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FOR ERRORS OF CRIMINAL JUSTICE

In an age when social justice has made such marked advances, when industry and community have learned to bear the losses falling upon employees by accident and sickness, and perhaps soon by unemployment and old age, when the State in ever greater measure has appreciated the propriety of assuming the risks of injury inflicted upon the citizen by the tortious operation of the administrative machinery of government, it seems strange that so little attention has been given to one of the most flagrant of all publicly imposed wrongs—the plight of the innocent victim of unjust conviction in criminal cases. Perhaps the indifference is attributable to the belief that such occurrences are too rare to justify public concern. This volume, which records, we are convinced, but a small proportion of the cases disclosed in American jurisdictions alone, indicates that such a belief is destitute of foundation. European judicial records are replete with such cases; and were proper statistics kept in the United States, it seems highly probable that American practice would show a proportionately disconcerting number of unfortunates. Frequently, the newspapers bring accounts of the release from penitentiary or jail of men shown to have been innocent, and prison wardens have expressed their firm conviction that many innocent men are in prison. European countries, for the most part, have by general statute recognized the government's obligation to indemnify the victims of such distressing error and injustice; the United States, apart from narrowly construed statutes in California, North Dakota, and Wisconsin, has not. In a few cases, mentioned above, indemnity has been granted to a particular unfortunate by special act. But such relief is spasmodic only and few victims of wrongful conviction have the necessary friends or influence to bring about the passage of a special legislative act. The problem must therefore be dealt with on a more general and scientific basis. To that end, an examination has been made of European experience in this field, in order to lay a proper foundation for appro-
priate statutes in the United States. As an Appendix to this study, prepared in the light of the principal European statutes and those of California and Wisconsin, a draft statute is suggested which might serve as a model for statutes in the American states and Federal Government.

Up to the present time, Anglo-American public law has been peculiarly indifferent to the plight of the individual injured by the defective or tortious operation of the governmental machine. With respect to the torts of officers, the Continent has, for the most part, long admitted the necessity and propriety of group responsibility; the Anglo-American world, with exceptions in municipal government and in the British colonies, has until recently believed that the demands of individual justice and public security were adequately satisfied by leaving the individual to seek his redress from the wrongdoing officer. That view is changing—the pending Federal Tort Claims bill is some evidence of that. Were it not for historical reasons, it would seem strange that the protection of the individual against official wrongs should, so far as concerns indemnity, have been so long neglected, for recognition of the individual’s rights against the State is a concomitant of the growth of individualism and of the constitutional subjection of the State to legal rules. Yet it required the growing social sense of the late nineteenth and twentieth centuries, coincident with mass production and the depreciation of laissez faire, to realize that the wrong of an officer acting officially was to be regarded as the wrong of the group, and that exceptional losses, due to the imperfections of administration, should not be permitted to rest where they happen to fall, but should be distributed over the group as a whole.

The conviction of innocent persons is not always tortious, in the sense that the State or its officers have acted maliciously or negligently. Court and jury, observing all the forms, may have been imposed upon and misled by perjured or mistaken witnesses or by circumstantial evidence, as the reported cases illustrate. Possibly this is one reason for the callousness of Anglo-American law in disclaiming any public obligation to make good the injury. But a mistake has been
made, whether in good faith or bad, and the question arises, who should bear the loss, the hapless victim alone or the community. Under any economic or legal system, there would seem to be but one answer to that question.

Within certain spheres of governmental action involving a public interference with private rights, it is freely admitted that the State owes compensation to those individuals upon whom special damage is inflicted. When property is taken for the public use, the Anglo-American, like most other systems, prescribes that just compensation shall be paid. This is a historic tradition in a free society. On the other hand, when, in the safeguarding of society by the punishment of crime, an equally governmental function, the community takes from an innocent individual his personal liberty, a privilege at least as sacred as private property, and in addition causes incalculable mental anguish, it dismisses him from consideration without apology or compensation. To sustain the discrimination, fine and tenuous distinctions have had to be drawn between the taking of property and the taking of liberty for the public use.

It should be observed that there are several aspects of the remedy of the wrongfully prosecuted individual. His predicament may be due to the false accusation or testimony of a complaining witness or to the misfeasance of police or other minor officers, as in the Preston, Stilow, and other cases. In these cases, American law permits the wrongfully accused and prosecuted person to sue the complaining witness or the officer for damages for false imprisonment or malicious prosecution without probable cause. It need hardly be added that this remedy, certainly so far as concerns actions against the police or inferior judges, is mostly futile and is rarely invoked. Where, however, the unjust detention or conviction results from the error, or even from the malice, fraud, or corruption of a judge of general jurisdiction, or where it results from an unfortunate concurrence of circumstances, the individual is without a civil remedy. The rule in this country may be expressed as follows:

No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. ... If corrupt he [the
judge] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may be done. 4

As a general rule no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such case there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject matter and of the parties, whether his jurisdiction be a general or limited one, he is not civilly liable where he acts erroneously, illegally, or irregularly. . . . Nor is he liable for a failure to exercise due and ordinary care or where he acts from malicious or corrupt motives. 5

The reason for the rule is thus stated by Mecham:

Courts are created on public grounds. They are to do justice as between suitors, to the end that peace and order may prevail in the political society and that rights may be protected and preserved. The duty is public and the end to be accomplished is public. The individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible. 6

The general rule of the immunity from civil suit of a judge having jurisdiction, for injuries resulting to private individuals from his acts, however malicious or corrupt, is, therefore, well established in American law. In the absence of statute any liability of the State is, of course, absolutely excluded, and up to the present time no such general statutory liability has been assumed either in England or in the United States.

In most of the European countries, on the other hand, the innocent individual unjustly arrested, prosecuted, or convicted has the civil remedies recognized in the United States—first, a right of action against the complaining witness or other person who has wrongfully accused him or otherwise aided in his prosecution, 7 and, secondly, a right of action against the officer through whose act he has been injured,
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where there has been an excess or abuse of the officer’s legal powers.

But at this point the similarity ceases. The extensive immunities of a judge from private suit in this country are recognized by the civil law only within the narrowest limits. On principle, the Continental judge is liable for his tortious acts in excess or abuse of his authority like any other officer, the only qualification being that in matters within his judicial discretion he is allowed considerable leeway. But corrupt or malicious exercise of judicial powers in all cases involves the personal liability of the judge. Besides the right of action against ministerial officer or judge, however, the individual has certain remedies unknown to Anglo-American law. He has, thirdly, a right of action against the State for the illegal acts of its officers, including its judges. This is often a subsidiary liability of the State assumed by statute, which renders the State and the officer liable in solido for the injury to the individual. It will be noted that under this head State liability apart from personal culpability is not recognized. Fourthly, certain constitutions, such as those of several of the cantons of Switzerland, under the head of personal liberty, allow a direct claim against the State for illegal arrest. These cover cases of arrest in disregard of the forms of law or of its substantial provisions. While habeas corpus, with the possibility of action against some inferior officer, would probably be the remedy in this country, a direct action against the State for damages is permitted in these Swiss cantons. The claim here does not arise from the admitted innocence of the accused, but from the illegal infringement of or interference with his personal liberty. Fifthly, and lastly, we have in Europe the remedy of an indemnity awarded by the State to those erroneously arrested, detained, and imprisoned individuals whose innocence is subsequently established.

For present purposes, a distinction must be made between (a) innocent persons tried and acquitted, and (b) innocent persons tried and convicted. Several of the countries of Europe permit the award of an indemnity by the trial judge or appellate court or administrative authority for the un-
just detention of an innocent person, even when it results in an acquittal or withdrawal of the prosecution. Although costs are often allowed in the United States against an unsuccessful civil litigant, it is extremely rare to allow costs against the State in an unsuccessful criminal prosecution, though the damage to the accused person may be great. But let that pass. The effort to justify statutory compensation in the United States will for present purposes be confined to those innocent persons who have suffered the torture and injustice of an actual conviction for crime. Most of the countries of Europe, after years of struggle on the part of reformers, have now by statute recognized the liability of the State for injuries thus inflicted. An examination of this European effort and of the statutes which mark its successful outcome will occupy the remainder of this chapter.

