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Comments on Recent Judicial Decisions

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Improper Remarks by the Judge to the Jury.—In the case of *Green v. State,* decided by the Supreme Court of Mississippi at the present term, the essential facts were these: While the jury was being made up the judge went into the sheriff's office and instructed a deputy to summon young men for talesmen, saying, "We want to break this nigger's neck." Of the five talesmen summoned all except one were young men, and the jury as thus constituted found the accused guilty and the judge sentenced him to be hanged. On appeal, the Supreme Court granted the defendant a new trial on the ground that the remarks of the judge were calculated to influence improperly the jury.

"It is a matter of common knowledge," said the court, "that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; the jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury to avoid prejudice to either party.

"The court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that if they were exposed to improper influences which might have produced the verdict, the presumption of law is against its purity; and testimony will not be heard to rebut this presumption; it is a conclusive presumption." J. W. G.

Opinions of Jurors Based on Newspaper Report Not a Ground for Challenge.—In the last issue of the JOURNAL we commented on the practice of challenging jurors for opinions founded merely on newspaper reports and pointed out that its effect was to disqualify many men of intelligence who read the newspapers and thereby render difficult the selection of juries in cases which have attracted widespread attention in the community. We are therefore glad that the United States Supreme Court, in the case of James H. Holt, decided October 31, has ruled that the refusal of a trial court to sustain a challenge on such a ground is not necessarily a reversible error. The juror who was challenged in this case had taken the newspaper statements for facts, but stated that he had no other opinion than that derived from this source. He also stated that if the evidence presented in court should fail to prove the facts alleged in the newspapers he would return a verdict according to the evidence or lack of evidence at the trial and that he thought he could try the case solely upon the evidence, fairly and impartially. The Supreme Court held that the mere holding of an opinion based on newspaper report was not conclusive evidence of partiality and did not therefore constitute a valid ground for disqualification. This ruling strikes us as being thoroughly in accord with reason, and if followed in the practice of state courts more generally would remove one of the most common sources of delay in empaneling jurors.

In the same case the Supreme Court disposed of a number of other "meticulous objections" with the same disregard of the precedents. It held that an

indictment which alleges that the assault complained of was made feloniously and with malice aforethought is not defective because of failure to make the same allegation in the preliminary averment of assault; that the action of the trial court in permitting the jurors to separate during the trial was not a reversible error; that the conduct of the trial judge in requiring the accused to put on a certain blouse was not requiring him to testify against himself; and that the refusal of the judge to give an instruction requested as to reasonable doubt, though he had impressed upon the jury the nature of the belief they must entertain in order to convict, was not an error which prejudiced the cause of the defendant. And thus justice was administered by the highest court in the land without regard to technicality or harmless error. J. W. G.

Doctrine of Harmless Error Repudiated in Oklahoma.—The Oklahoma Criminal Court of Appeals, which announces that it has no respect for precedents found in the "rubbish of Noah's Ark" and that it purposes to do all in its power to place the criminal jurisprudence of their new commonwealth on the broad and sure foundation of reason and justice rather than upon a technical basis, expresses the following opinion of the doctrine of harmless error (*Byers v. Territory,* 103 Pac. Rep., 534):

"All lawyers will agree that there is such a thing as error without injury. But few, if any, of them will admit that the doctrine of harmless error should be applied to any of their cases. It required the passage of over six years before a member of this court could realize that this doctrine had been properly applied to one of his cases. The more we reflect upon the doctrine of harmless error the more clearly we will see that it is in strict harmony with the philosophy of the law, and that its recognition and enforcement by the Appellate Court is absolutely necessary for the administration of justice. * * *

"Justice demands that in the administration of law its processes should never be allowed to become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases, and has bred a spirit of disgust for law and contempt for courts in the public mind. Reduced to its last analysis, the doctrine contended for by counsel, if recognized, would require this court to hold that, where evidence is admitted during a trial, and upon appeal it is held that such evidence was improperly admitted, a reversal of the conviction must follow, regardless of the character of the evidence in the record, upon the ground that the prosecution having offered this evidence as a part of its case, it is estopped from denying its injurious effect.

