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Criminal Law Case Notes and Comments: Abstracts of Recent Cases

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cule, and condemnation when they render a verdict out of keeping with the views of other citizens.

Conclusions

When the new Hiss trial opens, a new judge and a new jury will try to decide whether Hiss is innocent or guilty of willfully testifying falsely about his activities with Chambers. Although it is certain that there will be some changes in the next trial, the essential stories of the two principal witnesses will undoubtedly remain the same. In evaluating these two conflicting stories, little-publicized legal rules will again be employed in an attempt to reach a unanimous jury decision. The intense dramatic flavor of the Hiss-Chambers controversy effectively highlighted three as yet unanswered legal problems: first, the application of the so-called "two witness" rule in perjury cases; second, the relevance of the Statute of Limitations on espionage in the perjury trial; and third, the grave effects of the present lack of protection from disclosure of jury deliberations and votes.

Although it will receive no headlines, the requirements of the "two witness" rule may well be the deciding factor in the next trial. Although it will merit little public notice, the policy of the Statute of Limitations will be either quietly aborted, or the defense may successfully argue that evidence of espionage is inadmissible in the perjury prosecution, thus neatly hamstringing the government's case. Most important of all, perhaps, will be the effect of the disclosure and subsequent public reception to the deliberations and votes of the jury in the first trial. Although the jurors in the first Hiss case may not realize it, their divulgence of their balloting may seriously undermine the functioning of the jury system in the second trial of Alger Hiss.⁶⁰

NEWTON MINOW

Abstracts of Recent Cases

Duty of State Courts to Assign Counsel—In *Gibbs v. Burke*, 69 S. Ct. 1247 (1949), the United States Supreme Court held that where the trial record showed that unfairness to the defendant was apparent during the trial, it became the duty of the trial judge to assign counsel. In this case the court examined the record and discovered several instances in which the lack of counsel had proven disadvantageous to the defendant; then, on the principle of *Betts v. Brady*, 316 U. S. 455 (1941), the Court held that the fair conduct of the trial depends primarily on the trial judge who must determine the accused's need of counsel during arraignment and trial. This case represents a deviation from the recent right of counsel cases, turning on *Powell v. Alabama*, 287 U. S. 45 (1932). Under those cases the question of deprivation of rights under the Fourteenth Amendment was raised in terms of either complexity of the issues or personal inability of the defendant, either of which could

⁶⁰ On October 10, 1949 Mr. Claude B. Cross, representing Mr. Hiss, moved for a change of venue to Rutland, Vt. Federal Judge Alfred C. Coxe denied the motion, which was based on allegations that excess publicity in New York had eliminated all chances of a fair second trial in New York. For a discussion of judicial attempts to suppress prejudicial radio and newspaper comment on pending criminal trials see Comment (1949) 40 J. Crim. L. & Criminology 50. As this article goes to press, the second Hiss trial is scheduled to begin November 17, 1949 in New York.

be gauged before the actual trial. By resorting to the rule in *Betts v. Brady* and indulging in a retrospective examination of the record of the trial, the Court has broadened the duty of the trial judge to see that the accused is represented by counsel, still without making the Sixth Amendment requirement mandatory in all cases. (For a complete discussion of the recent Supreme Court cases on this point see *Right of Counsel Today* (1948), 39 *J. Crim. L. & Criminology* 432.)

Counsel's Closing Argument to Jury Limited—A growing group of cases recently have tended to supervise more closely the conduct of counsel's closing argument to the jury in criminal cases. In line with this trend, the remarks of the prosecuting attorney in *Woods v. Commonwealth*, 220 S. W. (2d) 1012 (Ky. 1949) were held prejudicial to the defendant. The only eye-witness to the killing with which the defendant was charged was his brother, Johnny Woods, who testified in a manner which tended to prove self-defense. At a former trial of the cause evidence proving that Johnny Woods had given false testimony concerning a previous arrest in Louisville and the renting of an automobile there was held inadmissible. While not redeveloping this evidence, the Commonwealth Attorney, in his closing argument to the jury, discussed these facts and pointed out that Johnny Woods had a tendency to prevaricate. On appeal, the Kentucky court held that this was prejudicial since it brought facts in from outside the record which would tend to destroy the credibility of an essential witness.

Likewise, in disciplinary proceedings growing out of the conduct of counsel in a trial for violation of the Pennsylvania Magistrates Court Act, the remarks of counsel for the defendant regarding the power of the jury, in closing argument, were held to be improper. Defense counsel told the jury that they were the judges of the law as well as the facts and therefore had a right to disregard the trial court's instructions. Although it is held that counsel may state what he believes to be the law and to base his arguments on such theories, it is improper for counsel to attempt to persuade the jury that they are not bound by the instructions as to the law of the case which they receive from the trial court. In *re Schofield*, 66 A. (2d) 675 (Pa. 1949) (For a general discussion of the scope of argument see Goldstein, *Trial Technique* (1935), §§694-718.)

Evidence of Subsequent Robbery Admissible to Prove Design in Felony Murder—After robbing one tavern, defendant and his confederates fled in an automobile, one of the confederates shooting the deceased, a bystander, from the automobile during the course of flight. Later the same evening, the group robbed another tavern. (*Commonwealth v. Darcy*, 66 A. (2d) 663 (Pa. 1949). Evidence of the second robbery was admitted to establish the fact that the murder occurred during the execution of a preconceived series of felonies. This view seems reasonable since without it, the proof of common design necessary to a felony murder conviction would be difficult, if not impossible, in this rather common fact situation. Thus the courts, generally, will permit the showing of a subsequent or antecedent crime as an exception to the general rule against the admissibility of other crimes where the offense requires a showing of common design. For a general discussion of this exception, see 2 *Wigmore, Evidence* (3rd ed., 1940), §§300-304.