The Catholic Lawyer

Volume 11
Number 3 *Volume 11, Summer 1965, Number 3*

Article 11

"Allen Charge" Used in Absence of Deadlocked Jury

hearing. Secondly, and collaterally, the principal case might strongly influence the state's decision as to when it is necessary to appoint counsel to defend an accused indigent. The broad holding of *Escobedo v. Illinois*[25] (that the accused has a right to counsel when the process shifts from investigatory to accusatory) obviously creates a constitutional right to counsel long before the trial. Thus, to protect itself against unforeseen contingencies, the state may be forced to provide counsel for the indigent even before the constitution requires it.

[25] 378 U.S. 478, 490-91 (1964).

"Allen Charge" Used in Absence of Deadlocked Jury

Appellant was convicted of stealing from the mails, forging and uttering Government checks, and conspiring to commit the alleged acts. The United States Court of Appeals for the Fifth Circuit, reversing in part and affirming in part, *held* that the supplemental charge given the jury after their deliberation for approximately four and one-half hours did not go beyond the permissible "Allen charge,"[1] and therefore, did not constitute reversible error. *Walker v. United States,* 342 F.2d 22 (5th Cir. 1965).

Whenever the jurors, at early common law, were given the task of deliberating upon the evidence and reaching a verdict, they usually were not discharged until they had reached a verdict.[2] The purpose of keeping a jury together was twofold: (1) to keep the individual jurors free from improper influences;[3] and (2) to coerce agreement among the jurors.[4] To assure the success intended, the jurors were placed in the charge of a sworn officer of the court, without food, drink or fire (with the exception of candlelight).[5] If they did not agree before the court adjourned, they were carried around in a cart until a verdict was "bounced out."[6]

In the United States, this common-law practice was followed until 1851, when the Massachusetts Supreme Judicial Court in *Commonwealth v. Tuey,*[7] upheld the following charge which was read to a jury, after a reported deadlock:

[1] Allen v. United States, 164 U.S. 492 (1896). The charge permitted in *Allen* instructs the minority juror to examine the questions submitted to him with a proper regard for the conclusion of the majority; he need not, however, necessarily acquiesce in that conclusion.

[2] Shoukatallie v. R., 3 All E.R. 996, 1000 (1961).

[3] McHenry v. United States, 276 Fed. 761, 763 (D.C. Cir. 1921).

[4] *Ibid.*

[5] Shoukatallie v. R., *supra* note 2; *accord,* McHenry v. United States, *supra* note 3.

[6] 31 U. CHI. L. REV. 386 (1964); *accord,* McHenry v. United States, *supra* note 3.

[7] 62 Mass. (8 Cush.) 1 (1851).

> although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other.[8]

This charge, though it has fomented great differences of opinion as to its merit, did effect a milestone — if a minority juror could not agree with the majority because of his own conscientious convictions as to the situation at hand, the resulting mistrial would be accepted and acknowledged by the court.

Although the charge was not immediately approved and employed by the courts of all the states, it did receive some recognition and approval. In 1881, the Connecticut Supreme Court, in *State v. Smith*,[9] agreed with the use of the charge. In 1896, the United States Supreme Court approved of a charge taken literally from *Tuey* and *Smith* in the case of *Allen v. United States*.[10] It is from this case that the charge received its now famous (or infamous) name, the "Allen charge."

In its approval of the charge, the Supreme Court stated:

> it certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself.[11]

The object of the jury system is to arrive at a true verdict through unanimity. This can be done only by deliberation, mutual concession and due deference to the opinions of each juror by the others.[12] If this end is to be achieved the court must have the authority and ability "to present to the minds of the dissenting jurors a strong motive to unanimity."[13] One effective method of presenting such a motive to the dissenting jurors has evolved from situations similar to that in *Allen*. After an extended period of deliberation by the jury, resulting in the report of a deadlock, the court gives a supplemental instruction. This supplemental instruction is, in essence, the "Allen charge."[14]

The Supreme Court in *Allen* fixed certain limits which must not be transgressed, and certain standards which must be complied with, if the supplemental instruction is to be allowed.[15] The court may impress the jury with the length of time which the trial has taken, the expense to the parties, the importance of the case and the significance of an agreement.[16] However, if there is any pressure by the court which appears to coercively urge an agreement, no matter how subtle, it is an unwarranted infringement on the function of the jury.[17] A most effective means for preventing the latter is the stringent requirement that the court must emphasize, in its supplemental in-

---

[8] *Id.* at 2.
[9] 49 Conn. 376 (1881).
[10] *Supra* note 1, at 501.
[11] Allen v. United States, *supra* note 1, at 501-02.
[12] Commonwealth v. Tuey, *supra* note 7, at 4; *accord,* Allen v. United States, *supra* note 1, at 501-02.
[13] Commonwealth v. Tuey, *supra* note 7, at 3.
[14] *Cf.* Savage, *The Charge to the Jury,* in SEMINAR ON PRACTICE AND PROCEDURE, 28 F.R.D. 37, 250-55 (1960).
[15] See Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962); United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961).
[16] Suslak v. United States, 213 Fed. 913, 919 (9th Cir. 1914); *accord,* Shaffman v. United States, 289 Fed. 370, 375 (3d Cir. 1923); State v. Rodman, 208 La. 523, 23 So.2d 204 (1945).
[17] 31 U. CHI. L. REV. 386, 389 (1964).

struction, the right of the individual juror to retain his conscientiously held viewpoint.