"It appears to us that this application of the doctrine of estoppel to the state in the enforcement of its criminal law, on account of the ignorance or mistaken judgment of one of its servants, is technicality run mad and gone to seed. We decline to be bound by or to follow a line of authorities so repugnant to reason, so demoralizing to respect for law and so destructive to justice. The habit of reversing cases upon technicalities is a very convenient one for appellate courts, for by so doing they can escape much hard labor, and all responsibility for their decisions, for a violation of some technical rule can be found in almost every closely contested case.

"We believe that appellate courts should faithfully and fearlessly do their duty, and decide every question presented with reference to the substantial merits of the case in which it arises. In this way only can justice be adminis-

tered. Ignoring justice and deciding cases upon technicalities has not only largely lost to the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself.

"No one can say that the members of the American Bar Association are sensationalists or are wanting in learning or ability. It is eminently a conservative body. Yet we find them crying out against and proposing a remedy for this evil. At its last meeting at Seattle, Wash., it recommended to Congress the following amendment to the Revised Statutes of the United States: 'No judgment shall be set aside or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.' . . .

"While the above resolutions are in stronger language than our statute upon the same subject, yet they are protests against the same evil, breathe the same spirit and tend in the same direction.

"It is the fixed purpose of this court to carry out the spirit of this statute; and, when a defendant has been properly charged with an offense and fairly tried and the evidence clearly establishes his guilt, this court will not reverse the conviction upon any technicality or exception which did not deprive the defendant of a substantial right. We cannot perform this duty without examining the entire record and going over the entire case.

"It is true that in the first instance the jury constitute the triers of the case, but when a defendant, by appeal, brings a case to this court and thereby invokes our judgment, we cannot act intelligently upon his appeal and determine the application of the legal principle involved to the facts in the case unless we carefully consider the evidence, and weigh it just as an intelligent jury should do upon the trial. If we cannot do this, then this court is a miserable and contemptible farce.

"The enforcement of the doctrine of harmless error in Oklahoma will greatly improve the character of our criminal trials. Lawyers will be compelled to try their cases upon their actual merits and will cease devoting so much time in attempting to force technical errors into the record. The needless waste of much valuable time and the expenditure of a great deal of money will be saved and far better results will be reached in the administration of justice, and the courts will gain the confidence and respect of the people, and acts of mob violence will cease to disgrace our state. The reversal of the just convictions of the guilty upon purely technical questions is the prime cause of want of confidence in the courts. This want of confidence often results in mob violence on the part of a long-suffering and outraged public.

"We realize that a great responsibility rests upon this court and that we have a sworn duty to perform, and we feel that it would be a crime against society to reverse this conviction in the light of the entire record in this case. If we thought that the alleged expert evidence in this case could have had any influence upon the jury in convicting the defendant, we would seriously consider the question of granting a new trial. But we could not entertain any such opinion without reflecting upon the intelligence or integrity of the jury. There is nothing in this record which suggests a doubt upon this question. In the face

of the entire record we have failed to find any error which would justify us in setting aside the verdict and the judgment of the court recorded thereon.

"Having arrived at this conclusion after a most painstaking reinvestigation of the entire record, our duty is plain. This court is largely responsible for the property, the liberty and the lives of the people of the state of Oklahoma. Next to honor, human life is the most sacred thing on earth. He who needlessly takes it must be held to a strict responsibility for such action. Laws are made to be enforced. Punishments are prescribed to be inflicted. If men do not respect the law, they must at least be made to fear it and to know that, while justice may move with a leaden tread, it crushes with an iron heel." J. W. G.

