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NOTES

THE USE OF LETHAL GAS IN NEVADA EXECUTIONS.

(A) ANCIENT METHODS OF PUNISHMENT.

From an early date, the doctrine of an eye for an eye, and a tooth for a tooth, has been accepted by society as a means of penalizing, and as a measure for the prevention of future crime. Through the many centuries of the application of this rule, society has materially altered it. Formerly, if a man lost an eye, through the willful misconduct of another, the court ruled that the wrongdoer lose an eye also. It was not wrong for the sheriff to proceed immediately, without the as-

sistance of an able corps of physicians and attendants, to punch or gouge out the eye of the wrongdoer.

Modern society is opposed to such penalties. Nowadays if a man loses an eye through the willful misconduct of another, an action for money damages lies against the wrongdoer as being chargeable with the crime of mayhem. Legislation has done away with many other means of punishment that were at one time lawful, such as the water-drip, the ducking stool, the splice, the rack, and many more of the like character. And yet an age-old question has always presented itself and that is whether or not the various means used by the State to inflict punishment upon the guilty party who, because of his misconduct, must forfeit his life, are really humane.

(B) CONSTITUTIONAL AND STATUTORY CHANGES AFFECTING METHOD OF PUNISHMENT.

The Eighth Amendment to the Constitution of the United States provides that "cruel or unusual punishment shall not be inflicted." Of course, this provision applies only to prosecutions by the Federal Government, but the majority if not all the States in the Union have enacted similar statutes in their constitutions, and the courts in many States have declared themselves as to their interpretation of the clause. Legislation sanctions executions by sending a powerful electric charge through the body. To our knowledge, no court has yet been called upon to give a decision in support of that means of execution. For that matter, death by hanging has never been discussed by any court of this country, as to whether such a means is within the meaning of either the Constitution of the United States or of that of the State where such means has been employed.. That death by electrocution, or by hanging, is within these constitutional provisions is a matter which time alone can decide.

The State of Nevada by statute,¹ in 1921, provided for the

1. Stats. 1921, p. 387.

death penalty by the administration of lethal gas, and prescribed that a suitable and efficient inclosure and proper means for administration of such gas for the purpose be provided, and that was held not to be an indefinite and uncertain punishment.²

In order to gain a fair idea as to whether a proper administration of this gas, as provided for by the statute, would be in violation of the constitutional provisions, it is necessary to know the nature of the gas to be administered, and its effect upon the human body.

By the term "lethal," as it is understood in its common usage in chemistry, is meant any poisonous gas. It is true then, that chlorine gas, a poisonous gas used in the recent war, is a lethal gas. So, also, carbon monoxide, nitrous oxide and many other oxides are clearly within the meaning of the term "lethal." Most poisonous gases contain an oxide in some form. Whatever this form may be, the general action of such poisonous gas upon the human body is to thicken the blood and prevent the carrying on of haemoglobin, which produces death.

(C) EXECUTION BY LETHAL GAS HELD NOT TO BE A CRUEL OR UNUSUAL PUNISHMENT.

The Supreme Court of Nevada has held that execution by gas is not a cruel or unusual punishment.³

Judge Coleman delivered the opinion of the court. Following eleven brilliant answers to the defendant's counsel's bill of exceptions, the learned judge comes upon the question as to the administration of lethal gas. The Court states:

"It is also contended that the Court erred in denying motion in arrest of judgment. The motion was based upon the assertion that the statute⁴ authorizing the execution of per-

2. State v. Gee Jon, 211 Pac. 676.

3. 211 Pac. 676.

4. Stats. 1921, p. 387.

sons convicted of murder in the first degree by the use of lethal gas, is violative of the terms of the Federal and State constitutions prohibiting the infliction of cruel or unusual punishment, and that the provisions of the statute authorizing the infliction of the death penalty in the manner mentioned is indefinite and uncertain as to the formula to be employed. The act in question provides: 'The judgment of death shall be inflicted by the administration of lethal gas. The execution shall take place within the limits of the State prison, wherein a suitable and efficient means for the administration of such gas for that purpose shall be provided by the board of prison commissioners. The warden of the State prison must be present and must invite a competent physician, and not less than six reputable citizens over the age of twenty-one years, to be present at the execution; but no other persons shall be present at the execution.' We are not in accord with either of the contentions."

The learned judge continues with a very able exposition in which he takes judicial notice of the many ways of bringing about the desired result. He states that in the instances of hanging, shooting or electrocuting, the same result is achieved and that it ought to make no difference so far as affects the guilty party, if he be executed by the administration of gas. He further states: "Our statute inflicts no new punishment; it is the same old punishment, inflicted in a different manner."

He states that for many years animals have been put to death by the administration of poisonous gas. That may be true, but to say that no cruel or unusual punishment is inflicted upon the animals that would not be inflicted if they were killed in any other way, is beyond everyone except those whose scientific study enable them to say with authority that it does not.

As has already been said, lethal is a term given to a group of poisonous gases. Does it make no difference that the eyes should be burned and the lungs severely pressed before the

actual working of the deadly gas is performed? I think that there would be a great difference in the humanitarian side of the question if one and only one gas could be discovered to meet the purpose of this statute in question and if such gas could be defined clearly in the statute. The learned judge in his opinion takes judicial notice of the many kinds of gas. He reviews gases from the harmless non-poisonous kind to the highly poisonous which destroy nearly everything with which they come into contact.

Under the statute in Nevada then, it would be altogether discretionary to the board of prison commissioners as to the gas to be administered. Is it reasonable to believe that the average board of prison commissioners are so well versed in chemistry as to be able to select or discover a gas which would inflict no cruel or unusual punishment?

That chlorine, mustard and vospene gases were used in the war is no argument in favor of the use of such lethal gases in the carrying out of the death penalty in times of peace.

Clearly, then, if the Nevada statute,⁵ as it stands, is modern and scientific, and conforms with the Constitution of the United States, it should stand as a leader for the future legislation of other States. Otherwise it should be repealed as unconstitutional.

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5. Stats. 1921, p. 387.