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COMMENTS

THE FEDERAL TRIAL COURT AND THE JURY CHARGE

What is the function of the modern jury in the trials of criminal cases in Federal Courts? If it is concluded that the jury is the trier of fact, [1] and not the trier of law, [2] what constitutes an invasion by the Court of this function?

By the twelfth century, the jury system had been fairly well established in the field of Civil law. [3] It was not until the early thirteenth century that it became a part of the Criminal proceedure. [4] By 1215, the accused, on request, was granted a jury trial in almost every instance. The members of the original jury were neighbors of the accused, and were brought into the case to aid the court to determine the facts, and to enable it to gain a more comprehensive knowledge of the issues. [5] With the growth of population, however, there came an increasing unfamiliarity of the people with the facts of the case, even though a neighbor was involved in one way or another with the case. The personal interests of the jurors diminished accordingly, and the jury developed into a special body for the determination of facts from the evidence, either oral or written, submitted by the parties to the suit. Evidence, unknown and unheard before, was substituted for the personal knowledge of the jurors.

It evolved upon the jury to determine all issues of fact, while it remained with the judge to determine all issues of law. "Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores." This was a favorite saying of Lord Coke, in distinguishing the respective fields of judge and jury. His reference to this has resulted in his being credited with the belief that it represented a limitation on the judges "as wide and full and exact as that upon the jury. He sometimes gets quoted in this country for a doctrine that would have much amazed him or any other English judge from the beginning down, namely for the notion that the court, at common law, has no right to indicate to the jury its own views of the facts." [6]

Many of our courts and legislatures have no doubt been influenced by this

1. State v. Gebhard, 73 N.D. 206, 13 N.W. 2d 290 (1944); Davis v. Commonwealth, 271 Ky.180, 111 S.W. 2d 640 (1937); State v. Danser, 116 N.J.L. 487, 184 A. 800 (1936); Holt v. United States, 45 F. 2d 392 (7th Cir. 1930).
2. Morton v. United States, 147 F. 2d 28 (D.C. Cir. 1945); People v. Simos, 345 Ill. 226, 178 N.E. 188 (1931); State v. Wright, 53 Me. 328 (1865).
3. Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 61, (1898).
4. Plucknett, A Concise History of the Common Law, p. 120 (4th ed. 1948).
5. 1 Reeves, History of English Law, p. cxxvii, f.2 (New Am. ed. 1880).
6. Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 188, (1898).

misconception of Coke's doctrine. [7] While the right of the judge to comment on the evidence has been abridged by some of the states, [8] the Federal Courts have always adhered to the common law doctrine on the subject. [9] This practice has been affirmed and reaffirmed by the Supreme Court of the United States, so that no doubt exists as to its validity. [10]

Too many trial court judges, using expediency as their by-word, take advantage of their rights to comment on the evidence to the extent that they work a usurpation of the province of the jury and leave little or nothing for the jury to decide. That a person indicted for a criminal offense has a right to a trial by jury, in the Federal Courts of the United States, at least, is both a guarantee of the Federal Constitution [11] and a tradition.

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court, and the consent of the government." [12]

Clearly it is within the province of the defendant to waive his right to a trial by jury. By ignoring the provision for waiver of a trial by jury, he signifies his desire to let twelve laymen, rather than one jurist, determine his guilt or innocence. What good is this desire if the court can lead the jury to a conclusion it might not have otherwise reached? The abuse by the court of its right to comment on the evidence results in a deprivation of the constitutional right of the defendant. It results in a conversion of a trial by jury into a trial by court.

More often than not, the instructions given by the judge to the jury give rise to this problem. The judge can "take the case from the jury" in two ways: (1) by giving a direct charge, coercive in nature, to the extent that the jury is almost ordered to bring in a verdict of guilty, and (2) by failing to give the jury sufficient instructions, leading it to believe that there is no alternative to a verdict of guilty.

Some of the following cases illustrate both extremes. There are, of course, cases that fall between these two extremes, which also work a denial of the rights of the defendant, and result in an invasion of the province of the jury.

The first case under consideration is the case of Murdock v. United States. [13] The defendant pleaded not guilty to a charge of refusal to testify to tax deductions, where he was suspected of tax evasion. He offered no evidence in his own behalf. In its instructions to the jury the trial court said:

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7. Duffy v. People, 26 Smith 588 (N.Y. 1863); Commonwealth v. Porter, 10 Met. 263 (Mass. 1845); Pierce v. State, 13 N.H. 536 (1843).
8. State v. Deas, 202 S.C. 9, 23 S.E. 2d 820 (1943); Vaughn v. State, 215 Ind. 142, 19 N.E. 2d 239 (1939).
9. United States v. Bob, 106 F. 2d 37 (2nd Cir. 1939), cert. denied 308 U.S. 589 (1939); Ryan v. United States, 99 F. 2d 864 (8th Cir. 1938), cert. denied 306 U.S. 635 (1939); Hargreaves v. United States, 75 F. 2d 68 (9th Cir. 1935), cert. denied 295 U.S. 759 (1935).
10. Quercia v. United States, 289 U.S. 466 (1933) reversing 62 F. 2d. 746 (1st Cir. 1933), cert. granted 289 U.S. 715 (1933); Zottarelli v. United States, 20 F. 2d 795 (6th Cir. 1927), cert denied 275 U.S. 571 (1927).
11. U.S. Const. Amend. VI.
12. Fed. R. Crim. P. 23 (a)
13. 290 U.S. 389, 393 (1933).