Defects in Indictments.—In *People v. Brander,* Ill. 91 N. E. 59 (February 16, 1910), an indictment charged the defendant, as agent of the "American Express Company, *an association,*" with embezzlement and larceny of certain property of said company. The jury found the plaintiff guilty of larceny of property worth $996. "The only question presented is whether the averment of ownership by 'American Express Company, an association,' without alleging incorporation or such facts as would show that said company could own property by that name, is sufficient." And because " 'association' is a word of vague meaning," and the indictment was "wholly lacking in any averment of ownership in any person, corporation or other entity that may be the owner of property," the judgment of the Criminal Court was reversed. The odd thing (it may be remarked) is that in another opinion handed down on the same day (*Malleable Iron Range Co. v. Pusey,* Ill. 91 N. E. 51) it is held with ease, following prior civil cases in Illinois, that "the transposition, alteration or omission of some words in the name of a corporation consisting of several words is immaterial [in a deed, devise or contract] if it was evident that corporation was intended." So that, at the outset, there is in civil cases no obstacle to doing justice if the person or body intended is clear from the description.

But in criminal cases, see what manner of law this is. Take an example: A man catches a burglar in his house, collars him, goes to the telephone to call the police station and this dialogue ensues: *Householder*—"Sergeant, I have a burglar here; send the wagon to fetch him." *Sergeant*—"What name and number?" *Householder*—"George Wideawake, 214 Division street." *Sergeant*—"All right; we'll come." *Burglar* (struggling to the telephone)—"Hold on, Sergeant. He has given you the wrong number; it is 1616 Division street, by the new legal numbering that went into effect in Chicago on May 1, 1910. I haven't burglarized any 214 Division street, and he has no right to aver that I have." *Sergeant* (to householder)—"Is that so about the number?" *Householder*—"Yes, it is; I ought to have given you the legal number. But that doesn't matter; I've got him here, and you know who I am and he knows where he is, and he has burglarized this house, no matter what the number is." *Sergeant*—"O yes, it does matter. We can't come to No. 214 if that isn't your number." *Householder*—"But, anyhow, I tell you now that it is No. 1616; so come along." *Sergeant*—"Nope; it's too late. You can't amend. You ought to have told me the right number in the first place." (Sergeant hangs up the telephone, countermands the wagon; burglar politely leaves by the front door.)

That would be a pretty enough farce, of course. But what is the difference between that case and this? None, in substance. Here is the state of Illinois

with a thief caught; it proceeds to defend itself by getting the help of the law; it calls upon the officers of the law to do their part, but in so calling it terms the owner of the stolen property an "association." And because "association" is a "vague term" the whole operation of the pursuit and jailing of a public offender is stopped, and the case resolves itself into an academic discussion of the correct description of the victimized party, although there is no question of the offender's guilt, and although no man, woman or child from Waukegan to Cairo has the slightest doubt who the "American Express Company" is or whether it could own or did own this stolen property.

We do not say that such a miscarriage of justice is due to the statutes, to the common law, to the courts or to the lawyers, or to all together. We do say that it is the strangest thing in the world to call by the name of Justice. In this day and generation a community which fondly attempts to protect itself against crime by such methods is like a child playing with its toy soldiers.—J. H. W. (in the *Illinois Law Review*).

Perversion of Justice in the Heinze Case.—*United States v. Heinze,* 177 Fed. 770, is a conspicuous example of the sacrifice of justice to verbal logic. It was a criminal action against F. Augustus Heinze for misapplication of funds of a national bank in New York City. The prosecution involved the examination of voluminous books of account, which were not only intricate, but were clouded by false and misleading entries. The United States attorney required in the performance of his duty the assistance of an expert accountant, and at his request the attorney-general appointed such a person, and expressly authorized him to aid in presenting the case to the grand jury. This expert went with the United States attorney before the grand jury and assisted him in unraveling the complicated accounts and unfolding their true meaning through the examination of witnesses. The investigation resulted in an indictment against Heinze. Thereupon a motion was made to quash the indictment because the expert accountant had been permitted to assist the United States attorney before the grand jury. The motion was granted and the indictment quashed.