**HISTORY**

In Greece and Rome the procedural distinctions between civil and criminal law were not clearly marked. Crime was prosecuted by the individual who suffered from the consequences of the specific act. Nevertheless, it was even then admitted that the private complainant, *calumniator*, was liable to the defendant in damages for a wrongful accusation or prosecution. The recognition of this liability of the complaining witness continues throughout the Middle Ages. In the *Constitutio Criminalis Carolina* of Charles V of 1532, it is provided (article 12) that the complainant must furnish a bond for the damages suffered by the accused, should the complaint not be sustained. When the prosecution of crime became the function of the State alone and purely a matter of public law, the question of compensation to an unjustly accused or convicted person, where the State was the complainant, was left out of consideration.

The movement for the indemnification by the State of erroneously convicted persons was begun toward the end of the eighteenth century in France, the land of "liberty, equality, and fraternity," and of the "social contract." One of its most earnest champions was Voltaire. He had taken a prominent part in securing the acquittal and restoration of
the rights of Calas, of the Sirven family, of De La Barre, and others. It was probably due to the intimate correspondence between Voltaire and Frederick the Great that we find in Prussia in 1766 the first legislative expression of the obligation of the State to indemnify unjustly arrested and detained persons. This decree provided:

If a person suspected of crime has been detained for trial, and where, for lack of proof, he has been released from custody, and in the course of time his complete innocence is established, he shall have not only complete costs restored to him, but also a sum of money as just indemnity, according to all the circumstances of the case, payable from the funds of the trial court, so that the innocent person may be compensated for the injuries he has suffered.

This equitable provision was probably short-lived. At all events it is not found in the Prussian Code of Criminal Procedure of December 11, 1805.

In 1781 the Academy of Sciences and Fine Arts at Châlons-sur-Marne again agitated the question, prompted undoubtedly by the severe cases of injustice by erroneous conviction which had then lately occurred in France. The Academy awarded two prizes for the best essays on the following question:

When the civil society, having accused one of its members, by the agency of its public authorities, fails in its accusation, what would be the most practicable and least expensive means to secure to the citizen, recognized as innocent, the indemnity which is due him by natural law?

Prizes were awarded to the authors of two monographs, which have since become classics in the literature of the subject.

The author of the first work, *Le sang innocent vengé ou Discours sur les réparations dues aux accusés innocents*, is Jean Pierre Brissot de Warville; the second, by the Intendant of Finances, Louis Philippon de la Madelaine, is entitled, *Des moyens d'indemniser l'innocence injustement accusée et punie*. Their thesis briefly was that while it is an injury to the public interest if we hesitate to prosecute a suspected person for fear of striking the innocent, still, public prosecution being an obligation, it would be wrong to punish the public prosecutor who has prosecuted an accused person
subsequently declared innocent by the courts. The accused citizen, however, ought to receive compensation from the State. Brissot calls attention to the indifference of society to the fate of the innocent accused person and advances the argument that the withholding of an indemnity is inconsistent with the social contract.

Since that time many of the foremost publicists of Europe have given serious study to the question and it may not be out of place presently to direct attention to their labors.

Between 1786 and 1792 the question under consideration was constantly debated in the French Parliament and by French jurists. In 1788 Louis XVI presented to the States-General an ordinance accompanied by a declaration that he was surprised that nothing had been done in France to indemnify persons erroneously convicted, and that the King considered such indemnification as a debt of justice. In 1790 Pastoret, in his Théories des Lois Pénales, devoted a chapter to this subject. He compared the misfortune of being innocently convicted to being struck by lightning and declared that the conviction of innocent persons was "as unavoidable a misfortune in our social order for the moral existence of the citizen as hail or lightning is for his physical existence."

In the same year Duport, in his draft of a code of criminal procedure, which he submitted to the French Assembly, inserted an article which provided for indemnification by the State for those declared innocent of an indicted crime, leaving its amount to be determined by the jury. The French Revolution put an end to the further consideration of this reform, with many other projected reforms, and not until a hundred years later (1895) did France by legislation undertake to solve the problem.

In 1783, the great Italian, Filangieri, suggested the establishment of an indemnity fund to compensate those unjustly arrested through false complaints. In 1786 the suggestion was incorporated in the renowned code of Leopold of Tuscany, later Leopold the Second, in which it was provided (sec. 46) that:

A fund shall be established out of the fines collected by the courts to indemnify those who have suffered from a crime, when the crimi-
nal cannot make reparation, as well as those who without intention or negligence, but, through an unfortunate concurrence of circumstances, have been arrested and subsequently acquitted, provided in both cases that the judge declare an indemnity as due under the circumstances and fix the amount.

The penal code of the Two Sicilies, chapter 6, article 5, contained a similar provision. Since then many Italian criminologists and jurists have supported the principle, among others, Carrara and Lucchini. Lucchini, the draftsman of an earlier code of criminal procedure for Italy, incorporated in his draft a provision covering State indemnity for unjustly convicted persons, and in the Code of February 27, 1913, article 551 provided for compensation for those acquitted on review of their cases by a court, provided they had been imprisoned at least three years. The new code of July 1, 1931 (art. 571) reduces the period to three months.

In England, Jeremy Bentham was the first champion of the doctrine of State indemnification for errors of criminal justice. He considered the obligation of the State so obvious that any attempt to demonstrate it could only obscure it. On May 18, 1808, Samuel Romilly, an apostle of criminal-law reform in England, introduced a bill in Parliament leaving it to the trial court to determine whether any, and how much, indemnity is due to an innocent individual acquitted after an unjust conviction. Solicitor-General Plumer opposed the bill on the ground that it created a distinction between those acquitted with and without the approval of the judge, and declared this a task equally dangerous and unconstitutional. The bill was withdrawn and no sustained attempt has since been made in England to regulate the question, although Parliament has on several occasions granted lump-sum indemnities as a matter of grace to various innocent individuals released after having suffered imprisonment upon erroneous conviction. There is now a demand for definite legislation.

In Spain the principle, expressed in an unusually liberal form, had a brief existence of fifteen months in the ill-fated penal code of 1822.
While the question of indemnity was again agitated vigorously in France during the middle of the nineteenth century, finding among its supporters some of the leading jurists of the time, yet the principle was first accepted in modern legislation in the cantons of Switzerland, where so many modern political reforms have received their first legislative expression.

The provisions of the codes of these various cantons are by no means uniform, some recognizing the right of indemnity only for imprisonment by reason of a conviction subsequently reversed on appeal, others for arrest and detention preliminary to acquittal only (Untersuchungsshaft, détention préventive), and still others for both. To some extent we shall discuss the provisions of these codes in connection with the laws of the other countries of Europe.

Brief code provisions authorizing the award of an equitable compensation to an erroneously convicted person are found in the codes of criminal procedure of Baden, March 18, 1864 (art. 184), and of Württemberg, April 17, 1868 (art. 484), and in the penal codes of Mexico, December 7, 1871 (art. 344), and of Portugal, June 14, 1884 (art. 126, secs. 6 and 7).

In Germany the problem was agitated vigorously after 1830, but, owing to state separatism, reached no legislative solution until 1898. Gersterding is said to have been the first publicist to demand compensation for innocent persons erroneously convicted. After the pioneer work of Heinze in 1865 on detention pending trial, German writers, among whom Geyer and Schwarze are mentioned as exceptionally deserving, and the German Bar Association, gave strong support to the reform, though it is interesting to note that the innocent person detained for trial was the subject of Bar Association resolutions as early as 1876, whereas the innocent person actually convicted had to wait for such support until 1892.

It is only within the last forty-five years that the countries of Europe have shown by their legislation a determined and fully considered intention to fulfil the obligation of society toward the innocent victims of the errors of criminal justice.
The Scandinavian countries—Sweden, Norway, and Denmark, in the order named—enacted, in 1886, 1887, and 1888, extensive and elaborate laws on the subject. In considerable detail they worked out the conditions under which the right to indemnity shall be exercised, its various limitations, and the procedure for giving it effect as a remedy to the injured individual. Indemnity is accorded both to erroneously convicted persons and to those erroneously arrested and detained. Of the three the law of Sweden is the most conservative, the law of Denmark, the most liberal—in fact, probably the most liberal of all the countries of Europe.

In 1892, Austria enacted a law providing for compensation only to convicted persons acquitted on appeal and re-hearing. A new Austrian law, adding cases where a sentence was reduced on establishment of a lesser offense, and modifying the procedure, was enacted in March, 1918. A further law extending the indemnity to cases of detention pending trial was enacted in August, 1918.

The French law of June 11, 1895, restricts the indemnity to innocent persons erroneously convicted. So does the code of Monaco. The Belgian law of June 18, 1894, goes somewhat farther in permitting an indemnity even where the sentence is reduced on review. Hungary, in sections 576–589 of its code of criminal procedure of December 4, 1896, went very far by providing compensation under certain conditions for both erroneously convicted and erroneously arrested and detained persons, even if the sentence was only reduced.

