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THE PROVINCE OF THE TRIAL JUDGE IN CRIMINAL CASES¹

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There can be no hard and fast rule for the guidance of a trial judge in a criminal case, or as defining his province, but some reflections upon the subject are not without interest, not as academic but practical questions.

In all cases there is the human element of the judge and the humane element which pervades society over against the question of the possible rigor of law enforcement. In crimes against the person the human element is strong and abhorrent.

Into such cases enter the factors of deliberate action, or great or sudden provocation, or disordered mind. On the other hand, in crimes against property, the psychological revulsion against the offender sometimes takes on a very different aspect in the minds of the triers when by jury; it is difficult of definition, but manifestly existent; that is, that a jury may have a stronger revulsion against a property offense than in case of an offense against the person where there is any element of provocation present or the act is prompted by revenge for a fancied or actual wrong done the accused.

Crimes against society, or the government, such as treason, or misprision of treason seem to present a still different psychological view. An analysis of these mental phenomena are, of course, more properly subjects for the psychiatrist, and yet they are, or some of them are, the everyday and commonplace presentations which are made to a trial judge in the practical administration of the criminal laws. Fortunate are we in crimes being defined by statute.

There is perhaps one exception, or more properly one instance, in which the definition itself is sufficiently elastic to cover instances, doubtless little thought to constitute an offense or crime, and that is conspiracy; but its expansion and elasticity grow out of the necessity for such wide range in administration, and far-reaching effects and results, in order to protect both society and individuals. Owing to the wide range of evidence under a charge of conspiracy and the danger in the application of the law, unless defined with special care, there is

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no branch of criminal law which is so susceptible of abuse or which demands such constant and watchful care by the trial judge as does this branch.

Mere definition is not sufficient in every case, if in any. There is such elasticity in the definition itself as to permit such wide and far-reaching deductions by a jury as to compass almost any transaction in any wise related or unrelated to the offense itself, and also to convert any act of those accused into conspiracy, as to render it an instrument of the widest abuse and gravest oppression, and the necessity for careful discrimination points to a corresponding requirement that the trial judge should guard its application with zealous care.

This is especially true in those jurisdictions where the jury is made the judge of the facts and the law, and where all the accused are tried together, as it furnishes an opportunity for one or more, more alert and experienced than the others, to cast the odium, on the gravity of the charge, upon one or more less guilty or even upon the innocent and guiltless.

Involved in many cases, over and against the crime and the criminal charge demanding requirement, stands the human and humane factors, and into them enter perhaps doubtful mentality, or the questions or subjects of environment, or heredity or disease, or great or sudden provocation, or perhaps many or all of them.

Brutality in any case, and severity in such a case, may fall far short of justice, and may be as illy countenanced as the offense itself; and yet there is that element in the human character through or by reason of which a failure of justice may occur unless the trial judge is upon constant attention, for justice must be a thing of right, all things humanly possible considered.

Not infrequently the psychology of the act prompts a maudlin sentimentality, to the failure of justice, the flaunting of the law, and the public hurt. It is apparently a seared public conscience, localized.

Strangely enough, in cases of offenses against property, the human mind is so constituted as that the act or the character of the offender is lost sight of in the revulsion against attacks upon property rights irrespective of the actual responsibility of the offender, and the situation takes on a gravity in the minds of jurors wholly disproportionate to the actual offense, and where juries fix the punishment, punishment is inflicted wholly disproportionate to the gravity of the offense.

In this class of cases not much discrimination is made by juries as to such questions as mentality, heredity, environment, disease and

the like, and the trial judge should be alert to discover in the case, if present, conditions which should be disclosed in the charge to the jury, without invading its province as judge of the facts, by calling attention to what might otherwise be overlooked.

