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Editorial: Selling Juries Short

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SELLING JURIES SHORT

MR. CROWE: *That (Dr. W. A. White's record as a psychiatrist) is objected to as incompetent, immaterial, and irrelevant. The one purpose of it will be to lay a foundation for him to testify as an expert on the question of the sanity or insanity of the defendants. On a plea of guilty your honor has no right to go into that question; as soon as it appears, it is your honor's duty to call a jury. I insist that the question of sanity or insanity is a matter under the law for the jury * * * From the moment you hear evidence on insanity everything you do becomes of no effect under the law, and this becomes a mock trial.*—(Chicago Tribune, July 31, 1924.)

There seems to be a growing feeling among many influential members of the legal profession that the "mock trial" feature, men-

tioned by State's Attorney Crowe, is introduced into legal proceedings not when a judge hears insanity testimony but when so technical a question is submitted for decision to an untrained jury. To them the wonder of jury decisions is, as Dr. Johnson said of a horse walking upon its hind feet, not that it performs its duties well but that it performs them at all. From them comes an insistent demand that all trial by jury be abolished in the interest of justice and celerity in handing down decisions.

Recent years have brought considerable qualification of the right of trial by one's peers; even staunch defenders of trial by jury agree with the Ohio Supreme Court which, some few years ago, remarked that although "the state, of course, owes fair and impartial trial and strict compliance with every guarantee provided by constitution or statute," it hardly "owes them the duty of forcing upon them acceptance of all possible rights and privileges in the face of an express desire to waive them." The state of Wisconsin among after commonwealths has adopted into the body of its law this qualification of the right to trial by jury, eliminating quite largely the compulsory factor, a move sanctioned as early as 1641 by the Massachusetts Body of Liberties Act.

This optional provision has, it is true, resulted in a great deal of litigation being argued without benefit of jury. Many attorneys feel that a hearing before a judge will lead to more substantial justice than appeal to a jury, because of a less well developed tendency to the use of sensationalism and emotionalism. (Incidentally, however, it might be remarked that the recent appeal to a Hawaiian jury by Clarence Darrow was no more emotional a plea than his closing remarks to a Chicago judge in a much publicized slaying case some years ago). None the less, jury trial with possibility of waiver at least preserves the privilege of trial by peers to those who believe with the United States Circuit Court of Appeals judge who said, "The jury's prejudices, if they have any, resulting from varied pursuits and environments, counteract each other; but with the single judge having no such counterpoise his bias and prejudice find full and unrestrained expression in his judgments."

A defense of jurymen and jury verdicts could well be developed along the line of its being a policeman on the street corner, whose good is measured less by the number of arrests he makes than by the number of crimes his presence prevents. What can happen when judges and jurists are given undisputed sway is pictured in Senator Beveridge's monumental "Life of John Marshall:" "Persons were hailed before national courts charged with offenses unknown to national statutes and unamed in the Constitution. Nevertheless the national judges held they * * * This was a substantial assumption of powers. In a manner that

were indictable and punishable under the common law of England. touched directly the lives and liberties of the people, the judges became lawgivers as well as law expounders."

Courts in that era went so far as to convict a former American citizen who had become naturalized in France by holding under English doctrine of indelible allegiance no American could expartriate himself. This particular extension of judicial influence was checked by legislative fiat. Other arrogations of power might be found illustrating the advisability of keeping some weapons in reserve to protect the rights of litigants and to safeguard the privileges of attorneys and barristers. The juryman's existence might find the same justification given the career of the United States Senator of whom it was remarked that his value lay not alone in what he had accomplished but in what his presence had prevented.

Certain it is that great caution should attend any further restriction or tampering with the institution which Blackstone called, " * * * the palladium of English liberty, the best criterion for the investigation of the truth of facts that was ever established in any country." For although the passing years may have lessened the importance and narrowed the sphere of jury activity, many today still look to "twelve reasonable men and women" to provide that which Chief Justice John Jay requested in 1792 (case of Georgia v. Brailsford) when he charged the jury, "Go, then, gentlemen, from the bar, without any impression of favor or prejudice for one party or the other, weigh well the merits of the case, and do on this as you ought to do on every occasion equal and impartial justice."

Abolition of trial by jury in the fairly immediate future seems hardly probable; that method of determining issues and questions of fact does not lack eloquent defenders to say as Joseph H. Choate said thirty years ago, "So let me say and again upon the same authority of personal experience and observation that for the determination of the vast majority of questions of fact arising upon a conflict of evidence the united judgment of twelve honest and intelligent laymen properly instructed by a wise and impartial judge who expresses no opinion on the facts is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment on such questions superior virtue or value."

ROBERT W. HANSEN