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ARE JURIES JUDGES OF THE LAW AS WELL AS OF THE FACTS IN CRIMINAL CASES?

A few weeks ago a jury in a criminal case in New Jersey signed a written protest against the right of the court to direct a verdict of acquittal.

Whether the court in this case had in view as a precedent the decision of the Circuit Court of the United States in the Southern District of New York, on the case of ex-Judge FULLERTON, does not appear from the statement of the case as published in the New York daily papers. But it would seem from the absence of any authority in the Fullerton case, other than one cited from a court of very limited jurisdiction in Vermont, that the action of the New Jersey Court must have been without precedent unless the Fullerton case was relied upon. The action of the Circuit Court in this case was certainly a surprise not only to that portion of the profession who had watched the course of the trial, but to the public generally. But whether the impression, which was certainly very general among the profession up to that time, that the court had no right in a criminal case to direct a jury either to convict or acquit has no just foundation, is a question of interest and importance. It is doubtless well established upon authority in this State that juries are not to decide questions of law in criminal any more than in civil cases.

In *Carpenter* v. *The People*, 8 Barbour 610, Judge WELLS says: "The idea which has become somewhat current in some places that in criminal cases the jury are the judges of the law as well as of the facts is erroneous, not being founded in principle or supported by authority. Courts of record are constituted the sole judges of the law in all cases that come before them."

In *Duffy* v. *The People*, 26 N. Y. 592, Judge SELDEN insists upon the same principle for seven distinct reasons, which are stated. And after stating that juries may find special verdicts, leaving the legal conclusions to the court, says: "When they find general verdicts I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means in criminal cases of reviewing their decisions, whether of law or fact, or of ascertaining the grounds upon which their verdicts are based."

In *The People* v. *Finnegan*, 1 Park. Crim. Reports, p. 153, Judge PARKER quotes this language of Judge STORY, from 2 Sumner 240: "It has been the opinion of my whole professional life that the jury are no more judges of the law in a capital or other criminal case upon a plea of not guilty than they are in any civil case upon the general issue." He said that in such case they had the physical power, but not the moral right, to decide the law according to their own notions or pleasure. That it is the duty of the court to instruct them upon the law, and of the jury to follow such instructions, etc. Judge PARKER says: "A wrong impression on this point has prevailed to some extent in the community, and it is time it was corrected."

The right of the court to direct a jury to find a verdict when no question of fact arises on the trial seems from these cases to be as clear in a criminal as in a civil action, upon principle. But that a broad distinction has hitherto obtained in the two classes of cases, both in this country and England, so far as precedent is concerned, seems also very clear. It may be that this distinction has no other foundation than

the false impressions to which Judge WELLS and Judge PARKER refer in the cases above referred to. But there are considerations which would seem to render the course pursued in the Fullerton case extremely dangerous as a precedent.

At a time when distrust of our judiciary is daily gaining strength, and when the immunity of crime has become a public reproach to the administration of justice, it would seem wiser to take power away rather than to add to the power of one man to convict or acquit of crime according to his own caprice.

The judge always passes upon questions of fact to a certain extent in every trial, whether civil or criminal, when he directs a verdict. That is, he assumes to decide that the evidence is so clearly for one side or the other that there is no question for the jury. It of course frequently happens that a certain amount of evidence is given in favor of the party against whom the verdict is directed by the judge, and it is not always an easy matter for the judge to determine whether the evidence so preponderates in favor of the prevailing party as to leave no question of fact for the jury. In all such cases then the judge *pro tanto* assumes the functions of the jury. If in any such case the court should err the aggrieved party has his remedy by appeal in a civil action. Not so, however, when the error is in favor of the prisoner in a criminal case.

If the judge in a criminal case has a right to direct an acquittal he must have an equal right to direct a conviction. In the latter case, however, the prisoner has his remedy by writ of error, while the people in case of a mistake by the judge would be wholly without remedy in case of a capital offense, even by a new indictment, and practically without remedy in cases of inferior crimes.

These seem to be strong considerations in favor of what has hitherto been understood to be the uniform practice of criminal courts both in this country and England, to direct the jury to find a general verdict in all criminal cases.

It will be seen that such a course must always be safe both for the prisoner and the people. For as was said by Judge

WOODRUFF in the Fullerton case, "there was no doubt in the mind of the court as to the right to set aside the verdict, which might be against the law and the evidence," a new trial would be secured by such a course, while in case of a verdict of acquittal by the court the function of the jury is wholly dispensed with.