It was a noticeable fact following the Civil War that juries composed of former soldiers, or largely so, were dominated by them, and that it was very easy to convict before them, for offenses of every kind, without much differentiation, and this continued, though in an ever lessening degree, through that generation, not that they were not a high class of men, because those who had a standing to be accepted as jurors were an extraordinarily high class of men, but it was because of their war experience, their amenability to strict discipline, and obedience to orders, and their becoming accustomed and hardened against charitableness and mercy toward offenders; and a repetition of that experience may reasonably be expected as to our recent service men.

In each case, ex-service men are imbued, and rightly so, with high purposes of endeavor in the protection of society at large, and individuals as well, and the preservation of, and any invasion of or encroachments upon rights which they had presented their own bodies and lives to assure; besides they were inured to hardships of an individual case, and even to individual suffering.

It was actual, and a natural sequence of war.

Just now we may wonder what is to be the trend of the female mind, since the sex has come to full obligation of citizenship, including jury service, toward the offending class, or the individual offender, because, reason as we may, there is a subtlety in the female mind and a directness of mental process which will find wide room for application, and perhaps expansion, in this new field of endeavor, with which we have not heretofore had to reckon in dealing with crime and criminal offenders. The innovation will doubtless be the subject of many surprises.

We can scarcely pride ourselves, as English-speaking people, over the conduct of criminal procedure by our forebears, up to very recent times, both as to the character and subjects of offenses and the severity of the punishment imposed for trivial offenses, as to many of which the matter may be laid at the door of the trial judges. Happily that blot on English history and upon the common law no longer stains the present fair record. As respects crimes against government, such as treason, or misprision of treason, while the offense is no less condoned

than in former ages or its gravity lessened, or misunderstood, it is treated as becomes enlightened minds, but with such deliberation and candor as makes the result all the more impressive.

The trial of Sir Walter Raleigh is probably the most conspicuous of the class, both as respects the triers and the character of the alleged culprit. The history of that trial, both in the manner of secret and court meetings of the triers with an acknowledged plan. Lord Cobban, a brother-in-law of Lord Cecil, one of the triers, who made repeated and different statements as to his relations with Raleigh, who while confined in the town of London was visited by Cecil, who secretly conveyed Cobban's maunderings to his associates, and other like infamies, characterized this case.

Coke was the prosecutor and his brutality in the conduct of the case, with eleven judges presiding and a jury, without any interruption by a single judge, is inconceivable even in that age (1603). Coke, before any evidence was heard, turning savagely toward Raleigh, declared: "Thou art the most notorious traitor that ever came before the bar. Thou art a monster with an English face and a Spanish heart." Raleigh was browbeaten and reviled without a word from any judge, and was convicted on the testimony of Cobban made out of the presence of Raleigh to Cecil and given to the judges by Cecil, and from them to the jury. Out of that incident, after long years, came the requirement that one charged with an offense should be faced by his accusers. It is a far cry from the trial of Raleigh to that of Sir Roger Casement, for a like alleged offense, in our own day, but it marks the progress toward sane and safe procedure. That case was conducted with a decorum and serenity of inquiry befitting so grave a matter, and yet the majesty of the law was upheld, and the honor and safety of an imperiled nation guarded in such an orderly manner as to disarm criticism of even a political situation, and to meet with the approval of organized society, at least in so far as the trial itself was concerned, or involved.

It is the duty of the trial judge to guard with equal zealousness the rights of society and of the prisoner at the bar. It is a grave responsibility, encompassed by many conflicting interests and emotions which enter into the consideration, and above all, by the underlying questions of motive and real responsibility on the one hand, and necessarily on the other by the question of the degree of the offense as related to motive or responsibility.

It is manifest, therefore, that passing indifference to these considerations is neither just to society nor to one accused, and the trial

judge cannot divest himself of responsibility in the matter by placing the burden on a jury frequently inexperienced as to their obligations and unable from lack of training or experience to make distinctions which really exist without advisory aid.

