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Jury Trial in France

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By Morris Ploscowe*

Introduction

Trial by jury for major crimes has been a principle of French criminal procedure since the Revolution. This principle survived all the changes in French political regimes down to our time. It, however, did not survive the Vichy regime. A decree of November 25, 1941[1] reorganized the French cour d'assises along lines made familiar by the Germans and the Italians. The jury of twelve with exclusive jurisdiction to decide the facts in a criminal proceeding was replaced by a jury of six which, together with the court, decided the question of guilt or innocence and the penalty to be imposed.

The vitality of the jury system in the century and a half of its existence was surprising since it was distinctly a foreign importation and had no prior roots in France. It was adapted by the French from English 18th century models. The adaptation was widely copied by other European countries in the 19th century. Thus, English trial by jury as modified and interpreted by the French became part of the common law of Europe.

It is the purpose of this article to analyze the French jury trial. This analysis has more than a mere historical interest. Basically, French trial procedure has been an attempt to find a compromise between traditional, inquisitory methods of procedure originating in the Roman and Canon law and the principles of accusatory (contentious) procedure copied from 18th century England. This compromise was effected by the Code d'Instruction Criminelle which came into effect in 1810. Its framers felt that the procedural reformers of the French Revolution had gone too far in their enthusiastic importation of English institutions, and their sacrifice of traditional French techniques of administering criminal justice. The Napoleonic Commission which formulated the Code d'Instruction Criminelle, attempted to preserve the sound features of the traditional inquisitory procedure contained in the Ordonnance Criminelle of 1670, and at the same time retain those principles of

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[1]Decree November 25, 1941, Sirey, Lois Annotée, (1942) p. 839.

criminal procedure derived from England which were necessary to an enlightened administration of criminal justice.

An analysis of the cour d'assises as it existed before the Vichy reform can throw light on the problem of whether a satisfactory compromise of this nature is possible: Can a system of trial procedure which places upon the presiding judge the affirmative duty of eliciting the facts in every criminal trial be combined with a system which leaves the presiding judge in the role of an umpire and which places upon the parties to a criminal proceeding the basic responsibility of adducing at the trial the evidence to support their contentions?

The Organization of the Cour d'Assises before the Vichy Reform.

The cour d'assises was the only French court which used a jury to dispose of civil or criminal cases. It had jurisdiction over major offenses, i.e. *crimes* which were punishable by more than five years imprisonment. It was composed of three judges and twelve jurymen. The court was organized as the need arose, and was not a permanent tribunal. It sat at least once every three months in each *department* of France.[2] The presiding justice of this court was a magistrate of high rank. Normally he was an associate justice (conseiller) of the Court of Appeal (cour d'appel). His two associates were taken either from the Court of Appeal or from the trial courts of first instance (tribunaux de première instance).

Jurymen for this court were selected from annual departmental lists compiled by mixed commissions of judges, administrative and legislative officials. Jurymen had to be French citizens over thirty years of age, and in possession of full civic and political rights. Women did not serve on juries in France.

A jury for a particular trial was drawn by lot from a panel of thirty-six jurymen who were normally expected to serve for fifteen days. Both the prosecutor and the defendant had the right to an equal number of peremptory challenges, which could not exceed twelve. There were no challenges for cause. The first twelve names drawn without challenge comprised the jury for the trial. In addition to the regular jurymen, one or two substitutes were drawn to take the place of a juryman who might become incapacitated during the trial.

[2]France is divided geographically in approximately 90 departments.

The Trial Procedure.

The protagonists in the cour d'assises have different roles than in an Anglo-American jury trial. In Anglo-American procedure, it is the duty of the prosecutor and the defense counsel to adduce at the trial the evidence which will support their contention. Their position is no different than if they were arguing an ordinary tort case. Opposing counsel carry on the fight, leaving the judge largely in the passive role of an umpire who directs the proceedings and sees that the procedural rules are observed. But in the French procedure the position of the judge and the parties is entirely different. The presiding judge does more than direct the proceedings. He is charged with the affirmative duty of bringing out the evidence for the prosecution as well as for the defense. The judge and not counsel interrogates the accused, questions witnesses, confronts witnesses and the accused, introduces the documentary evidence and does whatever is necessary to clear up the case. Counsel for the defense and the prosecuting attorney are on hand to see that their interests are adequately taken care of. But their activity on behalf of their clients is auxiliary and supplementary to the primary activity of the presiding judge in bringing out the evidence for both sides. The presiding judge has a definite mission to get at the truth concerning the offense. He obtains the material for the conduct of the case from a study of the dossier which is in his hands before the trial. The dossier is the ensemble of written documents and depositions which record the results of investigations into the crime made by police, prosecutor and investigating magistrate (juge d'instruction). With the dossier in his hands, the presiding judge is able to check the testimony given in open court by witnesses and the accused. He is able to bring out contradictions between present and earlier testimony and supply facts in prior depositions which are omitted at the trial.