> [T]he permissibility of a direction to jurors to re-examine their views in the light of those of their fellows is dependent upon the moderating reminder of their own individual responsibility and the necessity that any verdict be that of each of the jurors and not just that of a majority. When the moderating condition which makes the direction to re-examine their views permissible, and desirable in many cases, is omitted, then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand.[18]

It is common practice for a judge to exhort a jury to reach a verdict,[19] but such exhortation must meet the required standards.

> It is proper for the judge to admonish jurors who are in disagreement to re-examine their opinions in light of the contrary opinions of their fellows, provided it is made equally clear that the jury's verdict must represent the final judgment of each juror, and not merely his acquiescence in a majority view of which he remains conscientiously unconvinced.[20]

If the standards are shirked, the sanction is reversal. Absent compliance with the required standards, a minority member might well take the charge as an invitation to allow the majority to rule.[21]

From the foregoing, it is apparent that often the permissibility of the use of the "Allen charge" might be seen as dependent upon the use of a word or two, or even the tone of voice of the trial judge. It is not illogical, therefore, that differing viewpoints should be present side by side, as they are in the instant case.

In *Walker,* the Court found that the use of the "Allen charge" did not constitute reversible error. Determining that the charge was not "one-sided," the Court held that the giving of the charge was a proper exercise of the trial judge's discretion.

In a separate opinion, Judge Brown expressed disapproval of the "Allen charge," stating that there was little justification for its use. Quoting Mr. Justice Clark, he stated: "Allen is dead and we do not believe in dead law."[22] Judge Brown considered the charge "in its operative purpose and effect"[23] similar to the coercive common-law practices previously discussed. It would appear that this absolute rejection of the "Allen charge" is impractical. We need look no further than the "object" of the jury system, *i.e.,* unanimity, and the method most appropriate for its achievement, the supplemental instruction, to appreciate this. Operating within the standards and limits set down by the Supreme Court in *Allen,* the charge is effective and serves its purpose well.

Important to a consideration of the decision in *Walker* were the circumstances under which the charge was delivered. In all previous cases the "Allen charge" was given when the jury reported an inability to agree—a deadlock. If the charge were given before the report of the jury it was grounds for reversal on appeal.[24] The

---

[18] United States v. Rogers, *supra* note 15, at 437.
[19] Shoukatallie v. R., *supra* note 2, at 1001.
[20] Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455, 463 (4th Cir. 1960).
[21] *E.g.,* United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).
[22] Walker v. United States, 342 F.2d 22, 29 (5th Cir. 1965) (separate opinion).
[23] *Ibid.*
[24] *E.g.,* Green v. United States, 309 F.2d 852 (5th Cir. 1962); Powell v. United States, 297 F.2d 318 (5th Cir. 1962).

"dynamite" was not to be "exploded before there was any reason to think that blasting was necessary."[25] At Walker's trial when the court inquired whether the jury, after four and one-half hours of deliberation, desired any further assistance in regard to the law, the foreman replied: "Your Honor, we think we will reach a verdict soon. We don't think we are very far from it."[26] There was obviously no deadlock. Yet, the "Allen charge" was given.

A use of the charge, such as that approved by the instant Court, is ostensibly contrary to established precedent. It is true that precedent is often overturned, just as it is true that dissenting opinions become law. But it is rare that good law evolves from a disregard of a sound judicial premise. In *Walker* it seems that the Court disregarded the relevant proposition that "a verdict brought about by judicial coercion is a nullity in the eyes of the law."[27] With proper and due deference to the implication of the Court's instruction, the minority juror could only comply by yielding his conviction. Is this not an application of pressure by the Court?

In his separate opinion, Judge Brown quoted Judge Wisdom's opinion in *Green v. United States*:[28] "the Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. . . . There is no justification whatever for its coercive use."[29]

The charge, as used in *Walker,* is apparently improper. When functioning within its limits, the "Allen charge" harmonizes divergent views without unduly influencing the minority juror. But when it exceeds these limits, it is as offensive as the ancient common-law practices.

[25] Green v. United States, *supra* note 24, at 856.
[26] Walker v. United States, *supra* note 22, at 25.
[27] Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65 (1959).
[28] Cases cited note 24 *supra.*
[29] Green v. United States, *supra* note 24, at 854.

First Conviction Under New York Barratry Statute

Appellant was convicted of common barratry on proof that he had personally, with malicious intent, instituted nine groundless claims, actions or legal proceedings against the complainant in small claims and municipal courts. The Court of Appeals, in affirming the first conviction for barratry in the history of New York State,[1] *held* that Section 323 of the New York Penal Law had modified the common-law rule so as to render one guilty of common barratry who has himself, corruptly or maliciously instituted at least three groundless actions or legal proceedings.[2] *People v. Budner,* 15 N.Y.2d 253, 206 N.E.2d 171, 258 N.Y.S.2d 73 (1965).

[1] It is interesting to note that the appellant was previously convicted of barratry in 1961. However, the appellate division reversed upon a finding, *inter alia,* that the prosecution had failed to prove malice. People v. Budner, 13 App. Div. 2d 253, 215 N.Y.S.2d 791 (1st Dep't 1961).
[2] Section 323 reads: "Upon a conviction for common barratry, the fact that the defendant was himself a party in interest or upon the record to any action or legal proceeding complained of is not a defense."