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First Conviction Under New York Barratry Statute

"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."

At early common law, barratry was the practice of encouraging or maintaining suits or quarrels in the courts by (1) disturbing the peace, (2) taking or detaining the possession of property in question by subtlety and deceit, or (3) fostering calumny resulting in discord between neighbors.[3] Later, the definition was expanded to include any incitement of litigation between subjects of the King.[4]

In order to sustain a conviction for barratry at common law, it was necessary to show that the offender had incited litigation in several instances[5] and had not brought any of the suits in his own right.[6] It was not a defense to claim that malicious intent or an intent to vex and annoy was lacking.[7] In addition, it was immaterial that the suits were in fact meritorious.[8]

At common law, there was a strong aversion to the institution of litigation.[9] Barratry, and its sister offenses, champerty[10] and maintenance,[11] were based on a "mind your own business" philosophy which was, at one time, carried to the extreme of making it criminal for one to testify at a trial without having been previously subpoenaed.[12]

In New York, barratry is defined as "the practice of exciting groundless judicial proceedings."[13] Although the barratry statutes have been in effect since 1881, and although barratry was a crime at common law in New York, until 1965 there had never been a sustained conviction for the crime.[14]

In the instant case, the appellant ordered a suit of clothes to be made by the complainant. Subsequently, the appellant returned the suit, claiming that it did not fit properly. Thereafter, he instituted nine claims or other actions against the complainant. All of these actions, with the exception of two in which the appellant obtained default judgments, were either dismissed or resulted in a decision for complainant.[15]

Judge Van Voorhis, speaking for the majority, stated that although a conviction could not have been had at common law against a *party* to the litigation, Section 323 of the Penal Law was clearly intended by the legislature to modify that princi-

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[3] The Case of Barratry, 77 Eng. Rep. 528, 8 Co. Rep. 36b (1588). There are several derivations of the term "barratry." Some say that it is derived from the French word *barrateur* signifying "deceiver," while others contend it is derived from the Latin word *baratro* which signifies a "vile knave." Another theory regarding the origin of the word is based upon its usage and stems from two legal terms: *barra* meaning "the courtroom bar" at which cases were argued and *rettum* meaning "offense." Literally then, a barrator is a "bar offender." *Id.* at 529, 8 Co. Rep. at 37b.

[4] EHRLICH, EHRLICH'S BLACKSTONE 802 (1st ed. 1959).

[5] Voorhees v. Dorr, 51 Barb. 580, 587 (N.Y. 1868); 9 C.J.S. *Barratry* § 2(b) (1938).

[6] 1 RUSSELL, CRIMES 371 (10th ed. 1950).

[7] See PERKINS, CRIMINAL LAW 454 (1957). *But see* State v. Batson, 220 N.C. 411, 17 S.E.2d 511 (1941).

[8] State v. Chitty, 17 S.C. (1 Bail.) 379 (1830).

[9] 1 RUSSELL, *op. cit. supra* note 6.

[10] Champerty was an agreement whereby the champertor agreed to pay the expenses of a suit in return for a share of the land or other matter sued for, should the suit be successful. PERKINS, *op. cit. supra* note 7, at 449.

[11] Maintenance was an officious intermeddling in a suit that in no way concerned the intermeddler. It was an offense against public justice because it fostered strife and contention and perverted the remedial processes of the law. PERKINS, *op. cit. supra* note 7, at 448.

[12] PERKINS, *op. cit. supra* note 7, at 449; see 1 RUSSELL, *op. cit. supra* note 6.

[13] N.Y. PEN. LAW § 320.

[14] See People v. Budner, *supra* note 1.

[15] People v. Budner, 15 N.Y.2d 253, 255, 206 N.E.2d 171, 258 N.Y.S.2d 73, 74 (1965).

ple.[16] The statute was thus interpreted as rendering amenable to criminal prosecution one who is himself a party to barratrous litigation.

Chief Judge Desmond dissented on the ground that the legislature never contemplated a change in the common-law rule which precluded a prosecution for barratry when the "common barrator" had brought the actions *in his own right*. He reasoned that the only change from the common-law rule is that a person cannot now elude liability under the statute by joining himself as a party to an action brought by another.[17]

Despite Judge Desmond's interpretation, there is a wide disparity between the statutory and the common-law requirements for a conviction of barratry. The statutes substitute specific criminal intent for the general criminal intent formerly required, and dictate that the litigation be groundless, a requirement non-existent at common law.[18] The wording of section 323 that "the fact that the defendant was himself a party in interest or upon the record, is not a defense" also indicates a deviation from the common-law rule.