> "The court feels from the evidence in this case that the Government has sustained the burden cast upon it by law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

The Supreme Court of the United States held that it was reversible error to give a charge of this nature.

This is the most obvious attempt of the court to take the case from the jury by means of the coercive-type instruction. Through such an instruction, the court has effectively precluded the jury from bringing in any verdict other than guilty.

The recent case of Billeci v. United States [14] involved a charge less direct in its effect than the charge given in the Murdock case, supra. The charge given by the trial court was, in part, the same as that given in the case of Horning v. District of Columbia. [15] The charge given was:

> "In a criminal case the court cannot peremptorily instruct the jury to find the defendant guilty. If the law permitted it, I would do so in this case...a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors."

The United States Court of Appeals for the District of Columbia, in distinguishing this case from the Horning case, supra, in which the facts were uncontroverted, declared:

> "In a case in which all the evidence is given by witnesses presented by the Government but the defense does not concede that the essential evidence is true, a trial judge has no more right (to give a charge of this nature) than he would have to say it in a case in which contradictory evidence is affirmatively offered by the defendant."

Although not as direct as the charge given in the Murdock case, supra, the effect of this charge was no less prejudicial to the rights of the defendant.

Stretching to the breaking-point his right to comment on the evidence, the trial court in the case of Breese v. United States, [16] after stating that in its opinion the defendant was guilty, and that it was their duty to say so, added:

> "...I say to you again, gentlemen, that any opinion expressed by the court you are not bound by. That is the court's opinion, not the jury's opinion."

In remanding the case for a new trial, the Circuit Court of Appeals, Fourth Circuit held:

> "Inasmuch as the strong opinion expressed by the judge below in his charge to the jury...was calculated to mislead the jury, who

14. 184 F. 2d 394, 400, 401 (D.C. Cir. 1950).
15. 254 U.S. 135 (1920).
16. 108 Fed. 804, 805 (4th Cir. 1901).

perhaps construed this language as a direction on the part of the court, we think it would be proper to grant a new trial."

Even though couching his opinion with the admonition that it was merely an opinion, and not binding on the jury, the court's statement was as much an invasion of the province of the jury as the coercive-type charges previously reviewed. The words are obviously less strong than those used in the aforementioned cases, but, unfortunately, the harm done was no less.

A case that falls between the two extremes of "saying too much" and "saying too little" is the case of Konda v. United States.[17] On an indictment for sending obscene literature through the mails, the trial court charged the jury as follows:

> "I charge you as a matter of law that the document is non-mailable, that it was forbidden by the laws of the United States, that it had no place in the mails, and that you will not consider the question, in arriving at your verdict in this case, whether or not it was non-mailable."

The Circuit Court of Appeals, Seventh Circuit, in reversing the conviction, said:

> "...Material allegations are allegations of fact. And each, as much as any other, enters into a verdict of guilty. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty."

This charge was neither a direct nor an indirect charge that the jury should bring in a verdict of guilty, nor was it a statement of opinion of the guilt of the defendant. It is one step removed from the type of charge already examined. The trial court merely removed from the consideration of the jury one material allegation of fact. The jury is sworn to decide whether or not the evidence sustains each and every material allegation of fact. If the jury is the finder of fact, it is the finder of all facts, not merely those which the court wishes to surrender to its consideration.

Even the attitude of the court can usurp the function of the jury, as is evidenced in the case of Smith v. United States.[18] It was the exaggerated importance attached by the court to the act of the defendant that deprived him of a jury determination of his guilt or innocence. The words of the court were:

> "If I may be allowed to express an opinion on that subject, I think it is one of the most important cases that I have ever heard -- not because the punishment for simple assault provided by the statute is as severe as it is in many other cases that are tried here, but because the claim of the Government is that this man, the defendant, committed the assault upon Mr. Dempsey when he knew he was there in the performance of a public duty, and for that reason it is entitled to the gravest and most careful consideration at your hands. If the time has come when officers cannot serve process of the United States, then it is a sad time."

17. 166 Fed. 91, 92, 93 (7th Cir. 1908).
18. 2 F. 2d 919, 920, 921 (D.C. Cir. 1924).

The court made an action of simple assault sound like a charge of treason, merely because the prosecuting witness was a United States Marshal. It attached an importance to the case not called for by the indictment. His general attitude, as well as his words, gave the jury the impression that the defendant was guilty of a capital crime. In ruling on the erroneous nature of the charge, the Court of Appeals for the District of Columbia declared:

> "The words clearly indicated to the jury, not only the court's views as to the weight of the evidence, but as to the duty of the jury to reach the same conclusion."