French trials usually begin with the interrogation of the accused. The presiding judge questions him in great detail concerning his personal antecedents, character and past criminal record. The judge tries, by this interrogation to give the jury as clear a picture of the personality of the accused as is possible so that they will have a better basis for determining his guilt. The information concerning the accused has been gathered in the preliminary procedure from the relatives, friends, schoolteachers, employers, and acquaintances of the accused, and from the accused himself. The judge asks for verifications, denials, explanations. No incident in

the past life of the accused is too remote or too trivial if it is deemed to throw any light upon the character of the accused. Mme. Steinheil, charged with the murder of her mother and husband, for example, had to deny that she had had an illicit love affair twenty-three years prior to the killing.

When the judge had drawn from the accused all the facts about his past life and character, he then questions him concerning the commission of the criminal act with which he is charged. If the defendant admits the crime, he is thoroughly examined as to the circumstances of its commission. (It is to be noted that there is no plea of guilty in French procedure; all cases must be tried.) If he makes a denial, his defense is submitted to a rigorous analysis. Any contradictions in his testimony and any lack of verisimilitude in his defense will be clearly pointed out and explanations will be demanded. If the presiding judge does not believe the defendant's story he will usually try by all the resources at his disposal to obtain a confession on the stand. The accused cannot be compelled to give testimony against himself. No penalty may be imposed against him for a refusal to answer questions. But silence on the part of the accused would unquestionably prejudice his case with the court and jury. A jury could draw the inference that he has something to conceal; there is also no prohibition against the prosecutor's commenting on the accused's refusal to testify.

When the presiding judge has finished with the accused, he calls the witnesses. They are not examined and cross-examined as in an Anglo-American trial. After a witness is sworn, the judge directs him to tell what he knows about the case. The French believe that a spontaneous story will present a more accurate picture of what the witness knows than one obtained by questions. But the presiding judge does not hesitate to question a witness at length if he digresses too much or if he fails to bring out facts contained in his earlier deposition.

The testimony of witnesses in French trials is not confined by narrow rules on the admissibility of evidence, as in the Anglo-American law. So long as the evidence offered has some relevance to the issue being tried, there is in general no bar to its admissibility. If a fact can shed any light on the circumstances surrounding the commission of the offense or the guilt of the accused, it may be brought out at the trial. There are no peremptory rules, barring hearsay or opinion evidence, as in Anglo-American law. The French law seeks to tap all sources of evidence bearing on the

case. Freedom in the choice of evidentiary means, and freedom in their evaluation are its basic principles.

As in the Anglo-American law, however, the accused is protected by a presumption of innocence. The burden of proving his guilt is upon the prosecution which must have affirmative evidence to justify conviction. There is no duty upon the accused to disculpate himself or suffer conviction. Doubts must be resolved in his favor. In the Anglo-American law, to justify conviction the evidence of guilt must be beyond a reasonable doubt. In the French law, the evidence must induce a moral certitude in the minds of the jury that the accused is guilty. No presumptions or inferences of guilt may be drawn by the jury from the fact that a prosecuting attorney, an investigating magistrate and a presenting body have been sufficiently convinced of the guilt of the accused to hold him for trial. The decision as to guilt or innocence must be reached upon the basis of the evidence presented in open court. What is in the dossier of the preliminary investigation is not evidence. It is the duty of the jury to use as a basis for its decisions only the facts brought out directly before it.

