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BRIEFER CONTRIBUTIONS

FUNCTIONS OF JUDGE AND COUNSEL IN THE EXAMINATION OF JURORS

CHARLES T. McCORMICK¹

When Alphonse Capone, overlord of criminal gangdom, recently went to trial for defrauding the United States of income taxes, the eyes of the nation were centered upon a Federal court-room in Chicago. The wide notoriety of the defendant's long and prosperous career, and seeming immunity from state interference, made it inevitable that the Federal trial would be closely watched and constantly compared with the image of what would have occurred had he been on his trial in a state court.

One contrast was apparent at the outset and widely commented upon in the press. This was in regard to the manner of selecting the jury. The astonishing thing was that the judge, and not the lawyers, assumed responsibility for ascertaining whether the persons summoned for jury-service were qualified. Judge Wilkerson asked the few and simple questions which would disclose the fair or prejudiced attitudes of the venire-men, in a manner which assumed that they would be entirely open and frank in expressing them. He accepted from counsel suggestions as to additional questions, but all actual questioning was done by the court. In a few hours, and in an atmosphere of quiet decorum, twelve men were selected to try the defendant.

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Had Capone been on trial in a typical state court, how would this matter have been handled? The judge would first have examined the whole panel of jurors as to their statutory qualifications, such as residence within the county, the facts as to kinship with the parties, and as to prejudice or fixed opinion about the case. Those disqualified would be excused. Then each member of the panel would be examined and cross-examined by counsel on each side to determine whether either side might desire to challenge him peremptorily. This examination would in a serious case be as searching as the indulgence of the court would permit, into the life-history of each individual juror, his friendships and affiliations, and his feelings and predilections toward crime and punishment.

Without mentioning the more extravagant of such inquiries of lawyers to jurors which are the stock-in-trade of many trial court-rooms, a few of the more restrained queries which have been approved in recent decisions will give a sampling.² What church do you belong to? What other organization?³ Do you know the defendant, the witnesses, the lawyers? If the court should

²See *State v. Miller* (Mo.) 207 S. W. 797 (1918) and numerous cases cited under title "Jury" sec. 131, Decennial and Current Digests.

³*Young v. State*, 41 Okl. Cr. 226, 271 P. 426 (1928).

charge you that so-and-so is the law would you recognize and follow this? If it appears that defendant has been convicted of other offenses would you regard this as evidence against him?⁴ Would you disregard evidence given by a witness of unsavory reputation?⁵ Would you convict because the other jurors believed the defendant guilty? Because you desired to go home? Do you believe (in a murder case) in the law of self-defense and of excusable homicide?⁶ And so on to the limit of the ingenuity of counsel.

An instance is cited of "the trial of a labor-union slugger, where the selection of a jury consumed nine and a half weeks, involved the summoning of ten thousand veniremen, the examination of nearly five thousand talesmen, and entailed a cost to the state of forty or fifty thousand dollars."⁷ Such exuberance would hardly be conceivable in these piping times, but even within the last decade in Illinois there have occurred some glaring examples of riotous waste of time. The following was written in 1926. "The Sweet-Highten case was begun December 1, and the verdict was received on Christmas eve of last year. More than two weeks were required to empanel the jury. The Lincoln case required as much time. In the Stokes case in Chicago (not a homicide case) more than three weeks were required to empanel the

jury; and a like time was required in the Shepherd case."⁸

Why this elaborate and exhausting inquisition into the lives and minds of men who after all are not on trial but are merely summoned to give their time disinterestedly in the service of justice? From the point of view of the lawyer intent only on victory for his side, the questioning is by no means idle. In view of the wide powers of peremptory challenge of jurors, this inquisition will become a competitive process of sifting the panel down to a final twelve, with victory to him whose counsel winnows most expertly. Since it is hard to find persons whose views lean against the prosecution, an attempt at "evening up" is usually made by giving the defense two or three times as many peremptory challenges as the number allotted to the state.

