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Selecting Jurors for Service in the District Courts of the United States†

BY HON. JOHN C. KNOX*

When Judge Symes asked me to be your guest at luncheon today, and conditioned the invitation upon my willingness to make a speech, I found myself in a serious dilemma. I was delighted at the prospect of meeting you; but I recoiled from the idea of writing an address. I about exhausted my capacity for public speaking by what I said at Colorado Springs on Saturday night. However, since you wouldn't give me food unless I barked in return, I stand before you. But, when I decided to speak, I had to select a subject. This is always a hazardous task. A speaker, of course, always desires to please his audience, but in attempting to do so, he subjects himself to dangerous possibilities. Indeed, he often finds himself in much the same position that was occupied by a defendant who came before me some months ago.

It was pleading day, and the list of persons in trouble was exceedingly long. As the morning waned, and noon time approached, the proceedings grew drab and burdensome. I was tired of sending men to jail. And then, much in the manner that a brilliant sun occasionally breaks through a cloudy sky, and illumines all the earth, a deeply complexioned colored man, with a highly intelligent face, was arraigned at the bar. With real interest I awaited word as to the nature of the crime charged against him. The clerk of the court selected an indictment from his file, and turning towards the defendant, said:

"William Atkins, how do you plead to this indictment which charges you with maintaining an unregistered still, 'Guilty or not guilty?'"

The negro's face grew serious as he realized the import of the question and he answered:

"Guilty, with an explanation."

At this, I interposed, and asked:

"What is the explanation?"

In effect, it was, that on the day of defendant's arrest he had paid a social call upon an acquaintance who lived on the top floor of a Harlem flat. The host took Atkins into the kitchen where a still was in operation, and with true hospitality, gave the defendant a draft of his own distillation. This was followed by another, and then a third. In the course of half an hour the heat of the kitchen, combined with the pleasant glow that suffused the frame of the defendant, made him drowsy, and he fell asleep. All good times, you know, must come to an

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end, and so did that of Atkins. Being aroused by loud knocking upon the door of the apartment, he managed to orient himself to his surroundings, and answered the rapping. Being commanded to open the door, Atkins complied. He found two operatives of the alcohol tax unit, who, forcing their way into the apartment, discovered the sputtering still, several barrels of mash, a quantity of sugar, and a hundred gallons of alcohol. Inconsiderately, they placed Atkins under arrest. Such, gentlemen, was the train of circumstances through which the defendant journeyed from a Harlem flat to the marble walled room in which I sat dispensing a quality of man-made justice.

Upon hearing this explanation of Atkins' difficulty, I informed him that if he had given me a true version of the facts, he was not guilty of the crime charged against him, and should go to trial. At this the defendant observed:

"Deed, yo' onor, I ain't got no lawyer, and Ah don't think Ah wants a trial."

Informing him that I should be glad to assign counsel to present his defense, I was told:

"Thank yo' onor, thank yo'! Ah 'preciate yo' kindness, but Ah's heard these here lawyers that don't cost nothing ain't much good."

Thereupon, I promised I would give him a man of adequate skill and ability. Atkins continued to demur and said, seductively:

"Ah think I'd rather take my chance with yo' onor."

"But," said I, "on your statement I can't sentence you, and you'll have to have a trial."

Again I was told the defendant did not wish twelve of his peers to pass upon his guilt or innocence. I then became a bit peremptory and remarked:

"Well, make up your mind; are you guilty or not guilty?"

Atkins shook his head sorrowfully and said:

"Oh, yo' onor, that's such a hard question—Ah don't know what answer will do me the most good."

And, like unto William Atkins, I was at a loss to say what topic should be chosen for discussion today.

I would still be at a loss for a subject were it not that at the judicial conference, a couple of weeks ago, I was told that I should undertake a campaign to bring about the enactment of two bills now pending in the Congress, and which are designed to create a uniform method of selecting jurors for service in the district courts of the United States.

Such a topic, after the excellent repast that I have just enjoyed, is a rather heavy dessert. Nevertheless, it is of prime importance to those of us who hold court in the more populous sections of the country. And, since you have been showing me such courtesy and cordiality, I

feel that I may make bold to tell you something of what the judicial conference has in mind.

You will readily concede, I imagine, that the jury system is one of the really great achievements of English and American jurisprudence. To my mind, it is an institution that, under no circumstances, should be impaired or frittered away. On the contrary, its integrity should be maintained, and its operation improved.

If courts, in cases at law, are to accomplish justice, they must have the aid of jurors who believe in America, who are honest and upright, and who bring to their tasks the intelligence, sound judgment, and courage that will enable them rightly to decide intricate questions of fact, and to do so without fear or favor.

