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H. R. 4721 (PROHIBITING COMMENT UPON THE WEIGHT, SUFFICIENCY OR CREDIBILITY OF THE EVIDENCE AT THE TRIAL OF CASES IN THE FEDERAL COURTS)

MUCH to the surprise of the bench and bar, the lower House of the last session of Congress, without a dissenting voice or vote, passed H. R. 4721, a Bill forbidding judges of the United States District Court to comment on the evidence to the jury, a right which has been exercised by judges of the federal trial courts since the foundation of the government. There was no considerable public sentiment which demanded this drastic change in our federal trial system. The old method had worked well for a century and a half serving to nullify frivolous and absurd contentions of counsel which befogged real issues and misled juries to the detriment of the administration of justice, and yet the House passed this bill, and it is now pending in the Senate. There is a substantial reason why popularly elected judges exposed to the pressure of local sentiment should not be permitted to comment to the jury upon the evidence, but no reason at all why judges not dependent upon the favor of the people for their tenure in office should not continue to have this power and exercise this ancient practice.

At the conclusion of a jury trial in federal court in which many witnesses have testified, and, as often happens, the questions of fact are complicated and involved, it is undoubtedly a great aid to the jury to have the presiding judge, who has had a wide experience in weighing evidence on disputed questions of fact, comment on the mass of evidence pointing out what parts of it are important and what parts comparatively unimportant, clarifying what was obscure, untangling what was confused, and simplifying what seemed complex. With this aid, juries are enabled to arrive at verdicts which are more intelligent, and, hence, more just. This function of the judge, instead of being an "invasion of the province of the jury," as its opponents loudly wail, is, in truth, a tremendous aid to them which, investigation shows, they appreciate.

Just why the House should pass this revolutionary measure must be left to conjecture. No organized body either agricultural, industrial, commercial or professional demanded it. No suggestion that this House intended such a change appeared in the press. We may surmise that some second-rate lawyer when engaged in the trial of a jury case in a federal court had his laboriously constructed ballyhoo rendered ineffective by a few common sense remarks by the trial judge, and, on his election to the lower house, thought to "get even." There is a kind of lawyer who becomes annoyed, even enraged, when compelled by the judge to try the real issues in the case rather than indulge in attractive humbug and eloquent ravings over things nobody denies. By long practice, they have acquired the art of verbalizing a myth into the semblance of a reality, and bitterly resent the right to ply their sorry trade. All these would favor such a bill as H. R. 4721.

The House Judiciary Committee to which this bill, of course, was referred held no hearings. The true nature of the bill was disguised by a misleading title for which a new title was substituted revealing its true purpose, but *after its*

passage. The proceedings leading up to its passage appear at page 7913 of the Congressional Record, occupy little more than a half column and consume but thirty-seven seconds to read. Thus did this Bill, abolishing one of the most important functions of federal trial judges, pass the House.

Honorable Merrill E. Otis, United States District Judge for the Western District of Missouri, delivered an address on the subject before the State Bar of California at Del Monte on September 10, 1937, which has been published, and from which this writer gets the facts contained in this article. Judge Otis' address, together with the facts assembled in the appendix thereto, is an admirable, scholarly, and persuasive production. It goes into the Federal Reporter to find how much complaint there has been from litigants defeated in the district court in criminal cases of the comments of the trial judge to the jury upon the evidence. From this search, it appears that out of 5,781 defendants convicted in district court, only 85 complained that the trial judge had abused his right to comment upon the evidence. And of this number of such complaints 30 were sustained and the convictions reversed. Surely this fine record is sufficient to convince any fair-minded man that the abuse of this power of comment by federal judges has been negligible.

