TRIAL BY JURY, OR BY JUDGE?

BY STERLING E. EDMUNDS

WHAT is known as the Caraway bill, designed to prohibit to Federal judges the exercise of the power to comment on the evidence and on the credibility of witnesses in criminal cases, has again been introduced in Congress by its author, Senator Thaddeus H. Caraway of Arkansas. And again the bill is denounced by the *American Bar Association Journal* in these words:

> This old Common Law power which the Federal court preserves in its entirety is a jewel which some States have thrown away. That is no reason why Congress should attempt to throw it away. Nor need we hastily assume, for that matter, that Congress *can* do it. That is a question which would arise in case the mistaken effort now under way at Washington should result in the passage of the change proposed.
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> Those who have studied carefully the administration of justice in our country are generally agreed that one of the reasons why it halts and crime is insolent is the fact that in so many States this old Common Law power of the judges has been taken away. One of the main articles in any well-considered plan for making the administration of justice as efficient as possible must be the restoration of this power to the courts,—if the courts are not prepared to maintain and exercise it on the ground of inherent right.

The Caraway bill made its first appearance in Congress about five years ago, at which time the *American Bar Association Journal* made known its opposition. It may not have been an unrelated fact that, at about the same time "associations for criminal justice" were formed in many States, all of them advocating various changes in criminal procedure in the interest of a "simplified and swifter justice," among which changes was that to empower State judges "to comment on the evidence" after the practice in the Federal courts.

In Missouri such an organization urged upon the 1927 Legislature a number of proposals, among them one ardently advocated by the late Chancellor Herbert E. Hadley to repeal the act of January 12, 1831, forbidding Missouri judges "to sum up or comment on the evidence." The adoption of such a change, which the *American Bar Association Journal* advocates, would reverse what many far-seeing lawyers consider one of the most benign principles embodied in the laws of most of the States and tenaciously clung to for many years. The words of the Missouri statute are:

> The court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested to do so by the prosecuting attorney and the defendant or his counsel; but the court may instruct the jury in writing on any point of law arising in the case.

In his argument in behalf of abandoning this principle Chancellor Hadley said:

> The most important change that we suggest in our criminal procedure is that to the trial judge be given the powers that he had at Common Law. Under our present system he is made a mere moderator at the trial, with power only to preserve order in the court-room, to rule in a formal way on objections to testimony, and to instruct the jury in writing as to the law. At Common Law the judge was the directing and controlling influence at the trial. He still occupies this position in England and Canada and in our Federal courts. He has the right to examine a witness if he thinks such examination is necessary to elicit the truth. He has the right to advise the jury upon the facts, to express an opinion thereon and as to the credibility of witnesses, and to advise them, as he has under our system, as to the law. . . .
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> The fact should be emphasized that to give to the trial judges in our State courts such authority would restore the system of jury trial as it was established and developed by our English ancestors and as it continued in this country for a longer number of years than has the perversion of the original system which now obtains in some

forty States. We emphasize this point for the further reason that there is now pending in the National Congress a bill to take away from the judges of the Federal courts the right to advise the jury in reference to the evidence and the credibility of witnesses. . . .

The restoration of this right to the trial court has been opposed upon the argument that the possession of such a power on the part of Federal judges has at times been abused. There is no question but what this is true, but any power given to any public official may be abused.

II

All this is very well, but we are admonished by the constant assaults on the Federal Bill of Rights, as constantly supported in recent years by the Federal judiciary, that no protecting principle of our system of self-government in the States should be lightly surrendered in the supposed interest of swifter justice. Instead of accelerating and coördinating the processes making for summary and arbitrary governmental action it behooves us to retard them wherever possible, if we are to escape despotism.

Among the checks instituted in our dual system of government to defeat arbitrary power none is so vital to the liberty of the citizen as trial by jury, as it has been developed at the hands of the State Legislatures. That this system is not perfection, that under it stern and swift justice is not always meted out, are conceded; but it is strikingly significant, in contrast with the history of the Federal courts, that we have never had cause to complain of judicial tyranny in any of the State courts during the long years in which "comments on the evidence" have been forbidden to their judges. And none will deny that this has been the fulfilment of a primary object.

It has been said that by the English Common Law the judge was "the directing and controlling influence" in criminal trials. History reveals that this was only too tragically true. The independence of the jury as sole judge of matters of fact was from a very early time not recognized by the Common Law.