The federal government in Germany, where the subject had received more scientific attention than in any other country, waited until almost all the other important countries had by statute dealt with the matter before itself enacting legislation on the subject. It was not until 1898, in the Act of May 20, that Germany enacted a law which, under very stringent limitations, awarded an indemnity to persons erroneously convicted, who on the rehearing of their case and reversal of the judgment were declared innocent. Six years later (Act of July 14, 1904) Germany extended
the principle of indemnification to those under detention pending trial (Untersuchungshaft).

By a law of August 7, 1899, article 8, Spain accords an indemnity to the acquitted person or his heirs for the injury he sustained by the sentence annulled, provided the tribunal or judge incurred responsibility and is unable to meet it. The penal code of 1928, article 196, provides that, whenever a conviction is quashed on review, the acquitted person and his heirs have the right to an indemnity from the State.\textsuperscript{32}

The new Portuguese Code of Criminal Procedure of February 15, 1929, provides (art. 453) that an acquitted defendant may be awarded damages against his wrongful accuser and (art. 690, embodying sec. 12 of the law of April 8, 1896) that, if on review of a sentence the prisoner is found innocent, he shall be awarded by the court damages for his material and moral loss, to be paid by the wrongful accuser, if there was one, or if there was none or he is insolvent, then by the State.\textsuperscript{40}

The Polish Code of Criminal Procedure of 1928 provides for State compensation for unjust conviction and accusation.\textsuperscript{44} The Dutch code of 1921 covers both unjust conviction and detention.\textsuperscript{45}

In South America, not much progress in the direction of indemnity has apparently yet been made. Brazil appears to be the only country which accords an indemnity for erroneous convictions. If the accused was on review declared innocent by the federal Supreme Court, he may ask the court to grant him an indemnity.\textsuperscript{46} Argentina\textsuperscript{47} and Chile,\textsuperscript{48} while they have adopted the usual grounds of the French and similar codes for quashing convictions, Chile even admitting the right to special publicity for a verdict of innocence, do not seem as yet to grant an indemnity. Chile, however, is distinguished by the fact that it has in its Constitution of 1925\textsuperscript{49} recognized the principle of indemnity for wrongful detentions and convictions, though it has apparently not yet enacted the law intended to carry the provision into effect. Mexico has revised and expanded, in its Penal Code of 1929,\textsuperscript{50} the provision for indemnity embodied in its Code of 1871.\textsuperscript{51}
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In the United States, a movement was begun in 1913 for the indemnification of the innocent victims of an unjust conviction. An article in the *American Journal of Criminal Law and Criminology* for January, 1913, was reprinted, at the request of Senator, now Supreme Court Justice, Sutherland, who introduced Senate bill 7675 to carry out the reform in the Federal courts. In that same year, California and Wisconsin adopted detailed statutes, the practical effect of which has been outlined in the introductory chapter (supra, p. xxix). The coming of the European War prevented further serious attention to reforms of this kind, although North Dakota in 1917 adopted a statute modeled upon the Wisconsin Act.

THE THEORY

It may seem strange that this principle of compensation, so obviously just, which had, moreover, received the general recognition and support of jurists, publicists, and legislators, should have had to wait so many decades before acceptance in the actual legislation of modern states. The reason for the delay was, in part, the unwillingness to open already cramped treasuries to what seemed unlimited inroads and the inability of lower and upper houses of legislatures to agree upon the proper limitations of the right; while not by any means the least serious obstacle was the bitter disagreement among jurists as to whether the indemnity was to be considered an act of grace and equity on the part of the State or a legal duty and obligation. Before enacting legislation the European legislator demands the support of sound legal as well as economic theory. For years lawyers debated this question. The statement in Merkel’s *Juristische Enzyklopädie* (1st ed., 1885, sec. 63) explains much:

That such an indemnity would represent the real feelings of justice of the German people of the present time there can be no doubt. The reason why we at the same time hesitate to give this feeling legislative expression is partly (although by no means only) because we cannot base it on a dogmatic legal ground.
Arguing from legal principle, a large group of jurists, whose authority carried weight among legislatures and the people, advanced three arguments which seriously hampered the enactment of legislation on the subject.

The first argument was that the State in administering justice acts in its sovereign capacity and cannot be held accountable in law for the burdens which particular individuals may have to suffer, when its sovereign right has been legally exercised. To err is not illegal. If an innocent individual is by mistake convicted, this is a burden which, as a citizen of the State, he must bear. This might be called the "act of State" theory, by which the State escapes legal control, and a frank avowal of the "assumption of risk" doctrine. If, said these jurists, there has been an intentional wrong or illegality anywhere in the case, either on the part of the complaining witness, ministerial officer, court official, or judge, the law gives the injured individual ample redress.  

To this the answer has been made that, while the individual in modern public law must bear the burdens of citizenship without compensation, this applies only to the general burdens borne by all the citizens as a whole, and not to special sacrifices asked from the individual in the interests of the entire community. When we ask a citizen to become a juryman or a witness, when his diseased animal is killed for fear of contagion, when his house is destroyed to prevent the spread of conflagration, when his property is taken by eminent domain for public use, compensation is made for the special sacrifices he makes for the general benefit of society.

An ingenious replication is made to the contention that the taking of property and the taking of liberty for public use are analogous. By the taking of property, say the proponents of the "act of State" theory, the community is enriched, for which reason compensation is paid on the civil-law doctrine of unjust enrichment. In the case of unjust conviction the State receives no equivalent. The deprivation of the liberty of the individual is no gain to the State.

If the compensation in eminent domain represented the
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public gain, this argument might carry weight. But it does not. The advantage to society often exceeds by far the monetary value of the property to the individual from whom it is taken. The price paid represents not the gain of the State but the loss of the individual. It is a special sacrifice that is asked of the individual, for which society compensates him.

Two other arguments against which the champions of the obligation of State indemnity had to contend were drawn from the civil law. The first was: *Qui jure suo utitur, neminem laedit*; in other words, the State acting lawfully can legally injure no one. But in private law, from which this analogy is drawn, there has been a gradual change from this view of the legality of an act. The principle that he who lawfully uses his own incurs no legal liability has been restricted in application to the narrowest limits. Even a slight invasion of the rights of third persons (under an otherwise *prima facie* lawful use of one’s own) has given rise to the application of the principle: *Sic utere tuo ut alienum non laedas*. The transition in point of view took place definitely in England in 1862, in the case of *Bamford v. Turnley*.50 The general principle of both public and private law now is that a private act is considered lawful and is permitted by the State, there being admittedly no negligence or fault, only to the extent that it does not unduly interfere with the legal rights of others.51

The other objection drawn from the civil law was: “Without fault no liability,” and for many years it proved one of the most serious. This principle of “no liability without fault” was once incorporated in the civil or private law of all civilized countries, and, although American statutory and non-statutory law reveals many cases of liability without fault, such as the master’s liability for the torts of his servant and carrier’s liability for the safety of goods, the principle was one of the great obstacles which the workmen’s compensation laws had to overcome.52 Modern social and economic conditions have brought about even more important modifications in the rigidity of the doctrine, so that for large classes of cases liability is predicated on the mere causal relation between the act and the injury, whether in-
flicted with or without fault. The workmen's compensation acts are perhaps the clearest illustration of this broad change in legal principle, which now applies to many cases in which any member of a large social group is subjected to the danger of recurring accident and where a more equitable distribution of the loss seems mandatory.

The State, says Lößler, has escaped this obvious duty up to the present time because our feelings of law and equity are directed more toward property than toward liberty. Theft is a more reprehensible act than intentional personal injury and false imprisonment. The taking of private property, the killing of a man's diseased animal—these were recognized as subjects for compensation long before the taking of his liberty. Lößler ascribes this largely to the fact that the owners of property are a powerful social group and have induced an early social and legislative recognition of their rights, whereas those affected by wrongful arrest or conviction are a weak social group, whose voice is almost unheard, and whose rights are only at this late day securing slight recognition because of a general altruistic sense of social justice.

It ought to require no further demonstration to show that society rather than the individual should bear the risk of such tragic mistakes in the administration of criminal justice. Legislation having this end in view is supported by the same theory as compulsory social insurance, and general average in admiralty law. Socialist and individualist meet on common ground. Where the common interest is joined for a common end, with each individual subject to the same danger, the loss, when it occurs, should be borne by the community and not alone by the injured individual.