During the process of examination of the accused and witnesses by the presiding judge there is little for the defense counsel to do. He occasionally asks the judge to put additional questions to the witnesses or to the accused in order to bring out facts favorable to the accused. He will sometimes take issue with the presiding judge on the interpretation to be given to particular evidence. He may also object if the presiding judge is pushing the accused too hard in the interrogation. But so long as the judge is bringing out the salient facts, with a fair show of impartiality, defense counsel is largely a passive spectator at the proceedings. This is even more true of the prosecutor. The latter usually leaves to the presiding judge the task of bringing out the facts for the prosecution.

It is only at the end of the trial when all the evidence is in that prosecutor and defense counsel come into their own. Both the prosecutor and the defense counsel must then make their final speeches. The prosecutor speaks first. He will summarize the prosecution's case, hammering home its strong points. He will be followed by defense counsel who will try to minimize the prosecution's case and bring out the essential facts for the defense. Both defense counsel and the prosecuting attorney are allowed a wide range of comment in their closing speeches.

When the closing speeches to the jury were concluded, it was the duty of the presiding judge to formulate written questions for the jury concerning all the facts at issue. Each charge against the accused was broken down into its component elements. Questions were put regarding the culpability of the accused, the aggravating and extenuating circumstances, the alleged matters of excuse or justification, and if necessary, whether the accused understood the nature and quality of his act. These questions were formulated in such a way as to permit "yes" or "no" answers. The answers to these questions constitute the jury's verdict. In an Anglo-American jury trial, the presiding justice gives the jury oral instructions as to the law applicable to the facts brought out at the trial. The jury's judgment as to guilt or innocence is contained in a general verdict of guilty or not guilty. In France, the votes of seven jurymen were sufficient for a verdict, as contrasted with the unanimity required in this country. Since 1932, in France, after the jury answered the questions as to the guilt in the affirmative, it met together with the judges to determine the penalty to be imposed within the maximum fixed by law. The three judges and the twelve jurymen had an equal voice in the determination of the penalty. The vote was taken by secret ballot, and a bare majority sufficed for a decision as to the penalty.

The Advantages of the Procedure in the Cour d'Assises

Whether it takes place in the new world or the old, a trial, to be satisfactory, must place before the jury all the relevant facts which must be considered if an appropriate verdict is to be reached. At its best, French jury trial has distinct advantages over the Anglo-American in achieving this object. In the first place, the fact that the presentation of evidence is wholly in the hands of the judge makes possible a much clearer and more coherent statement of both the prosecutor's and the defendant's cases. In the second place, the elasticity of the rules of evidence allows a fuller presentation: every source of evidence may be tapped. In the third place, the most important source of evidence, the defendant himself, cannot refuse to testify.

Having studied the dossier before entering the trial court, the presiding judge is perfectly familiar with both sides of the case. He is aware of the strong points and the weak points in the evidence for the prosecution and for the defense. He has determined beforehand what evidence must be obtained from each witness

in order to build up a coherent story. He is only occasionally interrupted by prosecutor or by defense counsel, and the interruption is never long enough to deflect attention seriously from the main story he is trying to develop. The judge can present an organic picture of the crime and the circumstances of its commission in contrast to the disjointed picture which a jury receives at an Anglo-American trial, where a bewildered layman must extract from a barrage of questions and answers, objections and exceptions, the pertinent facts on which he must reach his decision.

The elastic rules of evidence make it possible for the continental judge to bring before the lay judges whatever information he believes to have any bearing on the case. Besides furnishing a wider basis for decision, this makes the continental trial a much less complex affair than an Anglo-American trial. There are absent from continental trials the disputes over the admissibility of particular evidence and over the form of questions which feature American trials.

Continental courts also do not present the spectacle so frequently seen in Anglo-American trials of the accused remaining a passive spectator at the proceedings. The thorough examination to which the accused is submitted brings out all he knows about the case. The accused is given a chance on the stand to affirm or deny that he committed the crime. If he denies the crime, his defense may be thoroughly tested by a searching examination. If he admits having committed the crime, all the circumstances under which the crime was committed may be analyzed. This examination of the facts and the inquiry into the personality, character, and past criminal record of the accused furnish a basis for an intelligent decision as to the penalty.