Here it must be remembered that while the Common Law is admittedly the system thus far protecting to the largest degree the Anglo-Saxon principles of civil liberty (in that it evolves from below, and is not a system imposed from above, as is the Roman Civil Law), yet it has ever been engaged in a struggle with governmental power; that its every advance in the protection of free peoples has been achieved only by arduous effort and sacrifice; and that at various stages of its development it has reflected, not civil liberty, but the triumph of governmental power over civil liberty.

Thus the institution of trial by jury has had a very halting growth in the Common Law. It, too, developed in contest with power—judicial power—and, being constantly opposed and checked, it presents at various periods only a caricature of its ultimate beneficence. Nor has this contest ended; nor will it end until man has ceased to find satisfaction in the possession of power over his fellow man.

In the reign of Edward III, we are told, the judge was so far controlling in the trial court, and the jurors were presumed to be so perverse, that they were locked up without fire or food to hasten their agreement in accordance with the "comments on the evidence"; and if they took unduly long, they might be placed in a cart, carried to the border of the county and upset in a ditch. It is not supposed that any one wishes to see this Common Law power restored to the judges.

For a great many years, until it attracted the notice of Parliament in 1667, it was the practice of English judges, at Common Law, to fine and imprison jurors who were courageous enough to ignore their "comments on the evidence" and acquit the intended victims. And, in spite of a resolution of the House of Commons declaring this practice illegal, the court, in the trial of Penn and Mead three years later, imposed a fine of forty marks upon each member of the jury who had voted for acquittal against the instructions.

While this appears to be the last English case in which jurors who ignored "the

controlling influence" of the court were fined, Hallam tells us that "the judges, and other ministers of justice, for the sake of their own authority or that of the Crown, devised various means of subjecting juries to their own direction, by intimidation, by unfair returns of the panel, or by narrowing the boundaries of their lawful function."

It was not until Bushell's case in 1670 that Chief Justice Vaughan grudgingly conceded that a jury might render a verdict contrary to the direction of the court without being guilty of any legal misdemeanor. Until that time the intended function of trial by jury as a bulwark standing impartially between governmental power and a desired victim had not been realized.

III

The right of trial by an impartial and unintimidated jury has reached its present stage of effectiveness in our State Courts largely as an incident to the struggle of the press for freedom. Thus Lord Camden, by whose tireless efforts the English press was freed, said in the House of Lords, in 1792:

> I ask your Lordships to say who shall have the care of the liberty of the press. The judges or the people of England? The judges are independent men. Be it so. But are they totally beyond the possibility of corruption from the Crown? Is it impossible to show them favor in any way whatever? The truth is they possibly may be corrupted —juries never can! What would be the effect of giving judges the whole control of the press? Nothing would appear that could be disagreeable to government. As well might an act of Parliament pass that nothing should be printed or published but panegyrics on ministers.

It is an alarming fact that under the Federal government we are approaching a return to the very condition that Lord Camden inveighed against, through the unconstitutional assumption by the Postmaster-General of the powers of a censor, supplemented by our new law of seditious libel, the Espionage Act. In 1919 the Postmaster-General arrogantly informed a Federal court that his exclusion of publications from the mails was "not subject to be reviewed, reversed, set aside or controlled by a court of law!" And the Federal courts appear acquiescent.

In the trial of a case under our new seditious libel law in 1918 Federal Judge Van Valkenburgh assumed to say to a jury:

> It has been stated here freely by counsel upon both sides, and by the court, that such right of criticism [of government] within proper limitations, exists. You should draw the distinction, however, between criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government, and intended to forward and perhaps expedite, and such as are made with the intent of hampering it and paralyzing the arm of the government in carrying it out.

The First Amendment to the Constitution, forbidding Congress to pass any law abridging the freedom of speech and of the press, is an unqualified inhibition upon all such laws; yet in the hands of the Federal judiciary it has become but a right to publish "panegyrics upon ministers" in time of war. Its peace time application may not be far distant; and when our Federal judges have the full care of the liberty of the press will it be impossible for an Attorney-General to show them favor when he is zealously interested in particular prosecutions? In his volume on "Judicial Reform," John D. Works says:

> Practically, Federal judges are selected by the Attorney-General of the United States. All applications for appointment are referred to, investigated by, and reported upon by him, and, where there are a number of applicants, he recommends to the President the one selected by him, and usually his recommendation is approved and the applicant of his choice appointed. The Attorney-General is also the attorney of the government in all its litigation before the judges he has selected. Not only this, but he assumes and actually exercises the right to investigate and supervise the course and conduct of these same judges, and has in some instances—whether generally or not is not known—made secret investigations of Federal judges through secret agents and without the knowledge of such judges.

