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Right to a Fair Trial

CRIMINAL PROCEDURE

RIGHT TO FAIR TRIAL

In a recent case, *Blue v. State*,[1] the defendant shoved or pushed the complaining witness, Burgess, in the chest to prevent him crossing a picket barricade. No serious bodily harm was sustained by Burgess; but he was frustrated in his effort to enter the plant where he was employed.

In a prosecution for assault and battery the trial court found the defendant guilty and fixed a penalty of $1000.00 fine and six months imprisonment—the maximum penalty allowed under the statute.[2] During the trial, the prosecutor made frequent references to the fact that the accused was a striker, a "saboteur", and that the defendant and his witnesses were hoodlums and worse than German spies. The prosecutor in a final appeal to the jurors to give the defendant "the full extent of the law", reminded them to think of his son and their sons and daughters who were overseas. The cross examination of the defendant's witnesses was pursued in like manner and consisted mainly of questions and statements calculated to reveal their "soft jobs", "good salaries" and draft status.[3]

Blue's counsel made no objection to either the cross examination or the argument of the prosecuting attorney, nor was any motion made to dismiss the jury. On appeal by new counsel Blue set out as grounds for reversal the prejudicial argument and misconduct of the prosecuting attorney in the trial court. The Indiana Supreme Court affirmed the decision with Richman, J., dissenting. The latter in a very pointed dissent conceded the guilt of the defendant but deplored the conduct of the trial court in its failure to discharge its duty by securing of its own initiative a fair and impartial trial.[4] The majority

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see 2 Beale, op. cit. supra n. 10 at 1091, "There can be only one place in which a contract is made, and that place can never be subject to great or serious doubt." (3) Why give one act, e.g., acceptance, more weight than another, e.g., offer, in determining questions of contract? (4) The dividing line between questions of obligation and performance is not a clear one nor always logical. Restatement, "Conflict of Laws" (1934) § 358, comment b. For further discussion, see Cook, op. cit. supra n. 12, c. 8, 14, 15.

1. 67 N.E. (2d) 377 (Ind. 1946).
2. Ind. Stat. Ann. (Burns, 1933) § 10-403.
3. Blue's case was tried during the Battle of the Bulge when the United States and Allied war effort hung in the balance and at a time when the fires of public sentiment against strikes and strikers were being fanned by various newspapers and radio commentators. The atmosphere in which the trial was conducted was reminiscent of World War I draft board bribery cases tried during war time, e.g., August v. U.S., 257 Fed. 388 (C.C.A. 8th, 1918).
4. When prejudicial appeals are being made to the jury and defense counsel remains silent, the duties of the trial court are drawn into issue. The question becomes whether the judge of his own initiative should take such action as may be necessary to assure a fair and impartial trial. While an early Indiana case, The St. Louis and South-Eastern Ry. v. Myrtle, 51 Ind. 566 (1875), has denied this duty of the trial court in such situations, other courts have recog-

did not concede that these arguments of the prosecutor were inflammatory or improper but rather justified these statements as necessary for the jury whose duty it was to fix the penalty.[5] The court further

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nized that such a *sua sponte* duty exists. Aetna Life Insurance Co. v. Kelley, 70 F. (2d) 589 (C.C.A. 8th, 1934); Collins v. State, 100 Miss. 435, 56 So. 527 (1911); Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878). The concept has been thus stated by Judge Learned Hand: "A judge, at least in a Federal Court, is more than a moderator. He is affirmatively charged with securing a fair trial, and must intervene *sua sponte* to that end when necessary. It is not enough that the other side does not protest; often protest will only serve to emphasize the evil". Brown v. Walter, 62 F. (2d) 798, 799 (C.A.A. 2nd, 1933). But see Union P. R.R. v. Field, 137 Fed. 14 (C.A.A. 8th, 1905).

5. Whether or not the jury should have been allowed to hear the alleged prejudicial remarks depends upon whether they were in fact prejudicial. Prejudicial appeals to the jury by inspired or over zealous prosecutors may take any form. The most common grounds for reversal are appeals to racial or class hatred: People v. Simon, 80 Cal. App. 675, 252 Pac. 758 (1927) (that the defendants were Jews and that the populace had grown suspicious of all fires in which Jews were in any way connected). The cases involving appeals to racial prejudices are particularly abundant where negro defendants are concerned. Simmons v. State, 14 Ala. App. 103, 71 So. 979 (1916) (that the jury should deal with the negro defendant in light of the fact that he was a negro); Hampton v. State, 88 Miss. 257, 40 So. 545 (1906) (that mulattoes were negros who were hated by the white race and should be despised by every negro). Religious prejudice: Freeman v. Dempsey, 41 Ill. App. 554 (1891) (counsel called the appellee "a Jewish Christ killer and murderer of our Savior"). References to the relative wealth of the defendant and the poverty of his victim: Goff v. Commonwealth, 241 Ky. 428, 44 S.W. (2d) 306 (1931) (ability of the defendant to pay "fat fees" to combat and stall the legal process); Sorrell v. State, 74 Tex. Crim. Rep. 100, 167 S.W. 356 (1914) (reference to the wealth and influence of the accused and the poor circumstances of the complaining witness). References to the conduct, habits or associations of the accused: People v. Tufts, 167 Cal. 266, 139 Pac. 78 (1914) (in prosecution for obtaining money under false pretenses, the prosecutor persistently asked the accused questions intimating that he was a sexual pervert); People v. McGraw, 66 App. Div. 372, 72 N.Y. Supp. 679 (4th Dept. 1901) (in a prosecution for burglary, the prosecutor alluded to the neighborhood where the defendant lived as one inhabited by criminals, and that the defendant associated with exconvicts). The enumeration of these by no means completes the list.