The controversial aspects of the theory are by no means concluded with the foregoing arguments. These may be deemed to explain the theoretical propriety of the indemnity. Since the reform has been introduced into legislation, wide divergencies of opinion prevail as to whether the relief to the individual finds support in private or in public law, a question which, though scientifically of interest in Europe, may in the United States be deemed academic.
Polemics have been indulged on the issue whether indemnity is a legal duty of the State, justifiable on known legal principles, or only a matter of charity, of equity and grace. Quite a number of jurists who deny any legal duty, for reasons already mentioned, are prepared to concede that it is a moral obligation, and sustain their position, in line with several statutes, by professing willingness to leave the grant or refusal of the compensation and its amount to the discretion of a court or judge, without conferring a right of action.64

Among those who insist that the indemnity can be justified on legal grounds and that it is the duty of the State to provide a formal right of action to the innocent victim of a wrongful conviction, wide diversity of opinion prevails as to the exact legal theory upon which their position can be sustained.

Some advance the argument that it finds its justification in analogy to the taking of property by eminent domain, adding that the invasion of liberty and honor is an even greater wrong.65 Others, supplementing this analogy, assert that, while general burdens of the State may have to be borne by all, special sacrifices can be exacted only against compensation; and that, if witnesses and experts are paid for their sacrifice, how much greater the right of the innocent arrested and convicted.66

Others maintain that the prosecution and conviction of the innocent, no matter what the direct cause, is a mistake of State agents appointed to enforce the criminal law. Who shall bear the consequences of this mistake? As between the State, which inflicted the erroneous sentence, and the victim, there can be no question but that the State must bear it, being liable for the injuries caused by its agents.67

It has been suggested that citizens of the State, by providing for the indemnity, thereby indicate their membership in a mutual insurance fund, part of their taxes going to premiums which enable the fund to pay the indemnity to those innocents who suffer from the misfortune insured against.68

It has been argued that the prosecution of crime and the
rightful immunity of the innocent represent two equally valid legal and social interests. When they collide, the lesser interest—the private—must give way to the greater—the public; but to balance the equities, when it is discovered that the greater interest unjustifiably and erroneously overwhelmed the lesser, the greater must make good the losses imposed. The prosecution of crime cannot be enjoined or prevented when it looks plausibly well founded; but when after operation it proves to have struck the wrong man, the least the State can do is to make compensation.

Again, the analogy of compulsory accident insurance is invoked. Just as the industrialist is obliged to assume the risks of accident or sickness in his enterprise, so the State, which a priori can be presumed to act only lawfully and not unlawfully, must assume the risks of untoward accident or mistake in convicting the wrong man.

Professor Goldschmidt of Berlin advances the theory that compensation represents the State’s guaranty for the objective legality and correctness of its official action, and that its liability for punishing the wrong man is analogous to that of the private judgment creditor who has instructed the sheriff to levy execution upon the goods of the wrong man.

Whatever the most convincing theory, compensation responds to an elementary demand for justice harbored in every human breast. Just as that demand is satisfied by conviction of the guilty, so it requires acquittal of the innocent. When, then, by a misguided or mistaken operation of the governmental machine there is a miscarriage of justice and the helpless innocent is actually convicted, the public conscience is and ought to be revolted and dismayed. The least the community can do to repair the irreparable, is to appease the public conscience by making such restitution as it can by indemnity.

THE STATUTES

An analysis of the European and the few American statutes may be useful to show the scope of the relief and the limitations which have been placed upon the grant of the indem-
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nity. It will be seen that the statutes have endeavored to restrict the indemnity to those only who clearly appear to deserve it. Therefore, first, the class entitled to receive the indemnity is strictly defined; secondly, to exclude the undeserving, specific and general limitations on the right are established, such as censurable conduct of the claimant; thirdly, the injury indemnified is in general confined to the pecuniary loss only; fourthly, a very brief statute of limitations is provided; and, lastly, the indemnity is in other respects restricted so that the burden on the State treasury will not be oppressive. The debates preceding the enactment of many of the statutes show clearly that the fear of inroads on the State treasury prevented the extension of the right and the removal of limitations in cases where an award was otherwise recognized as just. We shall discuss the statutes under the four heads: (a) who is indemnified; (b) the limitations on the right; (c) the extent of the indemnity; and (d) the procedure for making the right effective.

(a) Who Is Indemnified

Italy, France, Belgium, Portugal, Brazil, Spain, and Geneva (Code of Criminal Procedure, January 1, 1885) grant an indemnity only for the injury suffered through unjust conviction and imprisonment where on retrial or review an acquittal for innocence takes place; so also do California, North Dakota, and Wisconsin, except that in these states a Governor’s pardon also suffices as a method of acquittal or release. Indemnification for both acquittal on appeal after a conviction and for detention pending trial followed by acquittal or discharge is provided for in Sweden, Norway, Denmark, Austria, Germany, Hungary, Holland, Berne, Fribourg, Neuchâtel, Basel, and Tessin. Austria, Belgium, Germany, and some of the Swiss cantons grant indemnity if the sentence is reduced on appeal by application of a milder penal law.

The award of an indemnity is compulsory in case of acquittal on appeal after a conviction—that is, a right of action is given to the individual—in Austria, Germany, Nor-
way, Denmark, Hungary, Mexico, Neuchâtel, and Basel. It is also compulsory in case of detention followed by a discharge from custody or acquittal on first trial in Austria, Germany, Denmark, and Norway. In Austria and Germany, however, before the action lies, the court acquitting the accused on retrial must, simultaneously with the judgment of acquittal, issue a decree to the effect that an indemnity in the case is warranted by the facts, which decree is a condition precedent to the right of action. The relief is discretionary in both cases—acquittal after conviction and detention pending trial—in Sweden, Holland, and Fribourg. It is discretionary in case of acquittal after conviction in Italy, Belgium, Brazil, Portugal, Spain, and France, and discretionary in cases of discharge from custody in Hungary, Vaud, Neuchâtel, and Basel. While the award and amount of the indemnity are discretionary either with the court which quashes or retries or (as in Belgium) with the Government, it is doubtful whether the grant can be characterized as merely a matter of grace and favor, for the statutes are framed in the imperative. Nevertheless, as the discretion is unreviewable, the innocent acquitted person is probably not materially helped by considering it a matter of right. The new Italian code of 1931 expressly states that it is merely a grant in aid (soccorso) accorded only to those who need it. In Norway and some of the Swiss cantons it is also discretionary in case of a nolle prosequi; in general, however, a nolle prosequi does not open the right to the indemnity at all, a valid judgment or order of the court releasing the accused being required. It is explained by the committee report on the French law that the indemnity was left discretionary with the judge for the reason that it was considered best, instead of making the relief compulsory and specifying the conditions which limited the right, to prescribe no conditions, leaving the judge to determine in each case the effect to be given to the concrete circumstances in limiting the propriety of an award.

Innocence must be shown affirmatively on the part of the claimant in France, Germany, Italy, Belgium, Norway, Hungary, Sweden, Mexico, Spain, Monaco, Brazil, and
Neuchâtel. In Germany the claimant may show in the alternative that there is no longer a well-founded suspicion against him. In Hungary and in Sweden in case of unjust detention pending trial he must show any one of three things: First, in both countries, that the act for which he is held has not been committed at all. Secondly, in Hungary, that the accused has not committed it; in Sweden, that its author was another than the accused. Thirdly, in Sweden, that from all the circumstances it could not have been committed by him; in Hungary, that while committed by him it was not in a legal sense a punishable act.

France, Belgium, and other countries which grant indemnity, and Argentina and Chile, which do not, state the grounds on which a conviction may be quashed as (a) contradictory sentences against two or more accused persons, where only one could have committed the crime; (b) the appearance alive of the alleged victim of homicide; (c) proof of the falsity of testimony or of documents on which a conviction was obtained; (d) proof of discovery of a new fact which indicates the innocence of the convicted person.

California requires evidence that the crime was not committed at all, or if committed, that it was not committed by the claimant. North Dakota and Wisconsin merely require that the claimant be “innocent.” Most of the statutes do not specify what facts shall be deemed evidence of innocence, but leave this to the courts, or in the United States to administrative bodies, to determine.

