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The foregoing conclusions which would condemn any further exceptions to the rules of character exclusion are in effect strengthened by a remark of Dean Wigmore in his explanation of the rationale involved in allowing the prosecution to attack the character of the defendant after the latter has attempted to show his good character in his own aid. "The true reason for [allowing] this seems to be . . . not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one."<sup>46</sup> A defendant makes no such claim when he attacks the character of his victim. The prosecution, therefore should not, on the basis of either lay or legal reasoning, be permitted to refute a non-existent claim.

There is an additional practical consideration which should cause some hesitancy on the part of those who would readily accept the "Missouri rule." As a commentator on the case has so aptly put it, "the decision obviously will change the course to be followed by defense attorneys in many future trials."<sup>47</sup> In short this means that under the minority doctrine, a plea of self-defense, supplemented by inquiry into the reputation of the deceased victim for violence, could no longer be unquestionably interposed without the realization by defense counsel that his client would consequently be subjected to a perhaps disastrous attack on his character. This doctrine would therefore in effect qualify a right, heretofore absolute, which has been accorded recognition by centuries of Anglo-American jurisprudence.<sup>48</sup>

## AMENDMENT OF INDICTMENTS AND INFORMATIONS

Richard Jacobson

Traditionally the criminal law has maintained a distinction between indictments and informations with regard to amendment by the prosecution during the course of the trial. Because indictments were returned on the oath of a grand jury, the common law courts rebelled at allowing them to be amended except by the grand jury, while at the same time generally

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the story of the crime on trial by describing happenings closely connected in time and place: *State v. Ward*, 337 Mo. 425, 85 S.W. 2d 1 (1935); (2) to establish identity: *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928); (3) to show a specific emotional propensity but not a general propensity: *State v. Terry*, 199 Ia. 1221, 203 N.W. 232 (1925). *Cf. Wertz v. State*, 159 Md. 161, 150 Atl. 278 (1930); (4) to prove guilty knowledge: *People v. Marino*, 271 N.Y. 317, 3 N.E. 2d 439 (1936); (5) to show intent, *i.e.*, that the act was intentional and not accidental: *People v. Williams*, 6 Cal. 2d 500, 58 P. 2d 917 (1936); (6) to establish motive: *State v. Gaines*, 144 Wash. 446, 258 P. 508 (1927); See also MCCORMICK, *CASES ON EVIDENCE*, pp. 487, 488 (2d ed. 1948). In addition to evidence of similar crimes, the prosecution is also permitted to impeach the defendant like any other witness when he takes the stand. It may do this regardless of whether the accused has attempted to use his good character as relevant to his innocence. 3 WIGMORE, *EVIDENCE* §§890, 891, 925 (3rd ed. 1940).

46. 1 WIGMORE, *EVIDENCE* §58, pp. 457, 458 (3rd ed. 1940). Language to the same effect is found in *United States v. Holmes*, 26 Fed. Cas. 349, No. 15,382 (C.C.D. Me. 1858); A concise but classic statement of the reason behind the rule is that of Erle, J., in *Regina v. Rowton*, Leigh & C. 520, 533 (1865): "If the prisoner, having a bad character, misleads the court by calling witnesses to say he has a good one, in the interests of truth and justice, the false impression should be removed."

47. Note, 5 Mo. L. REV. 430, 431 (1940).

48. 2 BURDICK, *THE LAW OF CRIME*, §436a, pp. 122-126 (1946); 3 COKE, *INST. c. 8*, p. 55; 1 HALE, P. C., c. 40; See especially, 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, pp. 52-54 (3rd ed. 1923).

permitting amendment of informations.<sup>1</sup> Today the power of amendment of informations is even more freely exercised, and many jurisdictions have relaxed the restriction on indictments and permit, at least to a limited extent, their amendment. But as in the past, even in these jurisdictions, insubstantial and minor technical defects in the indictment are often bars to a speedy trial, with the result that there remains a large area in which reform might be accomplished, aimed at expediting judicial procedure. Statutory attempts have been made to achieve this end, but the opportunities for reform are not exhausted.