An Oregon trial judge voiced the opinion of many trial lawyers when he said: "It seems to me that the adoption of this rule [limiting examination of jurors by counsel] in its practical application is going to substantially destroy the right of peremptory challenge. Theoretically it will not, but practically every experienced trial lawyer realizes that that is what is going to happen. The value of an examination lies in the expression of the man's face, the hesitating or prompt manner of his answer, his shifty or firm glance of the eye—a number of personal eccentricities that all come to the surface with a close, rapid, searching examination which cannot be given by the judge, because the juror then takes it easily and

⁴*People v. Ranney* (Calif. App.) 293 P. 887 (1930).

⁵*Turner v. State*, 171 Ark. 1118, 287 S. W. 400 (1926).

⁶*People v. Bennett*, 79 Calif App. 76, 249 P. 20 (1926).

⁷*Willoughby* "Principles of Judicial Administration" (1929) p. 510.

⁸*Reid* "English Criminal Trials of Today," 10 *Marquette L. Rev.* 27, 32 (1925).

either doesn't make any answer or forgets, quite often sincerely forgets."⁹

Again, the emphasis which the trial lawyer, who is accustomed to this practice, comes to place upon the supposedly incidental matter of selecting the jury, is reflected in this candid passage from an address by a skilled and experienced advocate: "And it has come to be well recognized generally that a litigant may get the best legal service obtainable; he may have, to many right thinking minds, the preponderance of testimony and right; but if his lawyer 'can't pick a jury' his chances for success in that court are very slim. In this paragraph I have stated the proposition mildly. We all know and recognize the difficulties present always, on one side or the other, in selecting twelve fair-minded, impartial and competent men to try almost any case, and certainly any case of moment or of considerable public interest. The popularity of one or the other of the parties, the personal influence of the lawyer, the vocation of the plaintiff or the defendant, the age, the sex, the political or religious affiliation or activity of either or both parties. Opulence or poverty, business, fraternal or social connections—does either party trade with one of the jurors, or vice-versa—is a juror client to one of the lawyers, or does one of the attorneys hold a mortgage on one of the jurors? Who is kin to who, and what are a juror's environments? One or more of these and like inquiries and influences operate to a more or less extent in the trial of every jury case, and oftentimes determine the merits of the cause.

Does the lawyer of the litigant go fishing or hunting with one or more of the jurors—do they play dominoes or poker or golf together? Whom does he work for? Is he 'dry' or 'wet'?—An hundred associations or influences of such nature tend to give one side or the other an advantage even in civil cases, and in criminal cases it is just impossible to appraise the value of these equations. Prejudice, possibly, has more to do in determining the mind and verdict of a juror than anything else—unless it be self-interest, and this, of course, is a species of prejudice—like passion or envy or jealousy."¹⁰

In many states counsel in their inquisition are permitted to go to the length of rehearsing to each prospective juror the states of fact which in the trial they hope to establish, and then the instructions on the law which they hope that the court will give, and by way of pretext for this, inquiring of each juror whether he would have any difficulty or unwillingness in accepting and applying such "law" and "facts." As this is customarily done in the presence of the whole panel, the repetition with adroit variations of counsel's version of the crime or defense may often make a deep unconscious impression in the negative minds of the jurors finally remaining after the completion of the screening process. Those who give signs of any intelligent independent consideration of the questions asked will readily be rejected. Moreover, it gives additional time and opportunity for the counsel whose personality is the more forceful or winning to weave his spell about the jury.

⁹*Report, Judicial Council*, 4 Ore. L. Rev. 263, 270 (1925).

¹⁰Hon. T. D. Samford (1928) Proceedings, Ala. St. Bar Asso. 143-4.

What effect does this sort of irresponsible and extended inquisition have upon the minds of the jurymen finally chosen to try the case? Probably it will outrage and irritate many of the veniremen and forever disgust them with the processes of justice. They will be eliminated. Those who remain will necessarily be imbued with the impression that the trial is to be a proceeding where the personal whims and prejudices of the jurors will properly play a large part in the result. They are psychologically tested, picked, and prepared for the highest degree of receptivity to emotional appeal. It is difficult to conceive a more effective method to enable the tribunal to "divorce old barren Reason" from the trial.