The public generally, and you, as practicing lawyers, properly expect that somehow, and from some source, the courts will find jurors who are so equipped. But where, I inquire, are high intelligence, sound judgment, and wide experience to be found when men, some of whom may be your clients, flee from jury service as though it were the wrath of God?

Even in ordinary times the selection of persons to man the jury boxes of my court is a difficult task. Under existing circumstances, the job is doubly hard. To the end that you may appreciate some of the problems that daily confront the jury commissioners in the Southern District of New York, I wish to mention a few of the obstacles that lie in the pathway of their work. In that district alone:

(1) Thousands upon thousands of potential jurors are in the armed services of the nation;

(2) Thousands upon thousands more are engaged in war work of an essential nature;

(3) Stores and business houses are undermanned and their proprietors—with might and main—plead that their employees be relieved from jury service;

(4) Thousands upon thousands of persons who would make good jurors, and who ought to be made to serve, are exempt from service; and finally,

(5) When jurors' compensation is limited to four dollars per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship.

With respect to the item last mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited men should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement, I am in full accord, but it does not solve the difficulty that confronts metropoli-

tan courts. Adequate provisions for one's family is the first consideration of most men. And, if, with this thought predominant in the minds of potential jurors, the performance of public service means the default of an insurance premium, the sacrifice of a suit of clothes, or the loss of one's job, the service to be rendered by a juror who faces any one of these possibilities, is something that is not to be desired. In other words, few persons who have a grievance against the government, or who are dissatisfied with conditions that expose them to self-denial, are likely to have the spiritual contentment and mental detachment that are essential and requisite to competent jury service. Jury duty frequently involves sacrifice; sometimes it means the loss of a job that a man has held for years. That this result occasionally comes about is well within my personal knowledge. Confronted with reports of situations such as I have outlined, the judicial conference, that was held in Washington in September of 1941, decided that a survey of the operation of the jury systems in the national trial courts should be undertaken. To that end, the chief justice appointed a committee of five district judges. The men so chosen were Judge Neblett of New Mexico, Judge Lindley of Illinois, Judge Watkins of West Virginia, Judge Proctor of the District of Columbia, and myself. I chance to be designated as chairman of the committee. You are not interested, I assume, in the methods pursued in acquiring the information that was sought. Accordingly, I shall not bore you with procedural details. You may, nevertheless, be willing to hear some of the matters that came to our attention, and to listen to what we have recommended. First, let me speak of the matter of exemptions.

As you know, the qualifications of jurors who serve in a United States district court are regulated by the statutes of the state within which a particular federal court sits. Many of these statutes are antiquated, and as variable as a weather vane upon a blustery day in March. For instance, accountants and actuaries are relieved from jury service in Alabama and Florida; chiropodists in California, Missouri and Rhode Island; Christian Scientists in California and Oregon; funeral directors in New Mexico and North Carolina; professional gamblers in Colorado and Mississippi; linotype operators in North Carolina; millers in Florida, Georgia, Minnesota and a half dozen other states; pharmacists or druggists, or both, in thirty-six states; persons residing more than sixty miles from the place of holding court, and who pay twenty-five dollars in Nevada; any number of railroad employees in various states; osteopaths in Iowa, Mississippi and a number of other jurisdictions; veterinarians in six states; and Seventh Day Adventists in Colorado and Kansas.

Gentlemen, I have just begun to call the roll of those who, in one or more states, need never serve upon a jury. Others who may claim

exemption include doctors, lawyers, commercial travelers, express agents, ministers, optometrists, printers, teachers, professors, telephone and telegraph officials and operatives, newspaper employees, members of the national guard, firemen, policemen, city, state and county officials, and in some states where women are qualified as jurors, they need not do so if such is their desire.

Add to these exempt persons those who live at long distances from the places of holding court, and who are never asked to serve. When you have done all this, I ask you to remember that nowhere is a person competent to serve who has not reached the age of twenty-one years. Indeed, in some states, a man must be twenty-five years of age before he is eligible for jury service, while, in a number of jurisdictions, any one who has reached the age of sixty years may claim exemption. In other states, the age at which persons are exempt runs from sixty-five to seventy years of age. When you have totaled the persons who are thus exempt from jury service throughout the United States, I ask you to add to the sum, those who fall within these categories:

- (1) Persons who have been convicted of crimes involving moral turpitude;
- (2) Those who are physically and mentally unable to serve; and
- (3) Those who are illiterate, or ill, or who are absent from the district when called upon to do jury duty.