This basic distinction between indictments and informations was made in a classic opinion of Lord Mansfield's:

"There is a great difference . . . Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but . . . an officer of the Crown has the right of framing [informations] originally, and may, with leave, amend in like manner as any plaintiff may do. . . ."<sup>2</sup>

The common law doctrine denying any power in the court to amend indictments can be traced to the days when capital punishment was meted out for a substantial number of offenses, and many judges were moved by a humane tendency to seize on the slightest flaw in an indictment in an effort to save the life of the accused.<sup>3</sup> As this situation improved, statutes were enacted permitting amendment of at least formal or technical defects which did not affect the substance of the indictment.<sup>4</sup> The rule remained unchanged as to amendments of substance.<sup>5</sup>

In some jurisdictions, however, the courts, in the absence of such statutes, have merely continued to reiterate the early common law doctrine. Included in this group is Illinois, whose courts still hold that an indictment returned by a grand jury cannot be amended.<sup>6</sup> Since the grand jury has the exclusive right to find indictments, the court has no power to authorize their alteration or amendment.<sup>7</sup>

Illinois holdings have consistently been to the effect that an information may be amended to any extent which the judge deems consistent with the orderly conduct of judicial business, with the public interest, and with

1. *Davis v. State*, 196 Ark. 721, 119 S.W. 2d 527 (1938); *State v. Darling*, 216 Mo. 450, 465, 115 S.W. 1002, 1006 (1909).

2. *Rex v. Wilkes*, 4 Burr. 2527, 2569 (1770).

3. See Note, 7 A.L.R. 1516.

4. *State v. Kappen*, 191 Ia. 19, 180 N.W. 307 (1920) (further description added); *State v. Grimms*, 143 La. 421, 78 So. 661 (1913) (names in indictment changed); *Ex parte Hironymous*, 38 Nev. 194, 202, 147 Pac. 453, 456 (1915) (omission supplied in amendment); *People v. Johnson*, 104 N.Y. 213, 10 N.E. 690 (1887); *Rosenberger v. Com.*, 118 Pa. 77, 84, 11 Atl. 782, 783 (1887).

5. *State v. Moyer*, 76 Ore. 396, 149 Pac. 84 (1915) (substance defined as matter essential to show that an offense has been committed); *Calvin v. State*, 25 Tex. 789 (1860); *People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968 (1913) (changing the offense charged not allowed).

6. *People v. Clarke*, 340 Ill. App. 207 (1950) (the court, citing the *Wilkes* case, allowing amendment of an information, but stating that similar amendment of an indictment would not be allowed). In Illinois, where an indictment is found to be defective, the practice is to have the same or another grand jury find another in the proper form. *Gannon v. People*, 127 Ill. 507, 21 N.E. 525 (1889).

7. *Patrick v. People*, 132 Ill. 529, 24 N.E. 619 (1890); *People v. Klemick*, 311 Ill. App. 508, 36 N.E. 2d 846 (1941).

private rights.<sup>8</sup> Defects in an information not affecting the merits of the question of guilt or innocence may be cured by amendment at the trial,<sup>9</sup> as long as the defendant has not been rendered unprepared to make his defense to the charge in the amended information or is not prejudiced by being tried under it.<sup>10</sup>

The Illinois statute giving the court power to permit amendment of any pleading before judgment expressly states that it does not extend to criminal cases,<sup>11</sup> but it has been held nevertheless that by virtue of the common law the court may permit an information to be amended.<sup>12</sup>

In many states a further difficulty arises because a distinction has been made between "form" and "substance,"<sup>13</sup> and some of these states allow amendment of an information in form or substance before trial but in form only once the trial has begun.<sup>14</sup> Other states, however, have held informations amendable in form or substance during the trial if the defendant is not prejudiced thereby.<sup>15</sup>

The federal courts have adhered to the common law rule, apparently treating it as codified by the Fifth Amendment, and as precluding amendment of indictment during the trial.<sup>16</sup> Rule 7(e) of the Federal Rules of Criminal Procedure permits amendment of informations,<sup>17</sup> but, significantly,

8. *Long v. People*, 135 Ill. 435, 441, 25 N.E. 851, 853 (1890); *People v. Thompson*, 203 Ill. App. 296 (1917) (name of the proper defendant substituted for the wrong name appearing in the information); *Bergstrasser v. People*, 134 Ill. App. 609 (1907) (the court stressing that the public officer by whom the information was presented is always present in court).

9. *People v. Perca*, 181 Ill. App. 666 (1913).

10. *People v. Pokora*, 295 Ill. 442, 129 N.E. 173 (1920).

11. ILL. REV. STAT. c. 7, §11 (1949).

12. *People v. Fensky*, 297 Ill. 440, 130 N.E. 689 (1921) (the legislative intent in enacting this statute was to confine its subject matter to civil cases, leaving unchanged the law as to criminal cases, which allowed amendment of informations).

13. Amendments of form have been held to include the caption of the indictment, the name of the accused, the owner of property, the date of the offense, and the description of the offense or property. *Collins v. People*, 69 Colo. 353, 195 Pac. 525 (1920) (owner of property); *State v. Foxton*, 166 Ia. 181, 200, 147 N.W. 347, 354 (1915) (statute allowing amendment of errors or omissions of form, including description of any person or thing, as long as there is no prejudice to defendant's substantial rights); *Rocco v. State*, 37 Miss. 357, 366 (1859) (descriptive words). Identity of the injured person and the nature or grade of the offense are examples of matters of substance. *Wilburn v. State*, 101 Miss. 392, 58 So. 7 (1912) (offense charged by amended indictment different from original); *Com. v. Adams*, 92 Ky. 134, 17 S.W. 276 (1891) (if amendment of substance allowed, the judge could usurp the function of the grand jury); *People v. Motello*, 157 App. Div. 510, 142 N.Y. Supp. 622 (1913).