Hungary makes an interesting distinction between cases of unjust conviction and cases merely of unjust detention pending trial. In the first case, where the sentence has been served, damages are due ipso facto, even though there is a non liquet acquittal. The not guilty are indemnified. In the second case, where, as we have seen, the award of an indemnity is discretionary, innocence must, nevertheless, be proved. The innocent only are indemnified. While this is not clear from the statute itself, the committee reports leave no doubt on the subject.” In this respect the Hungarian law occupies an intermediate position between the two extremes. In cases of unjust conviction Hungary has followed the
Danish law; in cases of unjust detention, where proof of innocence is required, the Norwegian law has been accepted as a prototype.

Bonneville de Marsagny, an ardent proponent of State indemnity, advocated that innocence be proved affirmatively by the claimant, as this was a new action, and on the plaintiff should fall the burden of proof. This theory was vigorously opposed by Heinze, who, in 1865, brought the subject prominently before the public in Germany, and by Zucker and Geyer, who claimed that criminal law recognizes only one form of guilt or innocence—the State must prove a man guilty or else he is innocent. It would make an odious distinction between those acquitted with and without indemnity, between those proven innocent and those acquitted for lack of sufficient proof of guilt. As we have seen, however, a number of states have adopted the principle that innocence must be affirmatively proved by the claimant.

Other states do not require proof of innocence, but base the indemnity upon the mere fact of acquittal or discharge from custody, as, for example, Austria, Denmark, Holland, Portugal, Spain, Baselstadt, and Tessin. In case of erroneous conviction Denmark requires that it be “regularly proved that the penalty was not justified.” Some of the Swiss cantons show peculiar conditions in this respect. Berne, in its penal code of 1854, permits in the alternative the establishment of innocence, acquittal because of doubtful guilt, and *nolle prosequi* for insufficiency of evidence, which is a liberal, if not a hazardous, extension of the right. Fribourg, in its code of criminal procedure of 1873, indemnifies acquitted, nol-prossed, and not guilty “convicted persons.” Vaud, strangely enough, in its code of criminal procedure of 1850, indemnifies persons nol-prossed, but not those acquitted by valid judgment. Lucerne, in section 313 of its code of criminal procedure, requires that the accused should have been prosecuted without basis (*auf ganz grundloser Weise*). By this is meant the absence of suspicious conduct, lying, attempt to run away, to conceal evidence, etc.—what the Germans call *prozesuajes Verschulden*.

It is curious to note that in Schwyz and Zurich, where the
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legislature until recently has not provided for indemnity, the courts at times allowed it. They limited it to such cases as showed an entire absence of guilt and denied it where the evidence indicated a well-founded suspicion. This tendency to base the indemnity on the probability of guilt finds strong opponents among those authorities and courts in whose opinion mere acquittal justifies the indemnity.

The chief objections raised against the German law are that it fails to indemnify accused innocent persons who are nol-prossed, persons whose property has been attached in criminal proceedings, and those who, by giving bail, have escaped detention pending trial.

There is considerable difference in the legislation of these various countries as to the right of third persons injured by the conviction or detention of another to sue for the indemnity. In Germany, those who have a legal right to support from the unjustly accused person have an independent action, limited, however, to the amount of the support of which they have been deprived. In Hungary these same persons have a right of action for their lost support only where the accused has declined to bring the action himself. It is, moreover, limited to cases of unjust conviction, and not merely unjust detention pending trial. In Austria, in both cases, a claim for lost support can be brought only by the surviving husband or wife, children or parents, where the accused has died. A somewhat similar rule prevails in Italy and Belgium in the case of convictions. In most countries, Germany being practically the only exception, death of the erroneously accused (or desertion of family, as in Sweden) is a condition precedent to the bringing of the action by third persons, either heirs or dependents. In France, Italy, Belgium, Austria, Hungary, Monaco, and a few of the Swiss cantons, the right pass to his surviving spouse, ascendants, and descendants in a direct line. In Denmark, ascendants are excluded. In Hungary, in case the erroneously accused person has already paid the death penalty, those who have the legal right to support may bring the action, provided they can show that they are dependent on the support of which they have been unjustly deprived.
Earnest objections have been raised against this limitation of the heritability of the claim. It is said that the moral integrity of the person is the common property of his family, and that damage to property rights is the basic element of the individual rights of each. Claims of both categories, therefore, must be heritable. Legislation having in mind only a right to support disregards these considerations. In spite of Jellinek's assertion that this right to indemnity is a personal right only, most of the states of Europe have recognized the heritability of the right so far as pecuniary damage is concerned. Binding even recommends, and we believe properly so, that both the moral satisfaction and the claim to pecuniary indemnity should be transferable ab intestato. This point of view is followed by the Danish and the French law, but is rejected by the Swedish, Austrian, German, and Hungarian law. In France it is provided that relatives of a degree farther removed than would involve a material injury to them have no right to the claim.

(b) Limitations

A limitation almost uniformly expressed in the statutes is that the claimant shall not intentionally or by gross negligence have caused his conviction or detention. The statutes of some of the countries, such as Austria, Germany, Hungary, Norway, and Sweden, specifically mention certain limitations in cases where the detention or conviction may be said to have been partly due to the act of the claimant himself—thus, for example, where there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion. The statute of Denmark recognizes the possibility of extenuating circumstances. It is there provided that where, for example, the attempt to flee or the making of false statements, etc., is considered by the judge as having been due to fear, annoyance, or excusable error, he need not refuse the indemnity. He may award an indemnity reduced in proportion to the offense. Such an extenua-
tion was present, for example, in the Johnson, Olson, Preston, Stielow, and many other cases reported in this volume, a circumstance which lends weight to the criticism that not minor acts of deception or collateral transgression, but only an intentional and inexcusable delinquency directly causing the conviction or detention should bar relief. 41

Germany and Austria have gone farthest of all in defining the conditions and limitations under which the claim shall be excluded. In the German act of 1904, dealing with unjust detentions, the claim may be rejected if it appears that the act charged involved an infamous or immoral transaction, or was committed during a state of drunkenness which excluded the exercise of free will, or when it appears from the circumstances that the accused had prepared to commit a felony or lesser crime. These may be called conditions of exclusion bearing on the substantial justice of the claim. Similar restrictions are found in the Hungarian statute. But Germany has gone even farther and has provided expressly that certain other delinquencies of the claimant, having no connection whatever with the act charged, shall likewise deprive him of his right to relief. Thus, article 2 of the German act of 1904 provides that the claim may also be denied where the accused at the time of his release was not in possession of his civic rights, or was under police surveillance, or where he had been punished or sentenced to the penitentiary and three years have not elapsed since the termination of the sentence. In most countries these extraneous delinquencies and their effect on the right to indemnity are left to the discretion of the authorities passing on the claim, whether judge or administrative board.

Austria provides that a claim for unjust detention must be entirely rejected if there was against the arrested person a sufficiently well-founded suspicion which was not later dissipated or weakened; and that it may be rejected in whole or in part if the acquittal or release was due to the fact that the act was committed in a state of unaccountability, or if the act was performed in preparation for a crime or involved gross dishonesty or immorality or special malice, or if, during his detention, another proceeding was instituted against
the arrested person for an offense based upon adequate sus-
picion, not dissipated, or if at the time of arrest he was
under police surveillance.

As has been shown above, France expressly declined to
specify any limitations on the right, leaving it to the judge
to determine what acts or facts shall constitute a sufficient
objection to the payment of an indemnity. A slight differ-
ence between the Hungarian and German statutes may here
be mentioned, in that Hungary considers the failure to note
an objection or appeal against the verdict as sufficient to
warrant a denial of the indemnity, whereas Austria and Ger-
many expressly provide that such failure to invoke a judi-
cial remedy shall not be construed as negligence. By the code
of 1918, now repealed, Italy barred compensation if the
claimant had been sentenced to penal servitude on at least
two other occasions; under the code of 1931, one occasion
suffices.

Several of the statutes bar the remedy where the alleged
crime has been committed under duress, necessity, or self-
defense.

A very brief statute of limitations is generally provided—
from three months to six months is the usual time limit for
making the claim. Denmark makes an exception in permit-
ting the action to be brought within a year from the day on
which the accused had knowledge of the circumstances on
which he bases his demand. This provision seems rather
elastic. Italy grants the petitioner a year from the judg-
ment of quashing or acquittal.