In the cases of McAffee v. United States [19] and Williams v. United States [20] the extreme opposite to that discussed in the Murdock and Billeci cases, supra, is reached. In the McAffee case, the defendant was indicted for murder. In its instructions to the jury, the court correctly defined and differentiated the varying degrees of murder and manslaughter of which the defendant could be found guilty. It failed, however, to appraise the jury of the burden of the Government to prove its case beyond a reasonable doubt. The Court of Appeals for the District of Columbia, in reversing and remanding, pointed out:

> "...It should be orthodox practice somewhere in the instructions to tell the jury once in precise terms that a not guilty verdict is necessary in the event of failure by the Government to prove each of the elements of some offense beyond a reasonable doubt."

In the Williams case, the defendant was indicted for rape. In his instructions to the jury, the court failed to distinguish between the crime of rape and the crimes of assault with intent to rape, and simple assault. His failure to define the constituent elements of the crime of rape precluded the jury from finding the defendant guilty of a crime less serious than the one for which he was indicted. If the jury concluded that the defendant was guilty of something, they would be unable to return a verdict of guilty of anything less than rape. On appeal the case was reversed, the court saying:

> "To insist that a jury be told what rape is, and, when circumstances require, what the included offenses are, in the eyes of the law, is not to demand meaningless ritual...We merely insist that the judgment of the jury be informed and be made under the safeguards of correct proceedure."

In these two cases, it wasn't so much what the court said as what it failed to say, that resulted in an invasion of the province of the jury. In the McAffee case, supra, the court failed to give the jury an alternative to the verdict of guilty of any one of the three crimes defined. The jury was left with the impression that it could return only a verdict of guilty of murder in the first degree, murder in the second degree, or manslaughter.

In the Williams case, the instructions were even more prejudicial. Not only did the court fail to give an alternative to a verdict of guilty, but it led the jury to believe, by its failure to define the lesser crimes of which the defendant could be found guilty, that the defendant was, in fact, guilty of the

19. 105 F. 2d 21, 29 (D.C. Cir. 1939), cert. denied 310 U.S. 643 (1940).
20. 131 F. 2d 21, 22 (D.C. Cir. 1942).

crime of rape. The failure of the trial court in this respect was equally as prejudicial to the rights of the defendant, and as much a "taking the case from the jury", as the "guilty...beyond a reasonable doubt" instruction given in the Murdock case, supra.

A decision of the Supreme Court of the United States which appears to contradict the cases already reviewed is Horning v. District of Columbia, 254 U.S. 135 (1920). In that well-known case, the facts being uncontroverted, and indeed admitted by the defendant on the witness stand, the court charged the jury:

> "In a criminal case, the court cannot peremptorily instruct the jury to find the defendant guilty. If the law permitted it, I would do so in this case. It is your duty under your oaths as jurors to accept as correct and be governed by the exposition of the law which I gave to you..."

(Note that this charge is substantially the same as that given by the trial court in the Billeci case, supra.)

The Supreme Court of the United States held:

> "The facts were not in dispute and what he (the judge) did was to say so and to lay down the law applicable to them. In such a case, obviously, the function of the jury is little more than formal. The judge cannot direct a verdict, it is true, and the jury has the power to bring in a verdict in the teeth of both law and fact. But the judge always has the right and duty to tell them what the law is upon this or that state of facts, that may be found, and he can do the same none the less when the facts are agreed..."

This case is not contradictory to the cases heretofore presented. The facts in the Horning case were uncontroverted, whereas the facts in the preceding cases were not. Indeed, it was only that the facts were uncontroverted that the United States Supreme Court affirmed the decision of the lower court. The question still remains, however, in the minds of many jurists, whether the action of the trial court in the Horning case was proper, even granting the facts were not contested. The case has been much discussed, and often criticized, the consensus being that the charge should not have been given, and that the Supreme Court of the United States should not have affirmed the conviction of the defendant. [21]

In summation, it is found that the following acts and statements of the trial court amount to a usurpation of the function of the jury, and a denial to the defendant of his constitutional and traditional right to a trial by jury:

(1). A direction of guilty beyond a reasonable doubt.
(2). An indirect direction of guilty where the facts are controverted.
(3). A statement of opinion of guilt, with failure to admonish the jury to consider it only an opinion.
(4). A finding that one of the material allegations of the indictment is proven, and a removal of it from the consideration of the jury.
(5). Attaching an exaggerated importance to the case leading the jury to believe that it should find the defendant guilty.
(6). Failure to emphasize that the burden of proof is on the prosecution,

21. 21 Col. L. Rev. 190 (1921); 34 Harv. L. Rev. 442 (1921); 5 Minn. L. Rev. 231 (1921); But cf. 19 Mich. L. Rev. 324 (1921).

and to instruct as to the possibility of bringing in a verdict of not guilty.

(7). Failure to define the elements of crimes lesser in nature than that of which the defendant was charged, and failure to indicate the possibility of bringing in a verdict of guilty of one of those lesser crimes.

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