14. *State v. Kusel*, 29 Wyo. 287, 304, 213 Pac. 367, 372 (1923) (amendment to add charge of attempt requisite under statute for conviction for robbery, *Collins v. People*, 69 Colo. 353, 195 Pac. 525 (1920); *Sutton v. State*, 54 Ga. App. 349, 188 S.E. 60 (1936)).

15. *State v. Leek*, 85 Utah 531, 536, 39 P. 2d 1091, 1093 (1934) (names of injured persons added); *Potts v. State*, 72 Okl. Cr. 91, 113 P. 2d 839 (1941) (statute providing for amendment of information liberally construed); *People v. Wright*, 26 Cal. App. 2d 197, 79 P. 2d 102 (1938) (language of counts changed).

16. *Ex parte Bain*, 121 U.S. 1 (1886); *Heald v. United States*, 177 F. 2d 781 (10th Cir. 1949); *Carney v. United States*, 163 F. 2d 784, 789 (9th Cir. 1947) (otherwise defendants would be at the mercy of the court); *Edgerton v. United States*, 143 F. 2d 697 (9th Cir. 1944) (change in substance violates the Fifth Amendment, which requires grand jury indictment); *Hartzell v. United States*, 72 F. 2d 569, 586 (8th Cir. 1934); *Dodge v. United States*, 258 Fed. 300, 305 (2nd Cir. 1919).

17. "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." 18 U.S.C.A. §687 (1946).

no provision is made for amending indictments.<sup>18</sup> It has been held, however, that under a Federal statute<sup>19</sup> intended to eliminate the effect of all purely technical defects, an amendment of an indictment in form only<sup>20</sup> is allowable.<sup>21</sup> Such an amendment must be sufficiently definite and certain, and not operate to take the accused by surprise or prejudice his defense in any way.<sup>22</sup> It will be noted that these are not Supreme Court cases, but they may be indicative of a trend which will ultimately be adopted by that court.

Broader power of amendment has been advocated for many reasons, such as simplifying procedure,<sup>23</sup> minimizing delay caused by insubstantial defects,<sup>24</sup> and furthering the ends of justice, by "correcting evil and promoting remedy."<sup>25</sup> A liberal tendency has been displayed by many state courts in construing defects to be in form rather than in substance, so as to permit amendment where amendments of form are authorized by statute.<sup>26</sup> In addition, even though the grand jury system is preserved by most state constitutions,<sup>27</sup> those statutes authorizing amendment of indictments to correspond to the proof,<sup>28</sup> and permitting amendment of indictments both as to form and substance, have been held neither unconstitutional,<sup>29</sup> nor an infringement of the right to be indicted by a grand jury.<sup>30</sup> Any amendment not prejudicial to the rights of the accused may be allowed.<sup>31</sup> Furthermore, as relates to, the Federal Constitution, the

18. The Advisory Committee of Rules of Criminal Procedure said that the rule "continues the existing law that, unlike an indictment, an information may be amended," BENDER, FEDERAL PRACTICE MANUAL 534 (1948), citing *Muncy v. United States*, 289 Fed. 780 (4th Cir. 1923).

19. "No indictment . . . in any . . . court of the United States shall be deemed insufficient, nor shall the trial . . . thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." 18 U.S.C.A. §556 (1911).

20. *Harper v. United States*, 170 Fed. 385, 390 (8th Cir. 1909) (question of form exists where the only defect is that some element of the offense is stated loosely and without technical accuracy).

21. *United States v. Fawcett*, 115 F. 2d 764 (3rd Cir. 1940).

22. *Williams v. United States*, 179 F. 2d 656 (1950) (substitution of name allowed).

23. *Underwood v. State*, 205 Ark. 864, 171 S.W. 2d 304 (1943) (broader amendatory powers would eliminate some of the technical defenses by means of which criminals had often escaped punishment).

24. *State v. Heffelfinger*, 197 Minn. 173, 266 N.W. 751 (1936) (amendment to charge one intent rather than another where the overt acts were the same).

25. *Sullivan v. Com.*, 157 Va. 867, 877, 161 S.E. 297, 300 (1932).

26. *State v. Mullen*, 151 Ia. 392, 397, 131 N.W. 679, 681 (1911); *State v. Tolla*, 72 N.J.L. 515, 62 Atl. 675 (1905) (name of murder victim changed); *Kenney v. State*, 5 R.I. 385 (1858).