(c) Extent of the Indemnity

As a general rule, with but few exceptions, only the pe-
cuniary damage is compensated. In this respect, more than
in any other, the statutes have fallen short of the wishes of
their advocates, because in case of an unjust detention or
conviction the moral damage is by far the more serious ele-
ment of injury. Even the Code Carolina of 1532 recognized
that Schmach und Schande (suffering and shame) were
proper elements of compensation.
Germany, Austria, Sweden, and Norway indemnify for the pecuniary injuries suffered. Germany considers that these include not merely physical injuries and lost profits, but also the losses to future income, but they do not, of course, extend to moral injuries. In the statutes indemnifying for erroneous conviction, it is the injury suffered from the execution of the sentence, the actual wrongful imprisonment, which is compensated. Sweden provides expressly that the indemnity is to cover the “suspension or restriction of his means of existence resulting from the deprivation of his liberty.” The French, Danish, and some of the Swiss statutes are the most liberal. France provides indemnity for the damages (dommages-intérêts) suffered. In practice, however, so the authorities say, account is taken of the moral injury resulting from an unjust conviction, which is, indeed, hard to separate from the pecuniary. The Danish statute extends the indemnity to “the wrong, injury, and pecuniary losses which he has suffered.” Whereas most of the Swiss codes of criminal procedure provide for indemnity without specifying what injuries are to be indemnified, the code of criminal procedure of Neuchâtel in article 508 provides that:

In case the new decision declares the condemned person innocent, there shall be awarded to him by the court damages proportioned to the material and moral injury he has suffered by the erroneous conviction.

The Portuguese Code of 1929 contains a similar provision but merely requires an acquittal, without specifying innocence.

The Hungarian statute requires, first, a return of all money penalties; secondly, the return of the costs of proceedings and the value of confiscated property; thirdly, compensation for income lost during the imprisonment; and fourthly, money damages may generally be granted. How these are to be estimated and what they are to cover is not stated. Whether they cover the loss of position, diminution of business, and loss of credit, or whether they are simply confined to the definite actual fixed property losses cannot be established. The committee reports lead to the inference
that more than the property loss was intended to be covered, for the Swedish and Austrian statutes are characterized as unsatisfactory in this regard. It may be stated that it is the general rule in Europe to provide in the codes of criminal procedure for a return of costs to an accused person declared to be innocent.

The French law notes an express difference between material and moral injuries in the matter of inheritability. Both pecuniary and moral losses are the subject of indemnity on the part of those who are sufficiently near in relationship to the accused for the presumption to be drawn that they have suffered by the conviction of their relative. But, as already observed, the right is not extended to relatives of a degree farther removed than would involve for them a material injury.

The German statute of 1904 excludes from indemnity the mere arrest and detention preliminary to commitment for trial, except when followed by detention pending trial, in which latter event the preliminary detention is calculated as a part of the whole. This limitation seems unjust, and is so recognized by the commission redrafting the code of criminal procedure, who recommend indemnification even for a brief preliminary detention. Only where the arrest is followed by almost immediate release, where there is practically no real detention, is an indemnity, says the commission, unnecessary. A provable injury is in such cases, in the opinion of the commissioners, generally impossible. This proposition seems open to debate.

The compensation provided by the California Act is limited to $5,000 as a maximum, regardless of the length of the unjust imprisonment. North Dakota and Wisconsin provide that the rate of compensation shall be not greater than $1,500 a year, with a maximum administrative award in North Dakota of $3,000, and in Wisconsin of $5,000, but with provision in both states for recommendation by the compensation board to the legislature of a greater amount, if the board considers their statutory limit inadequate in a particular case. The special acts passed by legislatures to indemnify particular unfortunates have ranged from $500
to $5,000 in the United States, and up to £6,000 in Great Britain.\textsuperscript{53}

From the best information available, the administration of the European statutes for indemnity does not constitute a serious charge on the State Treasury, although statistics are hard to obtain. A recent report furnished by the French Ministry of Justice states that out of two convictions reversed because of conflicting verdicts against two or more defendants, one award for 3,000 francs ($120) was made; out of two reversals because of false testimony, no awards; and out of forty-three reversals because of new facts, six awards were made, ranging from 2,500 francs ($100) to 10,000 francs ($400).\textsuperscript{54} In a report of the German Ministry of Justice in 1927, it was stated that since January 1, 1924, no indemnities had been paid on account of unjust convictions, whereas M. 37,650 (about $9,000) had been paid to thirty-seven persons for unjust detentions, an average of $240 each. Ten persons were detained from eight days to a month, eighteen persons from one to three months, and the others for longer periods, the longest being eight to nine months. One award of M. 28,579 (about $7,000) for sixty-four days' detention is striking; the majority are under M. 300 ($75) and they seem to have but little relation to the number of days spent in detention.\textsuperscript{55}

In general the statutes recognize the obligation to accord satisfaction for the moral injury by providing for the publication of the decree of acquittal at the domicile of the accused,\textsuperscript{56} at the jurisdiction of the appellate court, and at various other places, which presumably will aid the accused to obviate and allay any prejudice from which he may have suffered by the publication of the fact of his detention or conviction. France goes the farthest in this direction, providing that:

The decree or judgment on appeal whence results the innocence of a convicted person shall be posted in the city where the conviction was first pronounced; in the place where the judgment was reversed; in the community or place where the crime or misdemeanor shall have been committed; at the domicile of those who demanded the appeal; and at the last domicile of the victim of the judicial error, if he is deceased, and shall be officially published in the Journal.
nal Officiel, and its publication in five newspapers, at the choice of
the appellant, shall be ordered besides, if he requests it.

(d) Procedure

The procedure, with minor exceptions, is generally very
complicated; only in France, Italy, Brazil, Mexico, Portugal,
and Spain is the indemnity, if any, determined by the
court which orders the prisoner’s acquittal. It is hard to de-
termined from this provision for judicial assessment of the
damage in the decree of acquittal, whether the indemnity is
to be considered a matter of legal right or not. Garraud and
Teissier," dealing with the French law, think it is. At best,
however, the award and its amount would seem to be within
the uncontrolled discretion of the court which quashes the
conviction or, on remanding, retries the case and acquits. In
Italy, it is grantable only to the needy.

In Belgium an executive department determines in its
discretion the amount of indemnity, if the court has found
the prisoner innocent. The statutes vary greatly from one
another, only one country, Denmark, making the claim for
compensation a right justiciable before the ordinary courts
in first instance. In general, it is regarded at least in first
instance as an administrative proceeding, which perhaps
more than anything else shows that the indemnity is con-
sidered an act of grace and not a matter of legal right.
Sweden requires that the claim shall be addressed to the
King and shall be examined by the Minister of Justice, who
is to pass upon the justice of the claim and the amount of the
indemnity. In Austria the trial or appellate court pronounc-
ing the acquittal states in its decision whether an indemnity
is justified and calls the acquitted person’s attention to his
right thereto. The claimant within three months must then
petition the Minister of Justice for reimbursement of his
losses, and if he receives no adequate relief, he has then a
right to appeal to the courts. In Hungary the trial court
makes the investigation, places its findings before the high-
est court, which, in turn, should it decide that the indemnity
is justified, sends the papers to the Minister of Justice. On
the basis of the findings of the highest court, the Minister of
Justice fixes the amount of the indemnity.
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In Germany it is provided that the second trial court, besides its decree of acquittal, shall hand down a decree as to whether an indemnity in the case is warranted by the facts disclosed. This decree cannot be appealed from. If it decides in favor of the claimant, he must make a formal application for indemnification to the district attorney in the jurisdiction where the trial court sat. The district attorney as a ministerial act sends the papers to the highest administrative board of the State (Landesjustizverwaltung). This board fixes the amount of indemnity, from which an appeal through the regular legal channels is granted. Austria and Germany, therefore, have at least made this concession to those who have always contended that the right to indemnity is a strictly legal right and should be justiciable in the law courts.

Among the Swiss cantons the procedure varies greatly, depending not only upon the nature of the case, but upon whether the accused is nol-prossed, acquitted after trial, or found innocent after conviction. In the first case, the district attorney sometimes fixes the compensation. In the second and third cases, it is usually left to an administrative board or the court itself, with or without hearing the released person. In most of the cantons, the compensation is admitted to be a legal right ultimately judicially enforceable; in others, it seems to be regarded as an administrative proceeding only, though the accused must often be heard and the decision is to all intents judicial in character. In others still, the jurisdiction is divided between the administrative and judicial authorities.

In Europe, the opportunity to assert and prove innocence is practically always available before the courts, on a petition for the revision of the sentence. It is therefore appropriate that the court which finds the innocence of the accused person and which has all the facts before it, shall at the same time determine whether he merits an indemnity from the State. Whether that same court shall fix with its judgment the amount of the indemnity as several countries provide, is a far more debatable question. Inasmuch as the acquitted prisoner cannot immediately establish and prove his damage, it would seem far more appropriate to furnish
him with a civil forum before which he can establish his claim, and that seems to be the rule adopted by the most progressive legislation.