If you do what I suggest, you will at least appreciate two things—the first is, that the reservoirs from which jurors may be drawn are not nearly as deep as you previously thought; and secondly, that millions of persons, possessing the best and most intelligent brains in all the land are relieved, by law, of the necessity of lending aid to the courts in their search for justice.

Notwithstanding these restraints upon the courts in their efforts to secure competent and suitable persons, I am told, from time to time, that the selection of jurors should be a democratic process, and that persons who serve in the United States District Court for the Southern District of New York are hand-picked. If this be a valid indictment of my conduct, I cannot do otherwise than admit my guilt. Nevertheless, unless restrained by an authority that I cannot resist, jurors in my district will continue to be hand-picked. Let me tell you this—in principle, I am a Democrat. At the same time, I hope that I am neither a fool nor a knave, and I have had a modicum of experience in our trial courts. This experience has taught me that practicality and actuality are matters that play important parts in judicial administration.

If, in making up our jury lists, my court were to follow suggestions that have been made to me, the result would be that our panels would be filled, not only with the halt, the lame and the blind, but also with the venal and corrupt. For example, men whom I respect,

have said that jurors should not be selected, but should, willy-nilly, be taken from the voting registers. That suggestion was given a try, and with this result—in some sections of the city, more than twenty per cent of the persons so summoned were found to be non-residents of the buildings from which they were registered. A further percentage of large dimension was found to be made up of men who could neither speak nor understand the English language. Still others, while honest and upright, were proprietors of one-man business enterprises, and to whom jury service would mean ruination. This experiment to bring suitable jurors into the court proved to be both unwise and inexpedient. I had the thought that lawyers in New York, in the trial of their cases, did not really want election day floaters, habitues of district clubhouses, and the illiterate to serve as jurors in cases they were to try.

In our survey of the congested centers—and even in some of the rural areas—it was found that somewhat comparable conditions prevailed. Discrimination existed in some localities. This related to social, political and sexual differences, and my committee was forced to the conclusion that jurors cannot be chosen haphazardly in any section of the country, and that the intelligent selection of jurors for service in the courts of the United States was a necessity.

And, upon the basis of principle and common sense, I should like to inquire:

Why should we not select the juror who is to say whether or not your client is to go to jail, or who is to declare if he shall be separated from the savings of a lifetime, or who is to determine if an injured man is to go without redress? Answering my own question, it seems to me clear that jurors who are to function in any such instance should be selected, and be selected with the utmost care. At every election, you and I, as responsible members of the community, argue, debate and consider the qualifications of the men and women who offer themselves for elective offices. Even now, due to a New York political occurrence of last November, the people of that state are seriously considering if they shall change the method whereby candidates for the judiciary shall be nominated. Well, in my opinion, an intelligent and upright juror, in the decision of a lawsuit, is quite as important, if not more so, as the judge who presides at the trial in which the juror sits. I ask again, under such circumstances, why should not the juror as well as the judge be chosen and selected by competent and discriminating authority? And yet, there are court decisions to the effect that the qualification of a person to serve as a juror should not be determined until he or she is called into the box, and there subjected to a *voir dire* examination. Without further discussion of the fundamentals of what is reasonably required, I should like to state the gist of the recommendations of my committee. They are these:

(1) In order that grand and petit jurors who serve in United States district courts may be so drawn as to be truly representative of the community, the sources from which they are selected should include all economic and social groups. From whatever sources drawn, those chosen should possess as high a degree of intelligence, morality, integrity and common sense as can be found by those who make the selection.

(2) The choice of specific sources from which names of prospective jurors are selected must be entrusted to the good faith of the clerk and jury commissioner, acting under the direction of the district judge, but should be controlled by the following considerations:

(a) The sources should be so coordinated as together to include all groups in the community; (b) economic and social status, including race and color, should be considered only to the extent necessary to assure that there is no discrimination on account of them; (c) when women are eligible by law for jury service, they should be selected and called to serve in the federal courts; (d) political affiliations should be ignored; (e) unsolicited requests of persons who seek to have their names placed upon jury lists and unsolicited recommendations of names should not be encouraged; and (f) in determining the parts of the districts from which jurors are to be drawn, the courts should bear in mind the desirability of conserving the time of jurors and preventing exorbitant travel expense to the Government.