27. *E.g.*, ILL. CONST. Art. II, §8: "No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger: *Provided*, that the grand jury may be abolished by law in all cases." This seems to draw a line between misdemeanors and felonies, and it may be noted in this connection that the grand jury requirement in the Federal Constitution is restricted to "capital or otherwise infamous crimes."

28. *Com. v. Liebowitz*, 143 Pa. Super. 75, 17 A. 2d 719 (1941) (real name of the accused substituted for alias he had given when indicted).

29. *State v. Heffelfinger*, 197 Minn. 173, 266 N.W. 751 (1936) (statute should be construed to carry out its purpose to liberalize the power of the court with respect to indictments).

30. *People v. Sims*, 257 Mich. 478, 241 N.W. 247 (1932) (no violation of constitutional provision that accused shall have the right to be informed of the nature of the accusation); *Chrisman v. Superior Court*, 59 Cal. App. 305, 210 Pac. 632 (1922).

31. *People v. Watson*, 307 Mich. 596, 12 N.W. 2d 476 (1944) (failure to allege venue of the offense allowed to be corrected by amendment).

Supreme Court has interpreted the Fourteenth Amendment as not extending the Fifth Amendment to the states in this connection. It has held that neither the due process clause of the Fourteenth Amendment nor any other provision of the Constitution requires a state to commence criminal prosecutions by indictment of a grand jury, and that all that is required is that the accused be informed of the nature and cause of the accusation.<sup>32</sup> The Supreme Court has indicated further that state statutes might authorize amendment of indictments.<sup>33</sup>

There has thus been a marked, but still limited advance in the direction of desirable procedural reform. This advance indicates that the policy of forbidding amendment of indictments during the trial is outmoded.<sup>34</sup> There would seem to be no inherent constitutional difficulties in statutory authorization of any type of amendment, of indictments as well as informations,<sup>35</sup> as long as the defendant would not be prejudiced in facing the amended charge.<sup>36</sup> Since a lack of harmony among the courts has existed in determining just where the line between form and substance should be drawn, this distinction should be discarded, and the court given discretionary power to permit any amendment which would not deprive the accused of any fundamental rights.

A common law decision gave adequate expression to the principle involved by describing a state (Massachusetts) Declaration of Rights as intended "to secure substantial privilege and benefit to the parties criminally charged, not to require particular forms, except where necessary to the purpose of justice and fair dealing towards the accused. . . ."<sup>37</sup> As long as the defendant is fully apprised of the offense and the circumstances, and is not surprised in that the amended indictment charges something entirely new and unexpected, there is no reason for limiting the power of amendment.<sup>38</sup> Technically an amendment of form alters a grand jury finding no less than an amendment of substance. An amendment of substance need not prejudice the defense any more than an amendment of form, nor an amended indictment any more than an amended information. What is important is to assure that the accused gets a fair trial, and if the latter may be assured, then the advantages of removing procedural roadblocks should be paramount. Farsighted courts, in upholding statutes which merely facilitate the pleading in a criminal case,<sup>39</sup> have set the

32. *Hurtado v. Calif.*, 110 U.S. 516 (1883).

33. *Cf. Ex parte Bain*, 121 U.S. 1, 8 (1886).

34. It is even possible to speculate as to whether the delay consequent upon the requirement of returning an entirely new indictment where a defect appears violates the Sixth Amendment, which guarantees to the accused a speedy trial.

35. Although this might lead to a flood of litigation involving statutory interpretation.

36. The question of amendment after verdict presents itself. There is authority to the effect that no amendment will be allowed after the trial. *Sutton v. U. S.*, 157 F. 2d 661, 665 (5th Cir. 1946) (the Sixth Amendment, guaranteeing the accused the right to know the nature and cause of his accusation, would prohibit amendment of pleadings after verdict). But some authorities have sanctioned amendments of indictments after verdict. *Com. v. Syren*, 150 Pa. Super. 32, 27 A. 2d 504 (1942); *State v. Breedlove*, 199 La. 965, 972, 7 So. 2d 221, 223 (1941) (statutory authorization of amendment of indictment at any time during or after trial).

37. *Com. v. Holley*, 69 Mass. 458, 459 (1855) (amendment of an allegation of a former conviction).

38. "The rights of the respondent are properly guarded by that part of the act, permitting [amendment] only in case the court consider the variance not material of the case and the respondent is not prejudiced in his defense . . ." *State v. Casavant*, 64 Vt. 405, 407, 23 Atl. 636 (1892).

39. See *Com. v. Liebowitz*, 143 Pa. Super. 75, 17 A. 2d 719 (1941).