In the United States, the right to a judicial review of a conviction usually lapses within a brief period, so that most releases from confinement on proved innocence will be the result of a Governor's pardon, as is attested by the cases reported in this volume. Inasmuch as this fact probably precludes a judicial determination of the right to and amount of the indemnity, at least in first instance, it may be well to adopt in principle the method embodied in the laws of California, North Dakota, and Wisconsin, namely, to provide for the filing of a petition before an administrative board, which shall act in a judicial capacity, with appeal, at least on questions of law if not more, to a higher court. It is questionable whether the administrative board should reopen the issue of innocence if the acquitting court or the Governor in his pardon places the discharge on that ground.\(^9\) In California, the finding of the Board of Control becomes a recommendation to the state legislature; in North Dakota and Wisconsin, the finding operates as a judgment against the state payable by the State Treasurer, unless the board in a given case considers its jurisdictional amount ($2,000 and $5,000, respectively) inadequate, in which event it may recommend to the legislature the appropriation of the excess.

Practically all the statutes provide that the State shall have a subrogated right against those individuals, officers, or judges who, by their negligence, corruption, or malicious conduct, shall have caused or contributed to the detention or to its undue prolongation or to the conviction of the innocent accused person.

**CONCLUSION**

Such are the salient features of the more important statutes on indemnification of those whom, in the administration of its criminal justice, the State has erroneously and unjustly arrested, detained, or convicted. The principle has been
clearly recognized, but, as the examination of the statutes discloses, the remedy in practice is granted only within the narrowest of limits. Nevertheless, a step has been taken in the right direction and it is one which we in this country would do well to follow. How we shall apply the principle, whether the relief shall be compulsory or discretionary, whether court or jury shall estimate the extent of the injury, within what limits and under what conditions the indemnity shall be awarded, are matters which legislatures can work out with little difficulty. While it is true that our lax methods of administering the criminal law, the possibility of acquittal on technical grounds, and the usual requirement of unanimity on the part of twelve jurymen bring about nine cases of unjust acquittal to one case of unjust conviction, still that fact is no excuse for a failure to acknowledge the principle and to remedy the evil. It is by no means rare. It makes the individual hardship, when it does occur, seem all the more distressing. That there have been numerous cases of this kind there can no longer be any doubt, notwithstanding the unauthentic returns from wardens collected by the American Prison Congress and reported in the Journal of Criminal Law and Criminology (May, 1912, p. 181) to the effect that there are but few cases of unjust execution of innocent persons. It may be hoped that within measurable time remedial legislation may recognize the social obligation to compensate the innocent victims of an unjust conviction.
NOTES

1. P. xxiv.
2. The North Dakota statute of 1917 is practically the same as that of Wisconsin.
3. Excess of jurisdiction must be distinguished from entire absence of jurisdiction. For wrongful acts in cases where he has no jurisdiction at all, the judge is civilly liable. See Mechem, Public Offices and Officers (Chicago, 1890), secs. 628 and 629; Bradley v. Fisher, 13 Wall. 395, 391 (U.S. 1871); Hughes v. McCoy, 11 Colo. 591, 19 P. 674 (1888).
4. Throop, Public Officers (New York, 1892), sec. 713.
5. 23 Cyc., pp. 568-569, and authorities there cited.
7. See, for example, art. 975 of the French Penal Code.
8. See, for example, Austria, art. 9 of the organic law of December 21, 1867, and the law of July 12, 1872, on the judicial power and the right of action for torts by judicial officers in the exercise of their functions. Also, Spain, Ley de Enjuiciamiento Civil, 1881, arts. 963, et seq. Sec. 505 of the French code of civil procedure provides that judges are liable to civil suit in the following cases: First, if there has been malice or deceit (dol), fraud (fraude), or extortion committed either in the proceedings or in the judgment; fourthly, for a denial of justice. In France, the procedural difficulties of bringing an action against a public officer are somewhat greater than in Germany, although the substantive rights against a wrong-doing officer are now practically the same in both countries. Up to the last decade, the French officer enjoyed greater immunity for his official acts than the German. The German civil code, sec. 839, par. 1, provides: "If an officer willfully or negligently commits a breach of official duty incumbent upon him as toward a third party, he shall compensate the third party for any damage arising therefrom." Par. 2 provides that "if an officer commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings." This last clause applies to cases of wilful perversion of justice under sec. 836 of the penal code and includes malicious or corrupt exercise of the judicial power. The commentaries of Planck and Staudinger explain the narrow limitations of par. 2 just quoted. It applies first to a final judgment only and does not excuse gross negligence, malice, or corruption. For all intermediate and interlocutory orders and decrees—as in negligently ordering an arrest or attachment, declining to receive evidence, failure to call a witness demanded by a defendant, a disregard of undisputed testimony—the judge is civilly liable and is not protected by the immunity granted in par. 2 of sec. 839. See Nödeke, "Die civilrechtliche Haftung des Richters nach dem B.G.B." in Gruchot's Beiträge zur Erläuterung des deutschen Rechts, XLII (1898), 795, at pp. 808, 821-822; Delius, Haftpflicht der Beamten (Berlin: Guttentag, 1889), pp. 206, et seq.
10. An Act of Massachusetts of June 22, 1911 (General Laws, 1921, c.
NOTES

277, s. 73) authorizes compensation for lost income to acquitted persons (not necessarily innocent of all wrongdoing) confined in excess of six months while awaiting trial.

11. The history of the movement, both in legislation and in literature, for the indemnification of unjustly arrested, detained, and convicted persons may be found in Geyer, “Die Entschädigung freigesprochener Angeklagten,” Nord und Süd, XVIII (1881), 167-184; H. Pascaud, “Erreurs judiciaires,” in Nouvelle Revue, LXVIII (January 1, 1891), 144-162, and in Revue critique de législation, 1888, pp. 597-637; W. Riecker, Die Entschädigung unschuldig Verhafteter und Bestrafter (Tübingen, 1911); M. P. Bernard, “De la réparation des erreurs judiciaires,” Revue critique de législation, XXXVII (1870), 390-415, 481-523; Ernst Gerber, Die Entschädigungspflicht des Staates gegenüber unschuldig verfolgten und bestraften (Zürich, 1921), pp. 1-16.


15. Pascaud, op. cit., Revue critique, 1888, pp. 617-618. See also Berlet, De la réparation des erreurs judiciaires (Paris, 1899); also, Bernard, op. cit.


17. It is interesting in this connection to examine Bentham’s proposals in his Traité de législation civile et pénale (Paris, 1802), II, 319, et seq.


CONVICTING THE INNOCENT

26. Hans Tobler, Die Entschädigungspflicht des Staates gegenüber schuldlos Verfolgten, Angeklagten und Verurteilten, mit Berücksichtigung des schweizerischen Rechts (Zurich, 1905); Gerber, op. cit., pp. 12-13. The most specific provisions on this subject are found in the codes of criminal procedure of Vaud, arts. 254, 267, and 598; Berne, arts. 235, 243, 345, 367 (see references to the new draft code in Gerber, op. cit., p. 13, note); Tessin, arts. 52, 135; Aargau, arts. 275, 364; Bâle-Ville (Baselstadt), C. Crim. Proc., Oct. 15, 1931, arts. 89-90; Fribourg, arts. 220, 293, 385, 378, 390, 388; Neuchâtel, arts. 245, 246, 368, 347, 431, 508. The constitution of Geneva of 1794 had provided for the award of an indemnity based on the number of days' detention. The principle, extended, is preserved in the code of criminal procedure of January 1, 1885. The federal code of criminal procedure provides for compensation for suspension of the prosecution as well as acquittal. Code of 1881, arts. 39, 122; Law of 1883, arts. 126, 139.

27. On December 15, 1929, a new penal code in the federal district and territories went into effect in Mexico. It repealed the code of 1871. The provisions of arts. 344, et seq., somewhat extended, are carried over in arts. 311, et seq., of the 1929 code. New codes (penal and criminal procedure) in force September 17, 1931, do not appear, according to a report from the Library of Congress, to contain these provisions. Diario Oficial, August 14 and August 28, 1931.


29. See Ritter, Die Entschädigung der im Wiederaufnahmeverfahren freigelassenen Personen (Freiburg, 1900), p. 15; Gerber, op. cit., p. 10.