In Indiana the following statements by prosecuting attorneys have been considered sufficiently prejudicial to demand a reversal or new trial where proper preliminary steps were taken by the accused to preserve his right to relief: "Luke Bessette has a bad looking face. . . If his face does not show him to be a bad man then I am not a good judge of human countenance." Bessette v. State, 101 Ind. 85 (1884); that the prosecutor knew the saloon keeper defendant and that "he was guilty of this and sure of other crimes." Brow v. State, 103 Ind. 133, 2 N.E. 296 (1885); that the wife of the defendant who was being tried for fornication was broken hearted over the defendant's conduct and that it was all the talk of the defendant's home town, Jackson v. State, 116 Ind. 464, 19 N.E. 330 (1888); that murders had been too frequent because of lax enforcement of the laws and that

held that the alleged misconduct was not available on appeal since the defense counsel had made no objection in the trial court.[6]

Inasmuch as the general rules of procedure require that an objection be made in the trial court to prejudicial argument or conduct and since none was made here the decision would at first appear to be clearly supported by the weight of authority. However, the general rule requiring objection is not without exception[7] and other jurisdictions have long recognized that prejudicial error may be raised for the first time on appeal where the argument or conduct was grossly prejudicial and no curative action on the part of the court could have assured an impartial trial.[8] The Indiana Supreme Court in a recent case, *Wilson v. State*,[9] recognized the exception and readily applied it.

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the jury should make an example of the defendant, Ferguson v. State, 49 Ind. 33(1874).

6. "As a general rule an appellate court will not reverse a judgment in a civil action or a conviction in a criminal prosecution because of an improper appeal by counsel to the prejudices of the jury where the improper appeal was not brought to the attention of the trial court by objection during the course of the trial." Notes (1932) 78 A.L.R. 1438, 1527, (1907) 7 A. & E. Ann. Cas. 229.

7. "The rule is subject to the exception stated. . . that if the improper remarks are of such character that neither rebuke nor detraction can entirely destroy their sinister influence a new trial should be promptly awarded regardless of the want of an objection or exception." Note (1907) 7 A. & E. Ann. Cas. 229, 231.

8. In a prosecution for violation of the liquor laws, M'Nutt v. U.S., 267 Fed. 670, 672 (C.C.A. 8th, 1920), the court after stating the general rule said: "Such is undoubtedly the general rule but there is an exception to it as firmly established as the rule itself. It is that in criminal cases where the life or liberty of the citizen is at stake the courts of the United States in exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been prejudicial to the rights of the defendant although the objection they present were not properly reserved by objection, exception, request, or assignment of error." In Gawn v. State, 7 Ohio Cir. Dec. 19, 24 (1896) the court after asserting that the remarks of the prosecuting attorney were planned to excite passion and prejudice and lead to a decision influenced by the prejudice so created said, "Many of these remarks were not objected to when made nor was the court asked to take any action in relation to them. This we believe is not always essential. When improper remarks are made to the jury and it is apparent that an objection thereto would afford no redress but only aggravate their injurious effect, the absence of objection at the time, under such circumstances ought not preclude their consideration upon a motion for new trial." Aetna Life Insurance Co. v. Kelley, 70 F. (2d) 589 (C.C.A. 8th, 1934); Skuy v. U.S., 261 Fed. 321 (C.C.A. 8th, 1920); People v. Simon, 80 Cal. App. 675, 252 Pac. 758 (1927); Starr v. Chicago, B & Q. R.R. 103 Neb. 645, 173 N.W. 682 (1919); Houston & T.C.R.R. v. Rehm, 36 Tex. Civ. App. 553, 82 S.W. 526 (1904); accord, Kansas City Southern R.R. v. Murphy, 74 Ark. 256, 85 S.W. 428 (1905); Akin v. State, 86 Fla. 564, 98 So. 609 (1923).

9. 222 Ind. 63, 51 N.E. (2d) 848 (1943). The case was a prosecution for receiving stolen goods valued at less than $25.00. The defense counsel failed to subpoena important witnesses for the defense and in general inadequately defended the accused. The trial judge assumed the role of an assistant prosecutor, commented upon the

In the *Wilson* case the court held that procedural rules should not prevent a consideration of prejudicial errors where fundamental civil rights were affected. The court there allowed the prejudicial conduct of the judge to be assigned as error in the motion for appeal even though no objection had been made to this misconduct in the trial court.

