in each of several trials, with a new jury for each trial, and the result is often a miscarriage of justice.

It is believed that the only possible argument that could be urged against such a provision is that it might subject the innocent defendant indicted jointly with a guilty one to a certain imputation of culpability from contact with his co-defendant to which he would not be subject if tried separately. But this seems unsound. The reasonable doubt necessary for acquittal of the one would be much more readily created where the other's guilt is so black and inescapable. White never seems quite so white as when placed side by side with black. Indeed the accused has nothing to fear from this score. In extraordinary cases or where it is evident that all parties will be better served in separate trials the court in the exercise of its discretion will grant them.

At common law the Commonwealth and not the defendant, in cases of joint indictments, had the right of election, subject to the discretion of the court whether to try defendants jointly or separately.<sup>17</sup> Ten States now by statute provide that the granting of separate trials rests in the sound discretion of the court in all cases.<sup>18</sup>

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"I recall especially one case where two men were indicted and charged with the theft of a lot of tobacco. The evidence for the Commonwealth showed the theft of the tobacco and that the two defendants together took it by truck to a warehouse, the tobacco so sold being identified as the stolen tobacco. The defendants demanded, and as a matter of a right, received separate trials. Upon the first trial the defendant being tried testified that he was standing on the street and that the other defendant came along in the truck with the tobacco and asked him to ride to the warehouse and help him unload it, and that he was entirely innocent in the transaction. Upon the later trial of the other he told the same story, i. e., that he was standing on the street and the defendant, who was first tried, came along in the truck with the tobacco and asked him to go along and help unload it. Had these cases been tried together the jury could have determined which of the defendants was telling the truth, or could have reached the conclusion, which I think was the truth, that both of them were actually engaged in the theft of the tobacco; yet upon separate trials, there was sufficient doubt thrown in the minds of the jury as to make a conviction difficult.

"If you can do anything toward having our Code of Criminal Practice amended so as to make possible the joint trial for defendants who are jointly indicted in felony cases, you will have made a substantial contribution to the enforcement of law in this State."

<sup>17</sup> *Hoffman v. Com.*, 134 Ky. 726, 733, 121 S. W. 690 (1909); *Drake v. Com.*, 214 Ky. 147, 151, 232 S. W. 1066 (1926); Geyer and Skinner, "Proposed Criminal Code Changes for Kentucky," 23 Ky. L. J. 430, 450.

<sup>18</sup> *California*, Penal Code, 1931, Section 1098; *Connecticut*, Gen. Stat., 1930, Sections 6529, 6531; *Idaho*, Code, 1932, Section 19-2006;

## V.

## ALIBI OR INSANITY TO BE PLEADED IN ADVANCE.

"Whenever a defendant in a criminal case not cognizable by a Justice of the Peace shall propose to offer in his defense testimony to establish an alibi on behalf of the defendant, or of the insanity of the defendant, either at the time of the alleged offense or at the time of the trial, such defendant shall at the time of the arraignment or within ten (10) days thereafter but not less than four (4) days before the trial of such cause file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to claim such defense and in cases of a claimed alibi such notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

"In the event of the failure of a defendant to file the written notice prescribed in the preceding section, the court, in its discretion, may exclude evidence offered by such defendant for the purpose of establishing an alibi or the insanity of such defendant as set forth in the preceding section."

At the Crime Conference called by the Attorney General in Washington on December 10-13, 1934, a resolution recommended "The adoption of the principle that a criminal defendant offering a claim of alibi or insanity in his defence shall be required to give advance notice to the prosecution of this fact and of the circumstances to be offered, and that in the absence of such notice a plea of insanity or a defence based on an alibi shall not be permitted upon trial except in extraordinary cases in the discretion of the judge."

A similar provision was recommended in the report of the Law Reform Committee at the 1934 annual meeting of the Kentucky State Bar Association.<sup>19</sup>

In a paper entitled "Necessary changes in the Law of Evidence to Meet Modern Criminal Problems," by Mason Ladd of the University of Iowa law faculty, read and approved at a round table discussion at the annual meeting of the Association of American Law Schools, December 28, 1934, the same rule was recommended.

Michigan (whose statute is above set out), New Jersey, Ohio, and Wisconsin have such statutes.<sup>20</sup> A similar bill is now

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*Louisiana*, Code of Cr. Pr., 1932, Section 316 (District Attorney or Court); *Michigan*, Comp. Laws, 1929, Section 17298; *Nevada*, Comp. Laws, Section 10966; *New York*, Bender's Cr. Code, 1931, Cr. Pr., Section 391; *North Dakota*, Sess. Laws, 1927, P. 374, Section 10833; *South Dakota*, Comp. Laws, 1929, Section 4876; *Washington*, Pierce's Code, 1929, Section 9377.

<sup>19</sup> Proc. Ky. State Bar Assn. (1934), p. 208.

<sup>20</sup> *Michigan*, Comp. Laws, 1929, Secs. 17313, 17314; *New Jersey*, see "The Justinian" published by the Brooklyn Law School for Feb. 31, 1935; *Ohio*, Gen. Code, 1932, Sec. 13444-20.

pending before the New York legislature. The Wisconsin Supreme Court under authority of Section 251.18 of the Wisconsin Statutes, 1929,<sup>21</sup> adopted the following rule, effective January 1, 1935:

"Alibi to be pleaded. In courts of record in case the defendant intends to rely upon a alibi as a defense he shall give the prosecuting attorney written notice thereof on the day of arraignment, stating particularly the place he claims to have been when the offense is alleged to have been committed; in default of such notice, evidence of the alibi shall not be received unless the courts, for good cause shown shall otherwise order."<sup>22</sup>

It is to be noted that the Wisconsin rule applies only to alibi and not to the defense of insanity. For this reason it is submitted that the Michigan act is much better, for the arguments in favor of advance notice of alibi apply with the same force to the defense of insanity.

The adoption of such a rule would be a decided step forward in the campaign of criminal law reform. It prevents imposition upon the court and jury, it tends to sever the "Shyster-Criminal" combine, and it will prevent the evasion of the penalty of the law by some fraudulently concocted alibi.

Evidence of an alibi or plea of insanity has been the resort of many criminals where there could not be raised otherwise any doubt of the identification of the offenders. Evidence of an alibi has usually been offered at the very end of the defense when there remained no time for the prosecution to investigate its good faith or the character of the witnesses produced and has often resulted in the acquittal of the guilty.

### CONCLUSION

It is the writers' conviction that each of these provisions represents a decided improvement over the present practice and that each has been carefully selected to meet an immediate and pressing need. It is to be hoped that the interest manifested in this report at the 1935 annual meeting of The Kentucky State Bar Association will result in a concerted effort towards the enactment of these recommendations as law by the General Assembly of 1936.

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<sup>21</sup> Upheld, In re Constitutionality of Section 251, 18 Wisconsin Statutes, 204 Wis. 501, 236 N. W. 717 (1931).

<sup>22</sup> Wisconsin arraignment corresponds to a preliminary examination and is held before the county judge. See Wis. Stat., Sec. 357, 20-24.