In the determination of the penalty, the jurymen had an equal voice with the judges. This helped to prevent unjustifiable acquittals. Under the traditional distinction between fact and law on which the jury system is based, the penalty was no business of the jury. Jurymen were not to let any concern over the penalty influence their verdict. The French Code stated specifically that jurymen would be grossly negligent in the performance of their duties if they let themselves be influenced in their judgment of the facts by a consideration of the penalties that might be imposed. But neither French juries nor those in other countries respected such limitations on their powers. Juries everywhere interest themselves in the consequences of their verdict. Whether a man is

guilty or not guilty is a secondary consideration. What happens to the accused if he is found guilty is the jury's prime concern. Juries, therefore, have not hesitated to acquit guilty defendants if they felt that too severe a penalty would be imposed as a result of their verdict. The French have met this situation by modifying their code and giving jurymen an equal voice with the judges over the penalty.

The Disadvantages of French Trial Procedure

Anyone accused of crime in France is likely to be handicapped in making his defense by a frequent lack of impartiality on the part of presiding judges. The attitude of judges may be seen particularly in their interrogation of the accused. In one French case a woman was charged with killing her mother-in-law. She vigorously denied any connection with the murder. One of the statements of the president of the cour d'assises in the course of the woman's interrogation was: "You killed your mother-in-law; you organized around her body a *mise en scene* which is beyond the bounds of probability." To this charge the woman answered in an irritated voice, "I did not kill my mother-in-law."[3]

In another case the accused testified that the deceased had kicked in the door and broken the window and that he came into the room with a menacing air, with his hand in his pocket, as if he had a gun. The presiding justice contradicted him, stating, "No! No! Debrie (the deceased) came in as a friend and moreover he was not armed."[4] Ridicule and sarcasm are frequently employed to discredit an accused. The judge who seems to take a special pleasure in bullying the accused is also an all too frequent phenomenon.

The French judge has usually obtained an opinion as to the guilt of the accused from his study of the dossier. In his conduct of the trial he frequently gives the impression that his sole duty is to obtain an acknowledgment of this guilt. Thus the accused is confronted not with an impartial judge, but with an accuser who will try to bring him to confess his guilt by skillful and relentless questioning. Conflict between the trial judge and the accused becomes inevitable under these circumstances, producing scenes which shock Anglo-American observers. So marked has the prosecutorial attitude of French judges been that the right to comment

[3]The case of Clementine Sandral. See Le Matin, January 16, 1932.
[4]The case of Louis Richard. See Le Journal, March 5, 1932.

on the evidence at the close of the trial was taken away from them because their comments frequently degenerated into a second speech for the prosecution. But a partisan attitude of the presiding judge frequently defeats itself. The jury often shows its resentment against undue pressure exercised against the accused and its sympathy for the underdog by bringing in an acquittal, despite the strength of the evidence against the accused.[5]

In the position they have assigned to the trial judge, the French make a fundamental error. The presiding justice is at one and the same time the representative of the prosecution, of the defense, and also a judge. He is expected to be impartial in performing all three functions assigned to him—by virtue of the fact that he is a judge. But impartiality in the performance of three divergent functions cannot be guaranteed simply because the man entrusted with them is a judicial officer. A man's attitude toward his work is very definitely influenced by the things that he has to do. It is a psychological mistake to believe that a man can present impartially evidence both for the prosecution and for the defense, and at the same time be uninfluenced by considerations for either side in reaching a judgment. The French have made the mistake of believing that a judge can act as the general for two opposing armies and at the same time be the umpire in the fight.

Serious abuses also result from the French practice of interrogating the accused as to his personal antecedents and his past record. Such evidence is no doubt relevant to the facts in issue. It enables judges and jury to estimate more accurately the probabilities of the guilt of the accused. But character evidence has its dangers. As Wigmore points out, "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court."[6]

But French law does not take any account of this elementary psychological fact. Statements as to the character and personality of the accused are made in French trials which render highly improbable any unprejudiced judgment on the facts. In one French case in which three individuals were charged with murder

[5]Under the reorganization of the Cour d'Assises by the Vichy regime the presiding justice carries the same attitudes into the juryroom, since at that time he, together with the jurymen, vote on the question of guilt or innocence.