The decision as it stands does not portend any major changes in the course of litigation in New York or in the choice of remedies available to one harassed by vexatious suits. The tort action of malicious prosecution would seem to be the more appropriate remedy, if the plaintiff can show that his person or property was interfered with by legal process.[19] The stringent requirements needed for conviction in a criminal case may motivate a person harassed by vexatious actions to seek the civil rather than the criminal remedy. For example, a criminal conviction of barratry requires a showing that the offender had instigated at least three groundless proceedings with malicious intent.[20] This must be proven beyond a reasonable doubt.[21] In addition, the complainant is unable to recover damages and can merely have the satisfaction of seeing the offender imprisoned or fined.[22]

On the other hand, if an action is brought civilly for malicious prosecution, the plaintiff may recover damages.[23] It is not necessary to prove that three suits were instituted, or to prove the offender's malicious intent beyond a reasonable doubt.[24] It is important to bear in mind, however, that although the tort remedy may be preferable to a criminal action, institution of one does not necessarily preclude the other.

The decision in *Budner,* although it will not engender a major change in the law, is a step in the direction of preventing serious abuses of our judicial system. Since the remedy of malicious prosecution may not always be available to defendants in civil actions it is clear that, while barratry will not be a primary recourse for harassed defendants, it will be an important deterrent to the use of the courts solely for the purpose of vexing certain individuals.

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[16] *Id.* at 256, 206 N.E.2d at 172, 258 N.Y.S.2d at 75.

[17] *Id.* at 257, 206 N.E.2d at 173, 258 N.Y.S.2d at 76.

[18] PERKINS, *op. cit. supra* note 7, at 454.

[19] 4 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 162 (1953).

[20] N.Y. PEN. LAW § 322.

[21] 9 WIGMORE, EVIDENCE § 2497 (3d ed. 1940).

[22] N.Y. PEN. LAW § 321.

[23] See PROSSER, TORTS 868 (3d ed. 1964).

[24] 9 WIGMORE, *op. cit. supra* note 21, § 2498.

No Negative Inference from Defendant's Refusal to Testify

Petitioner was convicted of murder in a state court after a trial during which the prosecutor had commented extensively on his refusal to take the stand. The court had instructed the jury that, while the defendant had a constitutional right not to testify, they might reasonably infer the truth of alleged facts which were within petitioner's knowledge but which he refused to deny or explain. The Supreme Court of the United States reversed the conviction and *held* that the prohibition against compulsory self-incrimination contained in the fifth amendment, and made applicable to the states by the fourteenth amendment, forbids both comment by the prosecutor on the accused's silence and instructions by the court that such silence is evidence of guilt. *Griffin v. California,* 380 U.S. 609 (1965).

At common law, during the period of the Star Chamber and Court of High Commission, there existed an inquisitional system of criminal justice.[1] Defendants were summoned into court, often merely as suspects, and were compelled to answer numerous questions covering a wide range of topics.[2] In response to this type of "justice" there evolved a common-law privilege against compelling self-incriminating testimony.[3] This privilege later became a rule of law which prohibited the defendant in a criminal case from being a witness, even if he so desired.[4]

In the United States, as a reaction to inquisitional criminal "justice" and other abuses which existed during colonial times,[5] a provision against self-incrimination was included in the fifth amendment.[6] Congress, however, found the common-law rule, preventing a defendant from being a witness, inequitable when applied to a defendant who was able, by his testimony, to prove his innocence. Accordingly, a federal statute was passed which permitted the defendant in *federal* courts to testify if he so wished.[7] It was made explicit, however, that his failure to testify created no presumption of guilt against him.

Under this statute the Supreme Court, as early as 1893, decided that it was reversible error in a *federal* court for the prosecutor or judge to comment on the failure of the defendant to testify.[8] The rule against "comment" was further enlarged by the Supreme Court in the case of *Bruno v. United States,*[9] which held that, by virtue of the statute, the defendant in a federal court had the right to have the jury

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[1] 8 WIGMORE, EVIDENCE § 2250 I(1)(b)(i)-(2)(b) (McNaughton's rev. ed. 1961).

[2] *Id.* at I(3); see also Griffin v. California, 380 U.S. 609, 620 (1965) (dissenting opinion).