Though this is in some respects a minor stage in the trial,¹¹ it has real significance as a phase of the epic and unconscious conflict between the ideal of a trial managed by a judge as its central figure and the widely prevalent, but never openly avowed, conception of a trial as a contest in a squared circle between trial lawyers where (within due bounds of decency) superior skill, luck, personality and learning should be free to prevail. It is as distasteful to a certain type of trial-

lawyer for the judge to assume any active and masterful role before the jury as it would be to a boxer for the referee to make himself the most conspicuous figure in the ring.

The trial lawyer has, both in his own mind and to a large degree in the minds of the press and the public, been able to associate the class-interested demand for a weakening of control of the trial by the judge, with the democratic ideal. Correspondingly he has been able to fasten the stigma of autocracy upon the opposing demand for such predominance by the judge as will safe-guard justice and respect for law. This transference has been made easier by the accompanying weakening of the personnel of the bench by making judges elective for short terms. Seemingly this perversion of the democratic dogma has never prevailed in the other countries which have inherited the English legal tradition. Canada, Australia, New Zealand, though in some respects more responsive in government to popular control than we are, and in some respects much more "radical" in sentiment, retain the judge as a life-time functionary with all his traditional pre-eminence at the trial, as the personal symbol of law and justice.

Surely no more critical test of supremacy between judge and advocate could be presented than the question of the judge's privilege to conduct the examination into the qualifications of the sworn and paid officers of the court who are to form a part of the tribunal over which the judge presides. It is noteworthy that most of the proposals for the establishment of the dignified practice of examination by the judges come from the judges themselves. In the Federal courts the Conference of Senior Circuit judges rec-

¹¹Except as bearing upon the respective roles of judge and counsel, the examination of prospective jurors in court is of less intrinsic importance than the administrative procedure for the original selection of the jurymen to be summoned. The quality of the stream must be chiefly protected at its source. An illuminating description of the defects to which a system of summoning jurors from a metropolitan area may be subject, appears in *Criminal Justice in Cleveland* (1922) ch. XI. Cf. *Bruce* "Summary, Illinois Crime Survey" 19 *J. Am. Inst. Cr. L. and Cr. Appendix*, 31 (1929); *Missouri Crime Survey*, 178-180 (1926).

commended the practice to the trial judges in 1923,¹² and it has been generally adopted in those courts.¹³ A few state courts seem to have preserved this as a traditional practice.¹⁴ In the other states, judicial efforts to assume responsibility for ascertaining the qualifications of prospective jurors have been quickly resented by trial lawyers. In Oregon, such a proposal by Circuit Judge Tucker before the Judicial Council met with hot opposition. A representative of the bar said: "Personally I would prefer to select my own jury, and we do that from the mental attitude that is exhibited by the jury in response to the questions, and something that the attorney cannot get when the judge asks the same question. We have discussed this question very thoroughly in our local Bar meetings

¹²The Federal Judicial Council, 2 Tex. L. Rev. 458, 461 (1924).

¹³The Supreme Court has recognized the practice approvingly, but has on occasion, reversed the trial judge for abuse of discretion in declining to examine the jurors upon some essential matter when requested by counsel. *Al-dridge v. U. S.* 51 S. Ct. 470 (1931). (Refusal to inquire as to racial prejudice of jurors in the District of Columbia, where defendant, a negro was charged with killing a white man.)