In every jury trial there is a power on the part of every juror to dissent from the direction of the judge. If all or any one of a jury in a civil action should refuse to find as directed by the court, the party aggrieved would have no remedy but by a new trial. Whether a juror could be punished for a wanton refusal to find as directed by the court in a case where there was clearly no question of fact to pass upon, as in the case of an inquest, is not so clear. In England there was formerly a remedy against such recreant juror by writ of attaint, or by punishment for perjury. See Worthington on Juries, page 89 (Law Library N. S. Vol. 13). There is no doubt but that the liability of jurors to punishment for misconduct originated when the office of a jury was wholly different from what it is at present. Mr. Worthington, in his able work on the subject of juries, at page 113, says: "It is apprehended that the existence of juries in this nation cannot be shown in any period of our history before the introduction of the Norman Laws and Customs. But on the supposition that juries had a prior existence it seems impossible that the most strenuous advocate for the remotest antiquity should be able to describe from authentic records what was the particular office or what were the particular duties of jurors in the Anglo-Saxon courts. The first clause of authentic information displays the recognitors and jurors acting as witnesses of the facts which in civil cases were in litigation and which in criminal cases were requisite to establish the innocence or guilt of the accused person. Even the four knights, the electors in the grand assize, were required to be of the vicinage; and the twelve knights were to be chosen by them from the same vicinage simply because they were required to be witnesses."

It is probable that the name "juror" was derived from this custom. The derivation of the name seems more appli-

cable to one who is to testify to a fact than to one who is to decide upon facts sworn to by others. But there is at this day but little uncertainty as to the proper office of a jury, which is to decide upon questions of fact presented upon evidence produced before them upon trials.

As to whether there should be any difference in the practice of courts in directing verdicts in criminal and civil cases that will best appear from a brief review of the statutes and decisions in this State, which are referred to in Colby's Criminal Practice, page 441. Assuming that the U. S. Circuit Court in this State is bound by the 34th section of the judiciary act of Congress of 1789 to pursue these statutes and decisions, MR. COLBY says: "Prior to the Revised Statutes there was no bill of exceptions in a criminal case and writ of error thereon for review of convictions in the Oyer and Terminer. The review was obtained in this manner: The court suspended passing sentence and certified the question which was in doubt to the Supreme Court, who considered and passed upon it and advised the court below either to grant a new trial or proceed to pass sentence, and sometimes when the convict was before them they passed the sentence themselves. Whether the trial was to be reviewed was at the option of the court before which it was had, and the party had no right, as in civil cases, to take exceptions and carry up the record for review. In case the judge consented to a review the necessary time for that purpose was given either by the court suspending its judgment or after judgment pronounced by suspending execution." The Legislature in the Revised Statutes altered this practice and gave to the prisoner the right to interpose his exceptions and a right to the review of the case, and they adopted various provisions to carry out their intentions. It will be seen by reference to this statute that no provision is made for a bill of exceptions on the part of the State. It seems to have been an open question in the courts of this State prior to the decision in the *People* v. *Hartung*, 26 N. Y. 154, whether there was any right of review on the part of the people in cases of acquittal in criminal trials. Chief Justice BRONSON in that case, after carefully reviewing the English and American cases bearing upon the

uestion, came to the conclusion that there was no such right and this was the conclusion of the court without dissent.

In 1852 an act was passed providing for a review upon writ of error on application of the District Attorney in cases of acquittal *other than by the verdict of a jury*. So that as the law now seems well settled in the State of New York, where the accused is acquitted by the verdict of a jury, there is no right of appeal and no way in which any error, however gross, on the trial in a criminal case, can be corrected on behalf of the People.

If, then, it was contrary to the well-known practice of criminal courts in this State for the judge to direct a verdict in a criminal case, while it was an open question whether the people had a right of review, it seems preposterous to inaugurate such a practice now when the judge, by an arbitrary exercise of authority, can set at liberty the worst criminals in our midst by assuming that there is no question of fact for the jury to pass upon. It seems eminently proper then that juries should understand their rights and obligations, and to know that it is the right of a juror in any case to dissent from the direction of a judge on a trial, and even if he should stand alone the accused would only be subjected to a new trial.

I have said that the Court of Appeals in the *People* v. *Hartung*, 26 N. Y. 152, held that the weight of authority in this country and in England was against the right of the State to review criminal trials. This would seem to account for the absence of any authority for the direction of a verdict of acquittal by the judge. For, as already stated, an error in such direction in a civil case could always be corrected on the application of either party, while in a criminal case the State, in case of a misdirection, was without remedy.

If the case of ex-Judge FULLERTON is to become a precedent in criminal trials in this country, it will appear to many who heard or read reports of the evidence, unfortunate that a clearer case of preponderance of evidence in favor of the prisoner had not been the first to establish the precedent.

If there was no evidence on which the jury could have rightfully convicted the accused there could be no danger to