Although the combination of prejudicial forces is different in the *Wilson* and *Blue* cases, certainly the result—an unfair trial—seems the same.[10] The remarks of the prosecuting attorney in the *Blue* case appear no less inflammatory or prejudicial than those that have prompted other courts to apply the exception.[11] The gulf between the majority and the dissent and the reason for the majority's refusal to apply the exception[12] recognized in the *Wilson* case seems clearly explicable on the basis that the majority does not believe the prosecutor's conduct or argument was prejudicial. While a refusal to invoke the exception is consistent with a finding of no prejudice, the premise of the majority that the appeals were not inflammatory seems untenable in view of remarks and arguments that the courts have previously condemned as prejudicial error.[13]

While the court found that the judge in the *Wilson* case was guilty of active misfeasance and prejudicial conduct, the judge in the *Blue* case remained silent when it is alleged his office demanded that he speak and affirmatively control the argument and conduct of the trial.[14] Though not every case can be anticipated and an inflexible rule prescribed as to when the trial judge shall interfere on his own motion, yet in a case of this kind where it is apparent that a high degree of animosity is being created, charging the trial court with a *sua sponte* duty is a desirable safeguard of civil rights. In view of the recent tendency of American courts to extend the judicial protec-

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evidence, and conveyed to the jury the idea that he thought the defendant was guilty. The defense counsel made no objection to this prejudicial conduct of the trial judge. The Indiana Supreme Court speaking through Richman, J., unanimously reversed the decision of the trial court stating that while ordinarily procedural rules must be observed to give appellate practice the necessary order and stability, yet, when it appeared from the record that a defendant's constitutional rights of an impartial trial had been denied, the court was free to take cognizance of the errors complained of even though objection had not been made in the trial court.

10. In the Wilson case the unfair trial resulted from the prejudicial conduct of the judge and the lack of objection to this conduct by incompetent defense counsel. In the Blue case the seemingly unfair trial is a result of prejudicial argument and conduct of the prosecuting attorney coupled with lack of objection by competent (Brief for appellant p. 85) defense counsel and a passive endorsement of the prejudicial argument by a silent judge.
11. Aetna Life Insurance Co. v. Kelley, People v. Simon, Gawn v. State, Houston T. C. R.R. v. Rehm, cited supra n. 8.
12. In the Blue case the majority concede the existence of the exception, p. 381.
13. See n. 5 supra.
14. Brief for Appellant, p. 88.

tion of the civil rights of religious minorities,[15] picketers,[16] and speakers,[17] and to reflect the mores of fair-play and justice of an American society in cases of capital crimes,[18] the *Blue* case stands as an incongruous result—a holding that reflects the unchecked bias and blind patriotic passion against one who exercised an unpopular right to strike in a time of grave national emergency.

FEDERAL JURISDICTION

LIMITATIONS ON FEDERAL EQUITY JURISDICTION

Appellants sought to enjoin enforcement of the 1944 "anti-closed shop" amendment[1] to the Florida Constitution, alleging that it violated the First Amendment, Fourteenth Amendment, and the contract clause[2] of the United States Constitution and that it conflicted with the National Labor Relations Act[3] and the Norris-LaGuardia Act.[4] The district court granted a temporary restraining order and caused a three-judge court to be convened. This court, deciding the case on the merits, vacated the restraining order and dismissed the complaint.[5] On appeal to the Supreme Court, reversed and remanded with directions to retain the bill pending determination of proceedings in the state courts which would supply the lacking construction and interpretation of the amendment. *American Federation of Labor v. Watson*, 66 Sup. Ct. 761 (1946).

After holding that the district court had jurisdiction to hear and decide the case on the merits, that it was a proper case for a three-judge district court, that the complaint stated a good cause of action in equity on the grounds of threatened irreparable injury, the Court concluded, Justice Douglas writing for the majority,[6] that it was improper for the lower court to have ruled on the merits at this stage of the litigation. The Court's action followed very closely its

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15. E.g., the overruling of the Gobitis decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).
16. E.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).
17. E.g., Thomas v. Collins, 323 U.S. 516 (1945).
18. E.g., Hawk v. Olson, 326 U.S. 271 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Powell v. Alabama, 287 U.S. 45 (1932).
1. Fla. Const., Declaration of Rights § 12; Fla. Laws, 1943, p. 1134, ratified at the general election Nov. 7, 1944.
2. U. S. Const. Art. I, § 10.
3. 49 Stat. 449 (1935), 29 U.S.C.A. §§ 151 et seq. (1942).
4. 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101 et seq. (1942).
5. American Federation of Labor v. Watson, 60 F. Supp. 1010 (S.D. Fla. 1945).
6. Stone, C. J., dissented on the grounds that the bill should have been dismissed for want of equity. Murphy, J., dissented on the grounds that the Court should hear the appeal on the merits. Jackson, J., took no part in the consideration of the case.