¹⁴In Alabama, California, Idaho, South Carolina, Utah, and perhaps some other states, by custom or statute the trial judge seems to conduct the examination of the jurors, with some discretionary latitude in permitting supplemental examination by counsel. In most of the other states, by law or custom, the counsel seem to be permitted a wide range of examination as a basis for peremptory challenge. No attempt has been made to investigate in detail the statutes and decisions of the particular states. See Digests cited, n. 1 supra; statutes cited, Am. Law Inst. Code Cr. Pro. Tentative Draft, No. 2 (1929) pp. 265-271; Comment, 18 Calif. L. Rev. 70 (1929).

down there and out of the thirty-four members of our local Bar one member thought that it might be a good rule and thirty-three of us were opposed to it, and I believe that that is a fair proportion of the attorneys throughout the state outside of Portland."¹⁵ Other judges present took the part of the lawyers and seemingly the proposal was lost. In Mississippi in 1920 the legislature authorized the judges of the trial courts to adopt rules of procedure. The judges promptly declared, by rule, that the function of conducting the examination of jurors was theirs, not the lawyers.¹⁶ At the next meeting of the legislature, however, in 1922, the trial lawyers in that body, who naturally are readily able in such assemblies to secure the passage of any technical professional measure which they desire, procured the enactment of a law explicitly restoring to the lawyers "the right to question jurors" and providing that "it shall not be necessary to propound the questions through the presiding judge."¹⁷ A trump card was still available to the judges in the contest to preserve the integrity of the process of selecting the personnel of the tribunal. One of the circuit judges was courageous enough to play this card. He refused to follow the statute in a criminal case, and overruled the defense attorney's

¹⁵4 Ore. L. Rev. 269 (1925).

¹⁶The rule, as set out in the argument of counsel in *Funches v. State* 125 Miss. 140, 145, 87 So. 487 (1921), was as follows: "Rule 10. In all cases the court alone shall examine jurors touching their qualification, and should the juror then appear to be qualified, the court will ask any additional proper questions suggested by counsel."

¹⁷C. 294, Laws of 1922; 1 Miss. Code (1930) Art 2068.

request for permission to question the jurors on the ground that "the statute relied upon is unconstitutional and one which the legislature of the State of Mississippi was powerless to enact, as it seeks to take the inherent power of the circuit court away and place the running of the courts in the hands of the legislature." One may imagine the indignation which must have swept the ranks of trial lawyers in the state. The Supreme Court was naturally more influenced by prevailing professional opinion than by any feeling of responsibility for safeguarding the dignity and decorum of administering justice in trial courts. Its surrender of control to the legislature of trial administration had already gone to the extreme lengths of permitting the legislature to deprive the trial judge completely of the power to instruct the jury at all upon the law, except and until requested to do so by the attorneys!¹⁸ Naturally, it reversed the courageous trial judge and instructed him to relinquish the function of examining the jury to the lawyers.¹⁹

This contest is surging on many fronts, of which the struggle for control over the selection of the

jury is a minor skirmish, but significant because the lines of opposing forces are already visible. In the Federal Courts, the custom of selection of judges from the higher *strata* of the bar,²⁰ the judges' independent tenure, and the frequent contacts and association of judges from different districts and circuits, have contributed to the up-building of a strong judicial *esprit de corps*.

Judicial conferences and councils, meetings of judicial sections in Bar Associations, quickening relations between judges and law schools, and the emerging demands of a small but influential element of the bar who are more deeply interested in the law as an agency of public justice than as a source of private advantage, may within the next few decades strengthen the professional group-consciousness of our state judges. When this time comes, professional pride will nerve them to assume control of the court-room. The trial lawyers will then take their rightful place as ministers of the court in marshalling facts and legal doctrines, and will cede to the judge the power to meet his responsibility for the dignity, dispatch and impartiality of the trial.

¹⁸*Bangs v. State* 61 Miss. 363 (1883).

¹⁹*Jones v. State* 133 Miss. 684, 98 So. 150 (1923). In Louisiana, the Supreme Court, though no specific statute stood in the way, condemned as an innovation, a rule adopted in the trial court, reserving to the judge the examination of jurors. *State v. Guidry* 160 La. 655, 107 So. 479 (1926).

²⁰Even this custom is threatened by danger of political coercion exercised upon the President by the Senate. *Sears* "Appointment of Federal District Judges" 25 Ill. L. Rev. 54 (1930), *Shartel* "Federal Judges — Appointment, Supervision, and Removal—Some Possibilities under the Constitution" 28 Mich. L. Rev. 485, 486-488 (1930)