[3] 8 WIGMORE, *op. cit. supra* note 1, at I(3); see Twining v. New Jersey, 211 U.S. 78, 91 (1908).

[4] See Wilson v. United States, 149 U.S. 60, 65 (1893).

[5] Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763, 783-89 (1935).

[6] The fifth amendment reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The constitution of every state except Iowa and New Jersey contains a prohibition against self-incrimination. 8 WIGMORE, *op. cit. supra* note 1, at § 2252, n.1.

[7] "[I]n the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States Courts . . . the person so charged shall, at his own request, but not otherwise, be a competent witness. *And his failure to make such request shall not create any presumption against him.*" 20 Stat. 30 (1878); 18 U.S.C. § 3481 (1948). (Emphasis added.)

[8] Wilson v. United States, 149 U.S. 60 (1893).

[9] 308 U.S. 287 (1939).

instructed that his failure to testify created no presumption against him. It is important to note that these cases, and in fact all of the federal cases dealing with "comment," are based on federal statutes and not directly on the right against self-incrimination contained in the fifth amendment.[10]

It was decided early that the bill of rights had no direct applicability to the states, but merely acted as a restraint upon the federal government.[11] In 1908, however, in *Twining v. New Jersey*,[12] it was argued before the Supreme Court that the states were forbidden from commenting on the failure of a defendant to take the stand. The bases for this contention were: first, the fifth amendment's protection against self-incrimination prohibits "comment"; and, secondly, the fifth amendment's protection against self-incrimination is binding upon the states by virtue of the due process clause of the fourteenth amendment.[13]

The Court assumed that the fifth amendment did protect against "comment" but found that the due process clause of the fourteenth amendment did not protect a defendant in a *state* criminal proceeding from self-incrimination.[14]

In 1947, the same issue was before the Court in the case of *Adamson v. California*.[15] Although the Court held that the fourteenth amendment guaranteed a defendant in a state court a fair trial, it found that the privilege against self-incrimination was not so essential to a fair trial as to be included within the scope of the due process clause.[16]

In 1964, the Supreme Court, in *Malloy v. Hogan*,[17] held for the first time that a defendant in a *state* criminal proceeding was protected against self-incrimination by the due process clause of the fourteenth amendment. The Court based its decision on the fact that the foundation of the American system of criminal justice is accusatorial rather than inquisitional, and that its essential mainstay is the provision of the fifth amendment that no person shall be compelled to be a witness against himself.[18]

In the instant case the Supreme Court held that the federal rule prohibiting comment on the failure of the defendant to testify is part of the fifth amendment's protection against self-incrimination.

The Court believed that "comment" is a remnant of the "inquisitorial system of criminal justice"[19] and, therefore, is forbidden by the fifth amendment.[20] The Court also found that when a judge or a prosecutor comments on a defendant's silence, that silence is, in effect, being offered to the jury as evidence against him. Therefore, the defendant is being penalized for exercising a constitutional right.[21] The Court next reaffirmed its earlier holding that once a right contained in the bill of rights is

[10] See, *e.g.*, Stewart v. United States, 366 U.S. 1, 2 (1960); Reagan v. United States, 157 U.S. 301, 304-05 (1895).

[11] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[12] 211 U.S. 78 (1908).

[13] The fourteenth amendment reads in part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

[14] Twining v. New Jersey, 211 U.S. 78, 114 (1908).

[15] 332 U.S. 46 (1947).

[16] *Id.* at 53.

[17] 378 U.S. 1 (1964).

[18] Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[19] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[20] Griffin v. California, 380 U.S. 609, 614 (1965).

[21] *Ibid.*

deemed applicable to the states, the minimal standard for determining a violation of this right is to be the same whether the right is violated in a state court or in a federal court.[22] Hence, the minimum rights which a defendant possesses in a state criminal court with reference to self-incrimination must be the same as those which accrue to him in a federal court.

The dissenters expressed the view that "comment" was not a violation of due process of law as such.[23] They did not believe that the "no comment" rule was part of the fifth amendment, but rather, contended that comment on the failure of the defendant to testify was a procedural matter, which, while regulated in the federal courts by statute, should be left to local regulation in the state courts.[24]

As a direct result of *Griffin,* the criminal procedure of six states has been altered. (These states allowed comment by the prosecutor and/or judge on the failure of the defendant to take the stand.[25]) The Court did not indicate whether the decision in the instant case will be applied retroactively in these six states. Presumably it will, since this has been the previous policy of the Supreme Court with regard to procedure which has been found to violate due process.

