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Whither Goest Thou

By JAMES F. KIRBY

Society changes. The ideals of one generation are mocked by the next. The great Kent in 1823 spoke of the menacing hand of the injunction, *Jerome v. Ross*, 7 John Ch. 315. In 1902 Chief Justice Start said that one man should not so violate the rights of another without feeling the restraining hand of equity, *Colliton v. Oxborough*, 86 Minn. 361. Still the relief asked in New York was not so far reaching as that asked in Minnesota one hundred years later.

The American colonists rebelled against the general warrant. Today it is said that officers should enter the homes of the citizens on mere rumor without a warrant of any kind. In their indictment of their king they alleged that he had made judges depend on his will alone for the tenure of their offices and the amount and payment of their salaries. Today it is proposed to have offenses tried without juries by commissioners who will hold office at the will of the government, their tenure of office depending upon their decisions. They charged him with quartering large bodies of troops among them and through mock trials protecting them against punishment for murders committed by them. Today we have large bodies of armed men going about the highways, even in the interior of the country, stopping peaceable, law-abiding citizens, without any pretense of a warrant, and searching their vehicles and their persons. The penalty, for not being able to distinguish in the dead of night between an officer not in uniform and a highwayman, is death by gun-fire without right of trial. When the killer is charged in the courts of the outraged state with an offense based on these facts, the case is lugged over into another sys-

tem of courts and the defense conducted by the officers of the government and at the public expense. They charged the king with depriving them of the benefits of trial by jury. Scarcely a day passes at the present time that some one does not make a demand in the public press for the utter abolition of jury trials. These things go on and scarcely a voice is raised in protest. True there may be protest against the things that are done but not against the method of doing them. There are not wanting myriads of men who loudly protest being deprived of a drink, but none who protest against the methods by which they are deprived.

Reverting to the jury trial many today declare that the unfit should not be born. Many states have passed laws on the subject of eugenics; whether such method of dealing with a human being is moral or immoral belongs to the theologian; whether it is cruel or kind belongs to the humanist; whether it is injurious or beneficial to the health of mind and body belongs to the doctor; whether it will accomplish the desired end in the best manner belongs to the sociologist; the procedure employed and its effects upon our legal rights properly belong to the lawyer. In Virginia the defendant is passed upon by a board with the right of appeal to the Circuit Court but in the trial the court sits without a jury. This law has been held constitutional by the Supreme Court of the United States in the case of *Buck v. Bell*, 47 S. Ct. 584.

A few years ago a state passed such a law against which it might be said that it violated the following principles theretofore considered to be a part of the American form of government, for the reason that the citizen's rights were taken:

- 1, Without trial by jury; 2, without the witnesses for the state being compelled to confront the accused; 3 without the witnesses for the state being put under oath; in other words, on unsworn testimony; 4, on the testimony of witnesses not subject to cross-examination, the defendant having no right to appear and cross-examine the witnesses; 5, on hearsay testimony; sometimes mere letters informally written to members of the Board, and on mere rumor, etc.; 6, without allowing the defendant to make a defense and

contradict the charges made against him or his ancestors, i. e., the Board need not allow the defendant to make a defense or to introduce evidence contradicting charges made against him; 7, without trial in any duly constituted court and without any legal process whatever, let alone due process of law; 8, without requiring any charge to be formulated against or any notice to be given the defendant; 9, without the defendant under this law being allowed the right to employ counsel to arrange his defense, or to appear for him; 10, by a politically appointed Board or bureau appointed by the chief executive of the state.

This law was passed by the legislature of a great state and incorporated into its jurisprudence without protest. It was hailed as the panacea for all social ills without a thought for the safeguarding of the citizen's rights against the exercise of unlimited power by a political bureaucracy. However, as time went on some raised their voices, not against the results to be accomplished, but against the method of invading the individual's rights and the breaking down of the safeguards which constitute the bulwarks of American liberty. The result was that laws so recklessly violative of human rights were in many cases held unconstitutional by the courts, or on a proper showing to the legislatures, voluntarily repealed or modified.

In 1929 the general assembly of the state of Iowa took up the passage of such a law. If such a law can be justified at all, this law is a model in safeguarding the legal rights of the defendant. It is found in the Acts of the 43rd General Assembly of the State of Iowa, Chapter 66, Page 106, sections one to twenty. The first section names the officers who are to administer the law. The second section designates specifically and clearly the classes of persons who are subject to the law and provides for jurisdiction over those included in these classes, who are at liberty as well as those confined in state institutions. Sections thirteen, fourteen and fifteen provide for appeal to the courts and for a jury trial. It would seem that in the twenty sections of this statute nothing has been overlooked by way of preserving the form and substance of due process of law.