We have recently had the spectacle of an Assistant Attorney-General appearing before Federal grand juries in various parts of the country to exhort them to greater zeal in returning indictments under a particularly unpopular law zealously espoused by the government. Are all Federal judges,

who look to the Attorney-General for advancement, above sensibility to this ardor emanating from Washington? Is it not possible that some of it will find its way into the "comments on the evidence" in such cases? It is perfectly well known that such has been the case.

Judicial power, like all other power, accepts no limitations as final; checks must be constantly reimposed if this natural tendency is not to engulf everything. This truth lies at the foundation of our written Constitutions, all imposed in distrust of power.

Presumably, in the Eighteenth Century, trial by jury in the Common Law contemplated a "jury of the vicinage" where the crime was alleged to have been committed, so that the accused could have the benefit of his known standing and character among his neighbors, and that he might the more easily obtain witnesses. Yet there was nothing resembling a "jury of the vicinage" in the English practice of transporting our Colonial ancestors to England for trial under various accusations before the Revolution.

It is a striking coincidence that now our Federal courts have largely destroyed the "jury of the vicinage" in so-called conspiracy cases, by assimilating an "overt act" to the alleged conspiracy and sanctioning prosecution in any distant jurisdiction where that overt act is said to have been committed. Hence a citizen accused of a conspiracy effected in New York, for example, might now be dragged to California or Oregon for trial in the Federal courts.

When our Colonial ancestors were transported to England for trial in this manner, before admiralty courts and before strange and unknown juries, if the charge happened to be seditious libel, so much the worse for them; for it was affirmed by English judges that by the Common Law the jury had no right to pass upon the guilt or innocence of the accused in such cases. Whether or not a writing was libel, they said, was a question of law for the court to decide; the jury could merely decide as to the fact of publication.

It can hardly be supposed that anyone, in urging a return to the Common Law power of English judges, wishes to restore this; yet it was a part of the "original" Common Law at the time of the Revolution, nor was it abolished until after the Fox Libel Act was passed in 1792. The English judges were furious over this act, as we learn from a note in Cooley's "Constitutional Limitations":

> In Lord Campbell's "Lives of the Chancellors, the author justly condemns the practice followed in spite of the Fox Libel Act, of expressing to the jury from the bench an opinion of the defendant's guilt. On the trial of parties charged with a libel on the Empress of Russia, Lord Kenyon, sneering at the late libel act, said:
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> "I am bound by my oath to declare my own opinion, and I should forget my duty were I not to say to you that it is a gross libel." Upon this Lord Campbell remarks: "Mr. Fox's act only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say: 'Gentlemen, I am of opinion that this is a wilful, malicious and atrocious murder'"?
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> For a considerable time after the act was passed, against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say: "As the legislature requires me to give my opinion in the present case, I am of opinion that this is a diabolically atrocious libel."

Although Parliament had tardily put an end to the fining and imprisoning of disobedient jurors, and interposed other checks in defense of trial by jury, subsequent history reveals a continuing record of martyrdom to judicial tyranny through the "right," still jealously retained by the English judges, to "comment on the evidence." In all periods in which government is deeply interested in criminal cases, or in which popular passions are widely aroused, "to comment on the evidence" turns out to be nothing more or less than judicial insistence upon a verdict of guilty.

In the trial of Muir and Palmer, for example, in 1793, for seeking to overturn the rotten borough system in England (they were sentenced to transportation for fourteen and seven years respectively), the jury was told that

> the right of universal suffrage the subjects of this country never enjoyed; and were they to enjoy it, they would not long enjoy either liberty or a free Constitution. You will therefore consider whether telling the people that they have a just right to what would unquestionably be tantamount to a total subversion of this Constitution, is such a writing as any person is entitled to compose, to print and to publish.

It is significant to recall that American public sentiment was so deeply stirred by the outcome of this exercise of the Common Law power of the judge to "comment on the evidence" that an expedition was actually undertaken from this country to New South Wales to rescue Muir. But a different spirit has come over us since that day.

IV

Such, in brief outline, was the posture of judicial power and trial by jury under the English Common Law at the time of the Revolution.

Is it to be wondered at that the individual States of the Union had a far different idea of what the right of trial by jury was and ought to be, and that their Legislatures should have adopted with such marked unanimity the one effective provision against the intimidation of jurors—a prohibition upon the judges to comment upon the evidence in criminal trials?