The instant case is a good illustration of the recent trend making federal criminal procedure based on the bill of rights applicable to the states by "absorption" into the due process clause of the fourteenth amendment.[26] This trend has resulted in the creation of a degree of uniformity in the procedural safeguards afforded defendants in state as well as federal criminal proceedings.

It is important to note, however, that despite this trend there will probably never be complete uniformity of standards since Congress and the Supreme Court possess a supervisory power over procedure in the federal courts which they do not possess over state courts.[27] It is only constitutional standards which can be made applicable to the states through due process, and not federal criminal procedure based on statute or rules of the Supreme Court.

This distinction gives rise to a most important question which *Griffin* leaves un-

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[22] See, *e.g.,* Malloy v. Hogan, 378 U.S. 1 (1964) (prohibition against self-incrimination contained in the fifth amendment made applicable to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel contained in the sixth amendment made applicable to the states); Mapp v. Ohio, 367 U.S. 643 (1961) (prohibition against unreasonable search and seizure contained in the fourth amendment made applicable to the states).

[23] Griffin v. California, *supra* note 20, at 619 (dissenting opinion).

[24] *Id.* at 623.

[25] "Of the six States which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the privilege against self-incrimination. Cal. Const. Art. I, § 13; Ohio Const. Art. I, § 10. New Jersey permits comment, State v. Corby, 28 N.J. 106, 145 A.2d 289 . . . but its constitution contains no provision embodying the privilege against self-incrimination. . . . The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. See State v. Ferguson, 226 Iowa 361, 372-373, 283 N.W. 917, 923. Connecticut permits comment by the judge but not by the prosecutor. State v. Heno, 119 Conn. 29, 174 A. 181, 94 A.L.R. 696. New Mexico permits comment by the prosecutor but holds that the accused is then entitled to an instruction that 'the jury shall indulge no presumption against the accused because of his failure to testify'. N.M.Stat.Ann. § 41-12-19; State v. Sandoval, 59 N.M. 85, 279 P.2d 850." Griffin v. California, *supra* note 20, at 611-12 n.3.

[26] See note 22 *supra.*

[27] See DOWLING, CONSTITUTIONAL LAW 668 n.5 (6th ed. 1959).

answered, viz., is the defendant in a state court entitled to the instruction that his failure to testify creates no presumption against him? The defendant in a federal court is entitled to this instruction, but the basis for this right has always been merely statutory.[28]

It appears that when the question does arise the Supreme Court will hold that such instruction is required, since an inference of guilt drawn by a jury would penalize a defendant for exercising his constitutional right.[29]

As previously noted, the recent trend of the Supreme Court has been to "absorb" specific procedural safeguards of the bill of rights into the due process clause thereby making them applicable to the states.[30] From a moral and logical point of view, there seems to be little doubt that a defendant in a state criminal prosecution should be protected by the fundamental procedural safeguards found in the bill of rights. However, one vital question still remains: is the Supreme Court constitutionally justified in finding that these procedural safeguards are contained in the due process clause of the fourteenth amendment.

If, as a minority of the Justices have stated, the Court has expanded the concept of due process beyond all rational basis,[31] then the Supreme Court has, in effect, usurped the authority of Congress and has effected by judicial decision what can properly be done only by constitutional amendment.

[28] See Bruno v. United States, 308 U.S. 287 (1939).

[29] See Griffin v. California, *supra* note 20, at 614-15.

[30] See note 22 *supra*.

[31] See, *e.g.*, Mr. Justice Harlan's dissenting opinion in Malloy v. Hogan, *supra* note 22, at 14; see also Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

State not Required to Provide Counsel on Appeal to Supreme Court

Appellant, an indigent, was convicted of escaping from an honor farm of the state penitentiary. He filed a petition for habeas corpus in the district court, asserting that the rights afforded him by the equal protection and due process clauses of the fourteenth amendment had been violated by the refusal of the Supreme Court of New Mexico to appoint counsel to assist him in appealing to the United States Supreme Court. The district court denied relief. The Court of Appeals affirmed and *held* that a state court is not required to appoint counsel for an indigent in taking such an appeal. *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965).

The right to counsel has been recognized in federal criminal proceedings since the adoption of the federal constitution.[1] Although the unqualified *right* existed, the

[1] U.S. CONST. amend. VI provides in part that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."