Formerly it was believed by Americans that the individual accused of crime should be tried by a jury of his peers in

the district in which the crime was alleged to have been committed. It was believed, in addition to this, that the punishment he was to receive should be fixed by the court that heard the evidence establishing his guilt. A few years ago a great agitation was started in the country by reformers claiming this method of dealing with the criminal was entirely wrong. These reformers said that the punishment of the criminal should not be administered to him by way of revenge for his crime, but that the punishment, if such it was to be called, should be inflicted by way of reforming the criminal. They said that no court in sentencing a man could tell how long it would take to reform him so that he would be fit to be returned again to society as a citizen with proper social orientation.

The result of this agitation was the passage of what is known as the indeterminate sentence law. Under this law the court that tries the man who is accused of crime is, if he is convicted, obliged to sentence him for the maximum period imposed by law. Then after he has served a certain time, as provided by statute, the Board of Parole takes up his case and after determining that he has reformed and is fit again to be returned to society he is put on parole. While on parole the board attempts to keep track of him and watch him and in some states to aid him in finding employment and keeping himself employed in legal and gainful occupations. It would be rash to say that the increase of crime and the large number of inmates in our penal institutions are due to this law or any other one fact. However, the operation of the law has not succeeded in the last quarter of a century in bringing about the millennium.

As noted above, the great lawyers and judges of one hundred years ago greatly feared the injunction. It was just a little before this time that the English Court of Chancery under the leadership of Hardwick, Thurlow and Eldon had extended the injunction to cases of trespass. The Great Chancellor Kent of New York feared it, but since then the injunction has branched out, principally by the extension of the doctrine of nuisance, until now it is almost impossible to commit any act denounced by law except the very primitive, savage crimes that cannot be twisted by some legisla-

tive act, or by some judicial decision, into a nuisance, the act enjoined and the defendant punished, not by a properly constituted criminal court on the verdict of a jury, but by a judge sitting alone as a Chancellor who, in a decree, declares that the defendant has failed to treat him with proper respect, i. e., is in contempt of court.

One of the latest developments of this kind is a decision of the Supreme Court of Louisiana which declares that the violation of any criminal statute is in itself a nuisance and may be enjoined. Possibly the court did not mean to make so broad a pronouncement, that we should look at what the court did and not at what it said. What it did was to enjoin a man from opening a store in a neighborhood in which he was forbidden to do so by a so-called zoning ordinance. This ordinance forbade the doing of this act and imposed proper sanction to insure obedience, but the parties interested did not see fit to proceed criminally against the defendant. They sought and obtained an injunction to restrain him from opening the store so that in case he did, his act might be punished not as a crime in a criminal prosecution but as a contempt of court in an equity proceeding, *City of New Orleans v. Liberty Shop*, 101 So. 798.

The Englishman is a stickler for freedom of speech and of the press and for the right of trial by jury in cases of libel and slander. At one time we vehemently asserted that we inherited this in all its vigor. But are we secure in these rights? The Minnesota Laws 1925, Chapter 285, read in part as follows: "Any person who . . . shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away . . . (a) a malicious, scandalous and defamatory newspaper . . . is guilty of a nuisance and all persons guilty of such nuisance may be enjoined, as hereinafter provided. . . . In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends."

This law has been held constitutional by the Supreme Court of Minnesota, State ex rel. *Olson v. Guilford et al.*, 174 Minn. 457.

The last of this brood by which the rights of the citizen are modified and by which he is subjected to a formerly unheard-of procedure and a formerly unheard-of punishment is what is called the habitual criminal acts. These laws provide that after a man is convicted of the commission of a felony a certain number of times, usually about four times, he automatically becomes an habitual criminal. In such case he does not receive the punishment due to the crime that he has committed, if a first conviction, but he is sentenced to the penitentiary for life. This works out in this way. Two men may be arraigned in court for the same offense on the same day. Both have committed the same act, possibly they have committed the act jointly. Each of these men may have committed the same number of crimes, in fact their criminal record may be identically the same; may extend over a long period of time and involve many crimes; yet one of these men, because he has not been convicted before, i. e., because he has not been caught, may receive a sentence in prison of one year while his fellow criminal will receive a sentence for life because he has been unfortunate enough to have been caught a number of times.

It will not do to say that no changes should be made in the law. Changing conditions of society bring about changes in the law. The ultimate objects attempted to be accomplished by many of these innovations are laudable. The promotion of temperance; the improvement of the type of our citizens; the prevention of miscarriage of justice, so often seen in the jury room; the suppression of blackmailers; the restraining of constantly repeating criminals, who are only released from prison to commit fresh crime and again to be returned,—are laudable objects to be aimed at. The intention of this short article is not to denounce, but to call attention to the fact that there is a spirit abroad of doing things in a different way than these things were done or attempted to be done by our fathers. The danger of all this innovation is that in attempting to reach results by short cuts, we may undermine the foundations of our great structure of human liberty that in our haste to accomplish good by law, we may dethrone the goddess of right and in her place set up the idol of the supreme state.