Each of these items is worth discussion inasmuch as there is much disputation and literature concerning them. I wish only to mention that, due to the agitation of certain persons in New York City, a bill has been introduced into Congress that jurors shall be drawn from all portions of a particular district. My district comprises eleven counties reaching from the Battery to Albany County. In each month of the year, the court, in which I sit, utilizes the services of from 800 to 1,000 jurors. Suppose that twenty per cent of them be called from so far up-state that they cannot commute between their homes and New York City. Their compensation would be four dollars per day, plus mileage. Suppose I take an agriculturist from his farm in one of the rural counties. While in New York he must eat and have a place to sleep. And where can he do that respectably upon the stipend that the government pays him? Meanwhile, during his absence from home, he must hire a man to milk his cows, and feed his stock. That man's pay, in all reasonable probability, will be as large, if not more, than the pay received by the juror. When, after a week of this experience, let us suppose the juror is called into a case in which the client of a good lawyer is a litigant. Certain it is that the lawyer, knowing the circumstances, would not want that juror to serve. In his mind, he will believe that the juror will probably charge his client with responsibility for his predicament. If called in a criminal case wherein a defendant was charged with fraud

against the government, the juror would feel, possibly, that being himself a victim of the United States Government, there was no reason why he should feel antipathy towards some one who had victimized the United States. To state the matter differently—that juror would be a disgruntled and vengeful man, entirely ready to vent his spleen upon any one who added to his anger and resentment. For this reason, my committee has disapproved the proposed legislation to which I have referred. This is but an instance in which the practicality of a situation should overrule the theoretical desirability of what a number of well intentioned, but misguided men, have proposed.

My committee, also, believing that state statutes are unduly restrictive of the action of federal courts in drawing and selecting jurors, has proposed that state statutes requiring that federal courts observe the qualifications and exemptions prescribed for jurors in the state courts, should be nullified by congressional enactments. It is our thought that a uniform standard should be adopted for all federal jurors. It should provide for liberal qualifications and few exemptions, leaving to the district judges a large degree of discretion in determining whether or not certain individuals or classes of persons should be subject to jury service.

The proper exercise of this discretion would make it possible for certain classes of war workers to be excused from jury service during the period of the present emergency; persons who are now exempt from service should be called for duty; and under the proposed legislation, persons beyond the age of seventy years, if found to be hale and hearty, would be eligible for jury service. Women, also, contrary to the provisions of our state statutes, could not claim exemption on the ground of sex, and, in the absence of good reason shown, would be required to render jury service. And, in this connection, I should like to observe that, in my judgment, the jury work of properly selected women is quite as satisfactory as that which is rendered by the masculine portion of the human race.

But, whether prospective jurors be men or women, it is the thought of our committee, that the names of none of them should go into a jury wheel until the jury commissioner of the court has received and given consideration to a questionnaire setting forth their personal histories and backgrounds. Whenever possible, we also believe that each prospective juror, before being permitted to serve, should be personally interviewed by a member of the jury commission for the purpose of determining his or her qualifications as a juror. We have also proposed that when a juror is required to attend court thirty or more days in hearing a single case, he may be paid, in the discretion and upon the certification of the trial judge, a per diem up to and not exceeding ten dollars for each and every day in excess of thirty days he is required to hear such case. By

this measure, if it be enacted, we hope to relieve some of the hardship to which jurors who are called to serve in protracted cases, are now customarily subjected. As matters now stand, it is often difficult to secure jurors in cases that will last over a period of weeks. Many jurors, at the present rate of compensation, simply cannot afford to neglect their business and personal affairs for a substantial length of time, and by what we have proposed, we hope to furnish such persons with this measure of relief. Furthermore, if persons residing considerable distances from the place of holding court are summoned for service, and it is impracticable for them to make daily trips between their homes and the court, they will be allowed, in addition to their per diem pay, a subsistence allowance of two dollars per day. This, in effect, will increase the area from which jurors are now drawn, and will tend to silence the criticism that too many persons are selected from the immediate vicinity of the courthouse.

One reform we have already accomplished is this: As many of you are aware, and until a few months ago, there was no statutory provision by which the government, in a case between private litigants, could pay for the subsistence of a jury once it has been charged, and had retired for its deliberations. If meal time came, and no verdict had been reached, it was literally necessary for the clerk to pass his hat among the attorneys for the parties in order to collect the wherewithal to feed the jurors. This procedure was not only undignified and humiliating, but actually scandalous. Under legislation now in force, the cost of necessary subsistence, upon order of the court, will be paid by the United States marshal, and thereafter, in the discretion of the judge, the outlay can be taxed as costs.