An earnest endeavor to so direct the course of a criminal trial, in so far as is humanly possible, in justice to society through a just conception of the underlying motives and responsibility of the prisoner is a duty and a province of a judge. Complaint is often made of the delay in trials, and the celerity of trials in England following the commission of an offense is cited as a model system.

I am not persuaded of the justness of the system as applied to capital offenses in rural communities, where there is a wide personal acquaintance, at least as applied in cases where so much is left to juries. When excitement runs high, after the commission of a grave or heinous offense, passions are so aroused that reason loses its sway. We may and should expect that result in the minds of those who are directly or closely connected with the injured or slain party; but aside from them, the human mind naturally revolts and takes an attitude of vengeance—the old savage attitude in us—and the mind is clouded, and the heart beats rapidly as we are filled with resentment over a grievous crime, and discrimination and the cool deliberation which ought to control cannot have sway. Under such conditions a trial judge should postpone trials until reason assumes its full sway, after the subsidence of the passions. Vengeance is not measured in terms of moderation; perhaps it cannot be; perhaps it ought not to be, especially with respect to sex offenses, because as respects them the mind at once runs riot and reason loses its sway; it cannot be otherwise, nor should it be otherwise, and no rule can or should be made as to any individual case, or any class of such cases, for no one not directly affected can possibly put himself in another's place, or measure another's agony, but if we are to have a government of law, such questions and, for that matter, all questions of crime and criminal responsibility must, in the very nature of things just and true, be considered with respect to the particular case, and society must deal with it as an organization to that end, among other purposes of organized society, and no one is in a position to deal with it, or to direct it, or so powerfully influence a cause for the common good and the common safety of that society, as the trial judge.

It is a responsibility of the gravest character and calls for a high order of administrative ability; for the application of sound and discriminating judgment; fearless, but humane, and of wide study and

observation in order that, so far as is humanely possible, exact and equal justice may be done, for an infrequent miscarriage of justice arises from the intemperate vituperation or vindictive action of counsel in attacks upon parties or witnesses, or both.

The human mind naturally revolts against unjust attacks upon parties or witnesses who are not in a situation to protect themselves, and jurors are strongly inclined to seek to vindicate them through their verdicts, as the only means of their expressing themselves, and it is a matter of common observation that such attacks are likely to react and to produce a more friendly attitude toward a prisoner or toward the side of an overabused witness, than would otherwise have been accorded.

Conversely, unjustifiable attacks on a witness on the part of the defense may have an unfavorable effect against the prisoner.

It is simply the question of fair play, and it frequently plays a vital part in trials.

Appeals on the part of defendants for such abuses frequently result in reversals, and the public is resentful, while it still must pay the bill for a retrial.

Such conduct is as unjustifiable as it is unnecessary, and a trial judge, without regard to objection, should promptly interpose, because it frequently happens that objection will not be made by counsel for the very purpose of opening a field which may divert the cause, and the trial, from the real questions and the development of an atmosphere in which the real issue is lost sight of, in a maze of collateral matters, and deliberate judgment beclouded. The trial judge is not simply a moderator, and the wide liberty and high duty of counsel do not warrant a course of conduct unjust, unfair and unnecessary in attaining the ends of justice, which it is the duty of both judge and counsel to reach.

Heinous crimes cannot be justifiable reasons for departure from established law and its orderly conduct, and in order that it be impressive, its decorous administration is essential. To that end unseemly and attempted impression upon jurors, by loud or boisterous or any kind of demonstration by spectators or adherents of parties, should be guarded against and effectively punished.

There is too much of a disposition on the part of some to treat criminal trials as town meetings, not only not justifiable on any account, but bringing the law into disrepute, and highly calculated to frustrate

the accomplishment of the very ends for which laws are enacted and courts created and maintained, and neither the sentiment nor the practice should be tolerated.

Judges are but mortals, but if they are inspired by a high resolve to measure up to their responsibilities they will assume that elevation from which their province as trial judges will be an open way.