What is the result of this kind of administration of criminal law? Does it protect the innocent against the abuse of governmental power? Certainly not. It is expressly stated in the opinion that the aid of the expert was necessary to an intelligent presentation of the case, and that his conduct was free from criticism. The result of the decision, therefore, is simply to deny to the agents of the government in the administration of criminal law necessary assistance, such assistance as the very nature of the case required. Here is the reasoning of the court: In early times no one was admitted to the grand jury room except the prosecuting officer, therefore this practice can never be changed except by statute. This limits the administration of justice to such conveniences as were adequate when causes before grand juries involved the simple issues of common law crimes. At the present time courts have to deal with the intricate accounts of modern corporate finance. These are matters that have recently arisen. Cannot the administration of criminal law take account of such changed circumstances? The practice of grand juries is not the creation of statute, but rests wholly in the decisions of courts. If they are not to abdicate their power to accommodate their law to changed conditions, there is no reason why the great change introduced into our life by corporate organizations should not be taken account of. There was a time when even prosecuting officers were not

admitted to the grand jury room, but the practice was changed by the courts in furtherance of an efficient administration of criminal law. A little later stenography came into use, and for some years the question was learnedly debated whether an indictment was invalidated by the fact that a stenographer was present to keep a record of the testimony before the grand jury. Finally, however, the courts reached the conclusion that these ordinary clerical conveniences did not poison proceedings before the grand jury. Can any sound reason be assigned why the aid of an expert accountant in the examination of the intricate books of account of a modern corporation should not receive a similar treatment by the courts? The grand jury is an indispensable part of every criminal prosecution in the Federal courts. Is it wise for those courts, in order to save the jury from imaginary and fanciful prejudice, to deny to them indispensable aid for the intelligent performance of their duty? Here the accountant was a sworn officer of the Government. He simply assisted the United States Attorney in unraveling and explaining the books of account to the grand jury. Can anyone suggest wherein his conduct would be any more likely to prejudice them than would the same conduct by the prosecuting officer? Crimes of corporate mismanagement constitute today one of the most serious menaces of society. The government in prosecuting them has to rely largely upon the books and bookkeepers of the men whose conduct is under investigation. These accountants, as a rule, are hostile witnesses. It is possible for them to give such an explanation of dishonest accounts as to completely mislead a grand jury. Unless an expert is at hand to aid the United States attorney in conducting the examination so as to set the matter right at once, the jury is confused and the prosecution must frequently fail. Expert accountants are recognized as indispensable aids in presenting such causes to a petit jury. Grand juries are composed of the same class of laymen, and are just as much in need of the same kind of aid. What folly is it to create a tribunal to investigate crime, and then, out of fanciful fear or prejudice, deny to it the means essential to the intelligent performance of its duty? Could the big corporate criminal ask for any better protection than such refined scholasticism? It is the defeat of substantial justice in such cases as the one here under review which makes our administration of law a byword and a hissing in the judgment of all men outside of the legal profession.

The decision under consideration shows how impossible it is for the Legislature to secure an efficient administration of law if the courts are guided by mere verbal refinements. As far back as 1861, the Attorney-General was authorized to appoint special assistants to district attorneys to aid them in the performance of "their duties." One would say, upon a mere reading of the language, that the statute covered all the duties of a district attorney, including the presentation of cases before the grand jury. But the United States Court for the Southern District of New York, in *United States v. Rosenthal*, 121 Fed. 862, by what was characterized in *U. S. v. Cobban*, 127 Fed. 717, as "a deft and subtle process of reasoning," held that this language should be confined to the trial of cases in court, and did not authorize the appearance of special attorneys before a grand jury, and for that reason set aside an indictment. To cure this decision, Congress by the Act of June 30, 1906, provided "that the Attorney-General or *any officer* of the Department of Justice or any attorney or counselor, specially appointed by the Attorney-General, under any provision of law, may,

when thereunto specifically directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, * * * which district attorneys now are, or hereafter may be, by law authorized to conduct." This statute was sufficient to cure the defect as to special assistant attorneys, but would not extend to a special accountant, because, forsooth, he is not "an officer of the Department of Justice." The result is that Congress must try again in order to get a net fine enough to catch the refinements of the judicial mind.

It is greatly to be hoped that a writ of error will be sued out to review the Heinze case, so that it may not stand as a precedent to embarrass the practical administration of law.[1]

[1]Since the above was written, the Supreme Court has rendered a decision, December 5, to the effect that the Circuit Court erred in holding the indictment insufficient.