[6]1 Wigmore, Treatise on Evidence, (1st Ed.), p. 127.

for the purpose of larceny and two with complicity in the larceny, the presiding justice in the course of the interrogation stated as to three of the accused: "All three of you are racketeers, high pressure swindlers (ecumeurs de l'epargne) for whom convicted criminals such as two of you, served as canvassers." Of one of the accused the president stated: "You have taken part in many fights in notorious places in the town. You amused yourself by showing your skill with the revolver. (A revolver was not used in the killing.) You beat your wife, your children and your comrades. Confess that you are of a violent temperament."[7]

In another murder case in which a woman was accused of killing her mother-in-law, the president tried to get the accused to admit that she had married her husband, who had died three years previously, for his money.[8] In another case the keeper of a bawdy house had killed her protector. Her past was presented to the jury by the president in these terms. "I do not know anything about your early youth, but you became a prostitute when very young. You earned a lot of money and this enabled you to obtain a promotion in the army of Cytherea. From an employee you advanced to a boss."

Mme. Steinheil who was charged with the murder of her husband and mother and acquitted by the jury has this to say in her memoirs as to her interrogation at the trial: "M. de Valles kept his promise; he asked me at first a number of almost indifferent questions about my childhood and my youth, and I had time to collect myself to some extent . . . . But soon, very soon, the remarks I heard were so revolting that I reeled under them. I had to deny for instance, that my father, whom by now the reader must have learned to know and to love, was a drunkard, and to declare that my conduct was irreproachable and could not have caused his death as was hinted. (Her father died in 1888, the trial was in 1909) . . . Relentlessly, mercilessly, questions were asked about my relations with Lieut. Sheffer at Beaucourt! (a love affair which occurred in 1886, twenty-three years prior to the trial) I fought desperately, and then, worn out by my own efforts, I almost collapsed and could not help sobbing. . . . "[9]

Other aspects of continental evidentiary rules may also be criticized. The presumption of innocence in favor of the accused

[7]The case of Nibas. Le Journal, January 29, 1932.

[8]The case of Clementine Sandral. Le Matin, January 16, 1932.

[9]Margaret Steinheil, My Memoirs, p. 419.

can be little more than a sham in a procedure dominated by a partisan judge. Nor does the rule that judgment must be had on the basis of evidence taken in open court mean a great deal where the evidence at every stage of the trial is controlled by the written documents of the dossier. The liberal rules on the admissibility of evidence also have their drawbacks. A good deal of rumor, ill-founded gossip, and pure hearsay find their way into continental trials. The Anglo-American exclusionary rules, for all their technicalities, guard juries against this kind of evidence. French jurymen should receive similar protection.

Conclusions

Compromises generally are unsatisfactory, and the so-called compromise on which French trial procedure is based is no exception. Under the traditional procedure used before the French Revolution a trial was had on the basis of the written documents resulting from the preliminary procedure. The French thought that they had eliminated this method of trial by having witnesses appear at a trial and by requiring the jury to reach its verdict on the basis of evidence presented in open court. Nevertheless, the dossier, which is the ensemble of the written documents resulting from the preliminary investigation, still has a predominating role at the trial just as it had in the traditional procedure. By giving the accused complete freedom to make his defense and to be represented by counsel the French were influenced by English procedure. But the predominant influence of the presiding judge, the searching interrogation to which the accused is submitted, reduces in practice the scope of the defense counsel's activity to a minor role.

Theoretically, French procedure has a presumption of innocence. But the clear demarcation of prosecution and defense, which is necessary for the vitality of any such presumption, does not exist in French procedure.

As a reaction to arbitrary standards of proof in the traditional procedure, the French made relevance substantially the only test of the admissibility of evidence. They overlooked the necessity of submitting to the jury, consisting of untrained laymen, evidence which had some a priori guarantee of trustworthiness.

It is evident that French criminal trial procedure, like so many other institutions of the defunct Third Republic, needs revision.

The revision will have to be more fundamental than the Vichy reform, which merely cuts down the number of laymen participating in the cour d' assises from twelve to six and alters the powers of both judges and laymen in the formulation of the verdict.

Any fundamental revision of French criminal procedure will have to consider such problems as the desirability of adopting an institution similar to the plea of guilty, so that only cases in which there is an issue of fact need be tried; the desirability of leaving the dossier in the hands of the prosecuting authorities and requiring them to produce the evidence to justify their accusations; the necessity of giving greater vitality to the presumption of innocence through such things as the exclusion of evidence of the defendant's past record until his guilt or innocence has been decided; the need for changes in the rules of evidence so as to eliminate ill-founded rumor and gossip.

These are some of the typical problems which have to be resolved before French criminal trials attain standards of fairness which would be satisfactory to an Anglo-American lawyer.