

REPORT
OF THE
COMMITTEE ON JURISPRUDENCE AND LAW REFORM
ON
FORMS OF VERDICTS IN CRIMINAL PROCEEDINGS.

To the American Bar Association :

Your Committee on Jurisprudence and Law Reform, to which was referred the preamble and resolution with reference to changes in criminal procedure offered at the last meeting of the Association by Egbert Whittaker, of New York, respectfully submit the following report :

The first suggestion to be considered is that we should engraft upon our jury system the Scotch verdict of *not proven*, and also, as we understand from the remarks of the mover, at Chicago, a positive verdict to the effect that innocence was established.

It seems to your committee that more would be lost than gained by such innovations.

The right to a verdict of *not proven* might induce a jury to acquit many whom they could hardly, on their oaths, be brought to say were not guilty, and, on the other hand, it might sometimes leave a stain upon the character of a man who was clearly innocent. It is true that in many, perhaps in most, cases of acquittal the accused really gets off from lack of proof, which is legally or formally sufficient. But the rules of evidence are part of the price we pay for liberty. If the State goes to trial, and then, with all its power, fails for any reason to make good its charge, we think a verdict of *not guilty* is none too much of a reparation.

And as to any positive verdict of "proved innocent," we cannot but think it as foreign to the American theory of evidence as it is to our precedents of pleading. A large part of the governments of the world proceed in criminal cases from the outset on the practical assumption that the accused is guilty. We make the contrary assumption. We ask him for no admissions. We allow him to testify in his own behalf, if he chooses, and, should he decline, we draw no presumptions from his silence. We refuse to convict on a mere preponderance of evidence. The State enters the contest with the odds against it, and the only question must be whether it has proved its accusation, not whether the defendant has proved his innocence.

It is also suggested in the resolution that we should modify our forms of verdicts in other respects, so as to make them express more fully the real conclusions of the jury as to the facts in issue.

An illustration of such a modification is given by the Continental practice of verdicts with special findings as to circumstances of aggravation or extenuation. But should we adopt it, convenience would require us also to adopt their procedure as to formulating statements of such circumstances for the consideration of the jury, either in the indictment or information, or by the court on the trial. This would result, on the whole, in increasing the power of the prosecuting attorney and the trial judge at the expense of the jury, and, however appropriate in countries where there is a wide difference in intelligence and education between the jurors and the officers of the court, we believe it unsuited to the conditions of American society.

During the last ten years France has become so much dissatisfied with the ascendancy of the trial judge over the juries that she has forbidden him in his charge to make any comments whatever on the evidence in the case.*

* By the law of June 19, 1881, repealing in part Art. 336 of the Code of Criminal Procedure, in accordance with a report made in 1880 to the Chamber of Deputies by a special commission.

The existence of circumstances of palliation or aggravation might also often be established to the satisfaction of a majority of the jury, but not of all, while all might agree on the main point of the conviction. Their consideration would introduce complexity into their deliberations, and tend to a certain degree to confuse the issue.

It seems to your committee the safer course is to leave the circumstances of the case to have their effect on the mind of the judge in determining the extent of punishment, without requiring or permitting the jury to pass upon them, except as they necessarily must in coming to their verdict. Not improbably, the practice in Europe in this respect would more nearly resemble ours were it not that there the judge often has something of the functions of a prosecutor.

The addition to a verdict of *guilty* of a recommendation to mercy is not unfamiliar to American practice, and if warranted by the evidence, in the opinion of the court, gives all the substantial benefit of a verdict of extenuating circumstances without its inconveniences.

The resolution also asks us to inquire whether the State ought not to indemnify those acquitted, upon a criminal prosecution, by some allowance for the expenses of their defence.

Even in civil cases, between private parties, we seldom give a successful defendant costs enough to make him good. Should we do so, the possible expenses incident to the defence would deter many from appealing to the courts when they had just cause, and in so far tend to bring back the rude days of private revenge and "taking the law into one's own hands."

So, in public prosecutions, the officers of the State, who seldom knowingly bring unwarranted accusations, and in matters of grave importance cannot move at all without the sanction of the grand jury, might often hesitate to commence proceedings, which were fully justifiable, if failure meant a heavier loss to the public treasury than the outlays necessarily incident to the maintenance of the action. The tendency of committing magistrates to hold for trial, in prosecutions where the costs of

the prosecution, in case of a discharge, fall on the town or county which elects the magistrate, and in case of a binding over, and subsequent acquittal in the higher court, on the State, is well known. If costs were given to the successful defendant against the State, a vigilant prosecuting attorney might well dread the outcry which would be made by his political opponents against the wastefulness of his administration, and be tempted to prosecute none but sure cases, or to delay the issue of a warrant of arrest until the evidence was prepared and the criminal had escaped.

We may add that, as we have already said, under the American system acquittals are more often due to lack of proof than to absence of guilt, and that the discharge of the accused in most cases leaves him nothing to complain of.

Your committee are therefore of opinion that it is inexpedient for this Association to recommend for adoption any of the changes proposed for consideration in the resolution in question.

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Committee.

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