Another innovation that the committee has put into effect, and one which has aroused bitter opposition upon the part of some persons, including district judges, is the distribution to jurors of a handbook or manual of instructions. In these days, as you can well imagine, there is a rapid turnover in the personnel of our jury lists. At each term of court, many persons who never before were acquainted with jury work are called for service. As a means of aiding them, and for the purpose of reminding persons who have previously served as jurors of their obligation and responsibilities, we have recommended that the judge who presides at the impaneling of a jury should make it a regular practice to deliver general and carefully prepared oral charges to all jurors when they report for service. This is supplemented by a printed pamphlet, stating in simple and general terms, the functions of the petit jury in civil and criminal cases, and which is furnished each juror. Such pamphlet was prepared, and at my request, Mr. Chief Justice Stone wrote its foreword. In part, he says:

"This handbook describes in language readily understood the functions of the jury man in the federal courts. Every prospective juror should read and reflect upon its advice and resolve by following it, to make his own contribution to the better administration of justice. Many will, I believe, be surprised and gratified to learn that that contribution can be far greater than they had supposed."

What the Chief Justice has suggested may thus come about is precisely what the committee wishes to accomplish by use of the handbook. Some judges, however, seem to believe that my committee is another New Deal bureaucracy, and is attempting to tell them how to run their courts. Nothing, of course, could be farther from the fact, and the handbook has been and will be distributed to such courts as wish to use it. Such judges as think the manual is tomfoolery and a waste of public funds are not compelled to use it, and they may, if they so desire, pooh-pooh this desire of the committee to emphasize the importance of jury service, and to add dignity and a sense of responsibility to its performance. Such manuals have been successfully employed in several state jurisdictions and are now meeting with favorable comment in many district courts, and producing beneficial results.

In order to increase the number of persons who will be available for jury work, our proposed legislation limits exemptions and disqualifications to six classes, as follows:

- (1) Persons who have been convicted of felonies and certain types of misdemeanors;
- (2) Persons unable to read, write, speak or understand English;
- (3) Persons who are mentally or physically infirm;
- (4) Persons who have served on juries within one year;
- (5) Public officials whose duties demand their full time and attention; and
- (6) Persons who are on active duty in the armed forces of the United States.

Should these bills become law, they will serve to bring the best brains of the community—brains that are now devoted exclusively to private enterprise—into the jury boxes of the district court; and this we believe will be advantageous, not only to your clients, but to the public as well.

We are altogether conscious of the fact that juries that serve in the federal courts are but a small fraction of the number that function in the state tribunals, and such changes in the national law as may be made, will not directly affect the caliber of the men and women who serve in the local courts. Nevertheless, it is quite likely that any improvement in the quality of jurors who serve in the United States courts will sooner or later be reflected in the type of persons who are called for duty in the state courts.

For my part, I feel firmly that under existing conditions, the jury system is basically sound, and on the whole reasonably successful. By this I mean, that even now, few juries fail to reach fairly correct verdicts. Jurors, however, are essentially human. They have their prejudices, preconceptions and antipathies—racial, religious and political. While not always controlling in a particular lawsuit, these considerations do sometimes affect a verdict, and this should, of course, be reduced to a minimum. We hope by the procedure that has been suggested these may, in part, be accomplished.

We shall, of course, never have perfect juries. But any plan that will improve the quality of our juries, is worth a try, and if we are permitted to call upon a greater percentage of the population that is fitted by education, intelligence and appreciation of our way of life, we may, perhaps, bring about a better brand of justice than that which we now know.

A Lawyer In Court†

BY KENNETH W. ROBINSON*

The nicest part about giving a talk so far as the speaker is concerned, is the pleasure of listening to his introduction, and hoping that the introducer will say tremendously flattering things about him. Of course, any speaker knows that they aren't true, and down in his heart he knows that the audience knows they aren't true, but still, the sensation must be somewhat comparable to that of a corpse if he could listen to the nice things said about him in the funeral sermon.

Undoubtedly most lawyers approach the trial of a case, particularly to a jury, with the same sensations—a sinking feeling in the pit of the stomach, and an assertion, which we really don't mean, that God deliver us from ever trying another case; yet, once the trial is started we undoubtedly feel that of all the phases of the practice of the law, it is one of the most stimulating, exciting and interesting.

There is no need in saying to a group of lawyers that which they all know, that behind the trial of every case there must be painstaking preparation—the interviewing of witnesses; their careful selection; the preparation of an adequate trial brief; the taking of depositions of your opponent's client in advance so as to know the full story he will tell in the courtroom. These things, I submit, we all realize are tremendously important. Furthermore, so far as our office is concerned, were it not for the work done in this connection by my partners, Philip Van Cise and my father, and by Albert Frantz and Robert Swanson, I

†An address before the Denver Bar Association, November 6, 1944.

*Of the Denver Bar.