It is only too true that the judges of the Federal courts do exercise today the power "to comment on the evidence," but it does not appear that it was viewed as proper in those courts at the time of their establishment. In the very early case of Georgia *vs.* Brailsford, coming before the Supreme Court of the United States in 1792, John Jay, the first Chief Justice, instructed the jury as follows:

> It may not be amiss here, gentlemen, to remind you of the good old rule that in questions of fact, it is the province of the jury, in questions of law, the province of the judge, to decide. But it must be observed that by the same law which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judges of the facts, it is, on the other hand presumable that the court are the best judges of the law. But still both objects are within your power of decision. . . . Go then, gentlemen, from the bar, without any impressions of favor or prejudice for one party or the other; weigh well the merits of the case, and do on this as you ought to do on every occasion, equal and impartial justice.

There is here seen none of that assumption of power to influence a jury that was soon to develop in the programme of the Adams administration, to strengthen and magnify the Federal judiciary as a Federalist stronghold. The conduct of Chief Justice Ellsworth, Justice Samuel Chase and others later, in prosecutions under the Common Law of England, which they insisted they had power to execute, and under the Alien and Sedition Acts, was fully as violent and tyrannical as any of the spectacles presented in the English courts, not excluding that of Jeffreys himself.

Like their English prototypes, the Federal judges not only chafed at all restraints, but constantly reached out for and seized power. They not only assumed to "comment on the evidence," but they instituted inquisitions and harangued grand juries. To the alarm of the country they asserted that it was their right to, and actually did, indict and try under any or all of the precedents and usages of the English Common Law, whether or not Congress had adopted such precedents in statutory form. As Senator Beveridge said in his "Life of John Marshall":

> The judges themselves had invited the attack so soon to be made on them. Immediately after the government was established under the Constitution they took a position which disturbed a large part of the general public, and also awakened apprehensions in many serious minds. Persons were haled before the national courts charged with offenses unknown to the national statutes and unnamed in the Constitution; nevertheless the national judges held that they were indictable and punishable under the Common Law of England. This was a substantial assumption of power. The judiciary avowed its right to pick and choose among the myriad of precedents which made up the Common Law and to enforce such of them as, in the opinion of the national judges, ought to govern American citizens. In a manner that touched directly the lives and liberties of the

> people, therefore, the judges became law-givers as well as law-expounders. Not without reason did the Republicans of Boston drink with loud cheers the toast: "The Common Law! May wholesome statutes soon root out this engine of oppression from America!"

Chief Justice Ellsworth went so far as to cause the conviction of a former American citizen who had become naturalized in France by holding that, by the English Common Law doctrine of indelible allegiance, no American citizen could expatriate himself.

V

This course of tyranny by the Federal courts ran on until 1812, when, in deference to a mighty storm of indignation, the Supreme Court reluctantly admitted that all of its fining and imprisoning under the Common Law had been unconstitutional. Thereafter it conceded that

> the legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense.

Justice Story, we are told, was "frantic" over giving up this strange and undefined stretch of power. The Federal courts retained the English judicial conception of jury trial from this period of violence, and Congress has not yet seen fit to correct it, in spite of constant abuse in many jurisdictions.

As to what trial by jury actually is in the Federal courts let us read the testimony of Circuit Judge Martin T. Manton, taken from an address before the American Bar Association in 1925 on "The Administration of Criminal Law in the Federal Courts":

> There is always present in the minds of laymen who come to serve as jurymen a thought almost bordering on fear of the presiding judge. They want to please; never to displease. They are always obedient; they are swayed onward in ardor for full performance of duty; they think in terms of justice. That is why we obtain correct decisions, as a rule.

That juries in Federal Courts entertain a feeling "almost bordering on fear of the presiding judge" and that they are "obedient" is not unrelated to the excess of power over them exercised by the Federal judge; under such conditions, however, their function as impartial judges of guilt or innocence appears practically to vanish.

To what extent a Federal judge may go in "commenting on the evidence" may be seen in the case of Horning *vs.* U. S., in which the Supreme Court, in 1920, upheld this charge to a jury as merely "regrettable peremptoriness":

> In conclusion I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . I cannot tell you in so many words to find the defendant guilty, but what I say amounts to that.

Again, in the Abrams case in 1918, Judge Clayton of Alabama, sitting in New York, said:

> If it were a case where the defendant were indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that. But I would have very little respect for a jury that would come in with a verdict that he didn't have any intent.