As everyone knows, the cardinal rule of statutory construction observed by courts is to ascertain the legislative intent, and this is usually done by discovering the evil sought to be remedied. What was the "evil" at which H. R. 4721 was directed? Obviously, the only possible evil would be that the federal district judges had abused the power given them to "advise the jury upon the facts," and thereby had invaded the special province of the jury. That there would be occasional abuses of this power is to be expected, since judges, being only human, are bound to err. Indeed, the principal function of all appellate courts is to discover and, as far as possible, to rectify substantial errors committed by judges of trial courts. In preparing his splendid

address to the California lawyers, Judge Otis did not content himself with generalizations but had taken pains to ascertain the extent of the abuse of this power. In doing this, he had his assistant examine the record of all the jury cases which had been appealed from the federal district courts to the Circuit Courts of Appeal from November 1, 1924, to January 1, 1937,— a period of 12 years and two months,— appearing in Federal Reporter, Second Series, Volumes 1 to 85, inclusive. That investigation revealed the following impressive facts:

In that period, as before stated, of 5,781 criminal cases tried to juries and appealed by the convicted defendant in only 85 cases was there even *complaint* that the power of the judge to advise the jury as to the facts in any way had been abused. And of these 85 cases the judge's charge was approved in 53, held reversible error in 30, and merely criticized in two cases. During the same period, it was discovered that of 1,825 civil cases tried by juries (estimate) and appealed, in only 19 cases did the appellant even criticize the trial judge's charge, and of these 19, the charge was approved in seven, and held reversible error in 11 cases. It thus appears that, in a total of 7,606 jury cases in which the defeated party in the district court appealed from the decision, he complained of the judge's charge to the jury in only 104 cases, and his complaint was held well-grounded in only 41 cases. During a 12-year period in the trial of over 7,000 cases, this power of the judge to advise the jury as to the facts had been abused only 41 times and the injured party had been granted a new trial on account of it. This is the monstrous "evil" which the lower house of our national legislature took it upon itself to correct by putting a gag in the mouth of the trial judge. It is as if a Big Bertha were used to kill a mosquito! Only 104 of over 7,000 actual litigants complained, yet the lower house, by passing H. R. 4721, sought to change an ancient rule that has proved most salu-

tary in the trial of jury cases in federal courts. It is to be hoped that the Senate will exhibit more common sense.

The House Judiciary Committee held no hearings. Its favorable report declared that the committee "considered" the bill. The particular quality and method of its consideration is well evidenced by its quotations from two decisions by inferior federal courts as follows:

"The great vice of the rule which permits judges to discuss the weight of the evidence, as it appears to us, is that the courts hold 'that opinion upon evidence by the court, cannot be held as taking a case from the jury.'" ¹

"And the courts in upholding this privilege of the court to express its opinions of the evidence, has even gone so far as to hold that 'whatever expression the court may have made, is not reviewable error.'" ²

In the first above case, the judge writing the opinion professes to have discovered a "great vice of the rule." In the second, the statement that "whatever expression the court may have made is not reviewable error," is simply untrue. If the learned author of this committee report had made the most casual investigation, he would have found that the Supreme Court of the United States, beginning with *Starr v. United States*,³ has often declared that what the trial judge says to the jury touching the fact *is* reviewable. And if the author of that committee report will turn to pages 30 to 33 of Judge Otis' address, he will find the titles of cases and volumes and pages where they may be found in which the United States Circuit Courts of Appeal during the past twelve years have reviewed what the trial judge has said to the jury to ascertain whether his remarks were prejudicial to the defeated party.

¹ Citing *Pittsburgh Ry. Co. v. Bloomer*, 146 Fed. 720, 722 (C. C. A. 3rd 1906).

² Citing *Union Pac. R. Co. v. Thomas*, 152 Fed. 365, 371 (C. C. A. 8th 1907).

³ 153 U. S. 614 (1894).

Yet this Bill passed the House without a dissenting voice or vote! And here is the point at which Judge Otis' remarks quoted below seem most appropriate:

"If in America's underworld there is a parliament, made up of representatives of crime and vice and greed for what other men possess, if in America's underworld there is a parliament, if this bill is introduced in that parliament, it will pass there too without dissenting voice or vote, aye with a shout of triumph it will pass, with such a shout as will shake the very girders of the capitol!"

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