32. Deutscher Juristentag, eleventh, twelfth, thirteenth, sixteenth, and twenty-second sessions; Romen, op. cit., p. 17; 35 Gerichtsblatt 478; 45 ibid. 374; 46 ibid. 155.


34. One of the best discussions of the Austrian law of March 16, 1892, including the legislative debates and "motives," is found in Hoegel, Das Gesetz betr. die Entschädigung für ungerechtfertigte erfolgte Verurteilung (Wien, 1901). See also A. Klewitz, in Archiv für öffentliches Recht, VII, 811-830; A. Löffler, Die Entschädigung unschuldig Verhaftete (Wien, 1908); Ed. Krzymalski, in Revue Penitentiaire, XVII (1894), 806-815.


36. ROBl. No. 318. See article by Fr. Klein in 62 Gerichtsblatt 301 (1918); by F. Kadecka in Allgemeine österreichische Gerichtszeitung, 1918, pp. 261-264, 277-281; and by Ofner, in 47 Juristische Blatter 409.
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41. Law of May 20, 1898, RGBl. 345; Law of July 14, 1904, RGBl. 231, Sen. Doc. 974, pp. 39-30. There has been a great deal written on the subject in Germany. The debates of publicists are found in the Verhandlung des deutschen Juristentages (German Bar Association), eleventh, twelfth, thirteenth, sixteenth, twenty-second, and thirty-sixth sessions. The legislative history is best brought out in Berichte der XI Kommission des Reichs-
tages vom 20 April, 1896, fourth session, 1895-97. Drucksachen, 294, and Entwurf nebst Begründung ("Motives"), same session, 9 Leg. Per., Vol. I, No. 73. The best commentaries on the acts are those of Burlage (Berlin, 1905); Krause (Hannover, 1909); and Kühler (Halle, 1904). See also Werner Engeli, "Die Entschädigungs- und Wiedergutmachungspflicht des Staates gegenüber unschuldig Bestraften und Verhafteten," Strafrecht-

In a draft of an Introductory Law to a new Penal Code and Enforcement Law, of May 20, 1900 (Drucksachen, 1907), it was proposed by arts. 73 and 74 to broaden the acts of 1888 and 1904. The 1904 act was to apply also to measures of correction and security (Besserungs- und Sicherungs-
maßregeln). Indemnity was also provided if the penalty is suspended or decreased. The procedure was to be speeded by delegating the power to examine petitions to another authority. The indemnity for unjust detentions was to apply also to detention for security (Verwahrung) and to deten-
tion suffered in a foreign country. The provision that compensation is not to be granted to a person in prison (Zuchthaus) for the last three years for another crime was to be abolished.

Inasmuch as indemnities for unjust detention appear to have been paid to foreigners who were not entitled thereto under reciprocity agree-
ments with Germany, a decree of the Minister of Justice requiring that nationalitiy be alleged was issued on February 17, 1923, JMBL, p. 33; Grotefend-Cretschmar (1922), p. 134. Speeding of the payments and simplification of the procedure was effected by decree of May 19, 1925, JMBL, p. 197; Grotefend-Cretschmar (1926), II, 782. In a decision of the Supreme Court of July 11, 1931 (RGZ 183, p. 212; Jur. Wochenchrift 40, p. 2784), indemnity for unjust detention was denied to a person without nationality.

The necessity for reforms in the 1898 and 1904 statutes was discussed at the thirty-sixth meeting of the German Bar Association (Juristentag) in 1901 by Professor Rosenfeld and Dr. Pestalozza. Danzig has adopted the laws of 1898 and 1904, and reciprocity to Dan-
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The principle of compensation by the State for a deprivation of liberty is not unknown.

56. Banford v. Turnley, 6 Law Times Rep. (N.S.) 721, at p. 723 (1862). The principle "Qui jure suo illusor, neminem laedit" may be directly traced to Justinian's Digest, 20, 17, 161—"nemo damninum facit, nisi qui id fecit quod facere suas non habet." It has, however, always been narrowly limited. See Blackstone, III, 217, citing Morley v. Pregaul, Cro. Car., 510.
57. Löffler, op. cit., p. 10. For examples of such action, see Joseph Unger, Handeln auf eigene Gefahr (3d ed.; Jens, 1904).
60. See the discussion of these views in Gerber, op. cit., pp. 19-20. Most of the statutes consider it not a matter of right, but a matter of grace.
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Garraud maintaing (Précis de droit criminel [Paris, 1918], secs. 503, et seq.) that the French Government adopted the view of "grace," but that the Chamber of Deputies in the 1895 law made it a matter of right. Teissier (Responsabilité de la puissance publique [Paris, 1900], p. 94) also says the judge "must" award damages. But if the innocent person has no independent right of action it would not seem to be as well secured as in Denmark, Austria, and Germany, where an independent judicial action is accorded.

63. See Geyer, Deutsche Zeit- u. Streitfragen, Vol. XI, No. 169 (1892), p. 26; A. Merkel, Juristische Enzyklopädie (3d ed., by R. Merkel, 1904), sec. 708. See criticism in Schwarze, 34 Gerichtsaal 100, 113; in Goldschmidt, op. cit., p. 130; and in Unger, op. cit., p. 98, n. 1. They maintain that expropriation is a lawful and intentional invasion of private right; that erroneous conviction is an unlawful invasion, not necessarily intentional or conscious, and not necessarily with fault, but certainly objectively improper. Liability is hence based on causation, not fault.


67. Geyer, in 34 Gerichtsaal 234; Gerber, op. cit., p. 22; see criticism in Schwarze, 34 Gerichtsaal 160, 125.


71. Goldschmidt, op. cit., at p. 117.

72. Basclestadt, Vaud, and Tessin. See Gerber, op. cit., pp. 32, 97. Gerber thinks that the individual against whom there is not enough evidence to justify prosecution is at least as much entitled to indemnity as the individual who is tried and acquitted. So does Max Alberg, 2 Deutsche Strafrechtszeitung 526 (1915). Some German states do grant indemnity in these cases by way of grace.

73. It is not clear whether the grounds for revision in Spain (arts. 954-959, C. Crim. Proc., 1882) are the grounds on which an indemnity may be claimed under art. 196 of the Penal Code of 1928.

74. Dolesshall, op. cit., p. 271.

75. Rudolf Heinze, Das Recht der Untersuchungschaft (Leipzig, 1890).

76. Tobler, op. cit., p. 55. See Schwey, C. Crim. Proc., February 18, 1908, sec. 274, Gerber, op. cit., p. 42; Zürich, C. Crim. Proc., January 20, 1919. Where courts have a free hand in determining the grounds on which alone indemnity shall be allowed, they are inclined to demand proof of complete innocence.

77. Dolesshall, op. cit., pp. 274, et seq.

79. Austria and Germany expressly provide that the claim is not subject to assignment or pledge.

80. Austria provides, however, that this shall not bar relief for illegally prolonged detention, and in the case of consiliation, only his intention to bring it about bars relief. Gross negligence applies only to failure to object to a conviction by contumacy, obtained in his absence.

81. See Gerber, op. cit., p. 47.

82. Protokolle der Kommission zur Reform des Strafprozesses, II, 284 ff.

83. Supra, p. xxiv.

84. One award of 339 francs, a reimbursement of outlays, is here omitted. The report was received from M. Matter, Procurateur Général of the Court of Cassation.

85. Reichstagsdrucksache, 1927, No. 3847, December 7, 1927, pp. 81, 120.

86. The codes of criminal procedure often provide for the publication of the judgment of acquittal in the official gazette (Reichsanzeiger); see, for example, the German Strafprozessordnung, sec. 411, par. 4.

87. Supra, p. 413.

88. For an example of such a decree, see Krause, op. cit., p. 213.

89. Gerber, op. cit., pp. 72, et seq.

90. In Wisconsin, an appeal to the Supreme Court (from the decision of the circuit court) was provided by an amendment of 1929. Stat. (1929), p. 2071.

91. See, for example, People v. Flask, 125 N.Y. 324, 26 N.E. 267 (1891); also the Illinois case cited in Green Bag for June, 1912, p. 321.

92. A large collection of cases of erroneous executions and sentences of life imprisonment has been published by Justizrath Dr. Erich Sello, Die Irrtümer der Strafjustiz und ihre Ursachen (Berlin: v. Decker’s Verlag, 1911), Vol. I, 529 p., quarto. See also A. Hellwig, Justizirrtümer (Minden, 1914); and K. Löffler, Die Opfer ungerechter Justiz (3d ed.; Jena, 1873), 3 vols.