When that case reached the Supreme Court, Mr. Justice Holmes, in a minority dissenting opinion, said:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the government has to publish the Constitution of the United States, now vainly invoked by them.

All this, it is plain, is not trial by jury in any true sense. Where such pressure may be exercised upon jurors the jury is superfluous. In his great work on "Constitutional Limitations," Justice Cooley correctly declares:

> A judge who urges his opinion upon the facts to a jury decides the cause while avoiding the responsibility. How often would a jury be found bold enough to declare their opinion in opposition to that of the judge upon the bench, whose words would fall upon their ears with all the weight which experience, learning and commanding position must always carry with them? What lawyer would care to sum up his case if he knew

that the judge, whose words would be so much more influential, was to declare in his favor, or would be bold enough to argue the facts to the jury, if he knew the judge was to declare against him?

It should be pointed out, finally, that the Federal courts have recently become partakers in the alien doctrine that crime may be punished without indictment or jury trial—in spite of the Fifth and Sixth Amendments—by bringing alleged offenses under the equity process of injunction. If this is constitutional with respect to one class of crimes it may eventually embrace all, and so destroy even the poor remnant of jury trial left in Federal practice.

Thus the present is no time for the States to let down any barrier erected for the protection of self-government and civil liberty; only if they hold steadfast may we hop to reëstablish them in the Federal govern ment.

In the inhibition upon trial judges t "sum up or comment upon the evidence' in criminal cases, the Legislatures of th States have endowed the institution o trial by jury with its predestined benef icence as the best human arrangemen thus far devised to protect the citizen against the otherwise overwhelming power of government to crush him. It is not effi cient, but neither is liberty efficient; only autocracy is.

To abandon this benign principle after the many years of martyrdom required to win it would be merely to transfer the old struggle to posterity.

HORSE-CAR DAYS

BY RAYMOND S. TOMPKINS

Nobody under twenty-five remembers horse-cars, and few, if any, of thirty. Perhaps most Americans of thirty-five never really saw one. But all men and women of forty saw them before they vanished, and everybody of fifty and up remembers them well.

A preserved horse-car is as rare today as a whale-oil lamp or a high-wheel bicycle. I know of only two actually in existence. One is in Baltimore. When the street car men dragged it out, painted it up, hitched a couple of ice-wagon horses to it, and put an original horse-car crew on the platforms, almost the entire Association of Commerce turned out to gape at it with awe and incredulity. Henry Ford has one. Others may be embalmed elsewhere, but I have not seen the fact recorded. Early Twentieth Century gasoline buggies with wagon wheels and handles for steering are preserved at the Smithsonian Institution and probably at the older and sturdier automobile factories, but no government antiquarian has seen fit to preserve a horse-car. This, perhaps, is not surprising, for the street railway men themselves, practical fellows to whom any romantic notion is like rat poison, have been content to see them fall apart and be junked.

The reason may be simple. Hundreds of men in the street railway business today were horse-car men; indeed, the modern electric railway is built upon the ruins of the horse-car and cable-car. Few men would think it worth while to preserve a pair of 1888 pants in order to hand their children a laugh at their expense, and perhaps the street railway men have let the horse-cars crumble for the same reason. Changes have been swift in the careers of these men. The horse-cars they used to operate are in the same limbo with the tin train of the boy whose parents have bought him a velocipede.

The horse-car age, crystal clear in the memories of men who take river-bed tubes and continuous six-day air flights for granted today, ran for about forty years—that is, from the early fifties until the late eighties, when the cable-car, closely followed by the electric car, began displacing transit by Dobbin. The story of the horse-car is full of picturesque color, but it remains buried in scattered fragments in hidden scrap books, old trade journal and newspaper files, and musty horse-car convention reports. The old-time horse-car convention, in itself, would be a fit subject for an heroic canvas. Yet a modern bank president's dim picture of his mother signalling to a horse-car driver from the bedroom window to wait for her while she pinned her hat on; an electric transportation mogul looking queerly at his aging hands as though they still felt the tug of the reins; a millionaire's poignant recollection of the gigantic manure pit not far from his boyhood home—such memories and a few scattered volumes on which the dust thickens undisturbed are all that remain of that mellowest of times. Soon there will be only the volumes and the dust.

The first and only text-book on how to build and run a horse-car line was written by Alexander Easton, a Philadelphia engineer, and published in 1859. He called it "A Practical Treatise on Street or Horse-power Railways; with Examinations as to