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Communications

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I. THE SELECTION OF JURIES.

The Editor of the JOURNAL:

Please permit me to comment upon the editorial in the November issue of the JOURNAL on "Reform in the Methods of Selecting Juries."

1. Speaking of delays in selecting a jury, the writer of the editorial assumes that there is an American practice which practically disqualifies for jury service intelligent men who may have hastily formed an opinion of the guilt or innocence of the accused from newspaper reports. This is the statement of a common belief, but I doubt its accuracy. In 1872 it was said in *State v. Medlicott,* 9 Kan. 257, that although the juror on examination stated that he had formed an opinion, it appeared from further questioning that this was an impression dependent "on the newspaper account, of the truth of which he had no knowledge." The court distinguishes between an opinion and an impression, and cites Cooley, J., in *Holt v. People,* 13 Mich. 224, as saying: To require that jurors shall come to the investigation of criminal charges with minds entirely unimpressed by what they may have heard in regard to them, or entirely without information concerning them, would be in many cases to exclude every man from the panel who is fit to sit there."

I admit, however, that the rule in at least a number of jurisdictions is just what the editorial states the practice should be.

2. The editorial further says: "It is submitted that any juror who is capable of doing this intelligently (i. e., of deciding controverted facts on the basis of the evidence presented in court) is capable of altering a preconceived opinion when the evidence produced in court points to a different conclusion from that which he may have reached on the basis of hearsay evidence or newspaper report." This test entirely ignores the rule that *prejudice* interferes with the *capability* to decide controverted facts on the basis of the evidence presented in court. Very intelligent men are often so prejudiced that they will not heed, and hence will not weigh facts. The *capacity* and the *desire* to weigh facts must exist at the same time.

3. Nor can I agree that the examination of the venireman should be limited to the two questions: First, whether he is in any way related to the accused or his victim; and, second, whether he knows of any reason why he cannot render a verdict in accordance with the evidence presented to the court.

The last question ignores the limitations of human nature. First, because few men believe themselves prejudiced; second, because the question gives the dishonest venireman the opportunity to answer in the negative. Further questioning might reveal that the honest man who answered the affirmative was so capable of weighing facts and so fair-minded that he would be unobjectionable, nay, highly desirable, although he had mistakenly believed the contrary. And further examination of the dishonest venireman would show him to be unreliable. In addition to this, the man who desires to escape jury service often stretches a point to answer in the affirmative, although when examined further his answers reveal his capability and eligibility. He is like the galled horse,

which flinches when first put under the collar, but which soon settles down to a steady pull.

With the purpose of the editorial the writer is in hearty sympathy. Examinations are sometimes too prolix. The writer, however, is at present unwilling to endorse any hard and fast limitation upon the examination in empanelling the jury.

WILLIAM E. HIGGINS,
University of Kansas.

II. IS AN INDICTMENT MERELY A PLEADING?

The Editor of the JOURNAL:

There is much current criticism of courts for holding indictments insufficient because of defects which appear trivial. Most of it proceeds on the theory that an indictment is primarily a pleading. It is said that a charge of crime should be upheld if its allegations notify the accused sufficiently for his defense. The draft report of the Committee on Criminal Procedure, printed in the November number of the JOURNAL, takes a similar view. It says that the rule which requires the setting forth of the facts which constitute the crime chiefly grew out of the exigencies of the old mode of review, by writ of error, in the days when the evidence at the trial was not brought before the court of review, and there was need of a record upon which the conviction might be sustained. The Committee concludes that the offices of an indictment should be to notify the accused of the case against him and to stand as a record to protect him from a second prosecution for the same offense, and that these purposes can be fulfilled well enough by allegations which express the nature of the accusation without setting out facts in detail; by a statement, for instance, that A is charged with larceny at common law, for that on the 10th of April, 1898, he stole a watch, the property of B.

To bring a man to trial upon a charge of crime is in itself to inflict upon him serious (it may be irremediable) damage. It subjects him to the indignity of arrest. It involves imprisonment until trial or release on bail. It entails expense for defense. It injures his reputation and credit. It interrupts his business and may destroy it, or cause him to lose his employment. It may bring anxiety and humiliation to his family and friends. If the charge is of felony, the law of many states invests the officer who serves the warrant with power of life and death. He may shoot to kill, if that appears to be necessary to effect the arrest or to retain custody of the prisoner. In short, though acquitted, the accused will have been damaged in person, in property and in reputation, and there is no other way in which a man can, in law, be damaged. For all this he is without remedy, if the prosecution was instituted in good faith and on probable cause. For if B's watch has been stolen and A is reasonably suspected of the theft, the law must give B power to cause this damage or fail adequately to protect him in the possession of his property. Yet, for A's protection, the law has hitherto, at least in general, imposed the condition that neither B nor anybody else may obtain a warrant for A's arrest or have him brought to trial until there has been an express and formal determination as to the probable existence of every fact, whether act, circumstance or state of mind, necessary to make A guilty, nor until that determination has been evidenced by matter of record.

The principle, if not as old as Magna Carta itself, is at least as old as the fourteenth century interpretation of Magna Carta. "No free man shall be taken or imprisoned * * * or any ways destroyed, nor will we go against him, nor will we send against him, unless by the lawful judgment of his peers or by the law of the land." It is the same principle which appears in constitutional provisions that warrants shall not issue except for probable cause, duly proved.

An indictment is not in substance or form a mere accusation. It is a finding of guilt. The same thing is substantially true of an information. The degree of particularity with which the circumstances of the alleged offense must be set out has hitherto been determined, it would seem, not alone by what is sufficient to apprize the prisoner of the charge, but quite as much by what was regarded as sufficient to enable the court to see that the question of his guilt had been investigated with proper care. Take, for instance, the allegation of the day on which the offense was committed, an allegation which the Committee propose to retain. The offense may be stated to have been committed on one day and the accused convicted, though the evidence shows it was committed on a different day, and even in a different year. But unless the preliminary inquiry into guilt is shown to have included a finding of a day on which the crime is believed to have been committed, he cannot be compelled to stand trial. The importance of finding out whether the prisoner could have had a motive for his crime is generally admitted. The ancient allegation that the prisoner was "instigated and seduced by the devil" was an allegation of his motive. It was not stated for his information, and it did not have to be supported by proof.

To waive the requirement of a preliminary finding, express and specific, of the facts concerning guilt, is not merely to modify criminal pleading; it is to impair a protection to personal security. It may be that there is a tendency on the part of grand jurors to delegate the performance of their duty to a prosecuting attorney, and that it is easy for the attorney to insert many of the requisite allegations by copying from a book of forms without inquiry as to their meaning or truth. But if a reform were practicable that would strengthen the security against prosecutions founded in carelessness, prejudice, enmity or a desire on the part of police or prosecutor to get credit for efficiency, it would seem preferable to a reform that proposes to lessen such security as exists.

It would be interesting to know how the number of criminals who escape for defects in pleading compares with the number who escape for defects in proof which a thorough preparation of the case would have supplied. A writer in the *American Law Review* (5 A. L. R. 734) has pointed out that a rule which with the design of preventing escape for defect in pleading brings criminals to trial on an indictment that states conclusions instead of facts, will facilitate their escape for defect of proof, if it leads prosecutors to forego a careful consideration of the facts necessary to be established, and a preliminary examination of witnesses, searchingly and in detail, such as they would be likely to make if they had to draw an accusation which explicitely set forth the elements and circumstances of the crime.

FREDERICK GREEN,
University of Illinois.