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TESTIMONY BY A JUDGE OR JUROR

FREDERICK M. HART*

Although the early history of the *jurata* shows it to have been chosen from among those who were familiar with the controversy and parties before the court, it has long been recognized that the better system attempts to obtain jurors and judges who have no prior knowledge of the dispute to be tried.¹ In furtherance of this policy the *voir dire* exists to eliminate unwanted jurymen and similar devices have been established to provide for the disqualification of judges.²

In spite of these protections, the situation still occasionally arises where it is discovered after a trial has begun that the judge or a juror is possessed of facts to which he should testify. When this occurs there is an immediate conflict between two tenets of the judicial system. It is a basic proposition that all relevant evidence should be presented to the trier of facts, while on the other hand the disinterestedness of the tribunal is essential to fairness. Unless this conflict is avoided by the granting of a mistrial and a recommencement of the action before a different judge or jury, there must be a compromise either with the principle of impartiality or a full disclosure.

When the Model Code of Evidence and the more recent Uniform Rules of Evidence were formulated, this problem was considered and space given in the final drafts to its solution. It will be the purpose of this article to investigate these solutions, especially those of the Uniform Rules which resulted from further consideration of evidential problems, and to compare them with the present posture of the law.

THE JUDGE AS A WITNESS

It is stated in Rule 41 of the Uniform Rules of Evidence that "against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness".³ The committee's comment notes that the intention of this rule is not to prevent a judge from testifying when the evidence which he will give is essential to a just disposition of the case, but that once he testifies, even if to merely formal matters, he is required to relinquish the role of judge in the case.⁴

The maxim that it is against public policy for a judge to testify in the trial over which he is presiding supplies the rationale for the rule.

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¹ THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, 90 et. seq. (1898).

² See Slovenko, "Je Recuse!": *The Disqualification of a Judge*, 19 La. L. Rev. 644 (1959).

³ 1952 Handbook of the National Conference of Commissioners on Uniform State Laws [Hereafter cited as 1952 Handbook], 480 (1952).

⁴ *Ibid.*

When it is necessary for a judge to testify to basic elements of an action, this, the commentators feel, should be known to the parties prior to trial and provision should be made to assure that a different justice will hear the case. Formal matters, they contend, should be proved by means which will result in less courtroom embarrassment.⁵

The problem of the judge as a witness was covered by the Model Code of Evidence, the forerunner to the Uniform Rules, in Rule 302 which provides that "the judge in an action may be a witness therein. If the judge testifies concerning a disputed *material* matter, he shall not continue as judge in the action against the objection of a party not calling him. . . ."⁶ [Emphasis added] This rule conflicts with the proposed Uniform Rules in that it allows a judge to testify to formal matters while still remaining as justice in the case. It was represented by the commentators to state the majority rule in the United States at the time of its adoption.⁷

While there is little doubt that the courts of the United States are in accord with presently proposed Rule 41 in so far as it denies a judge the dual role of justice and witness when his testimony is material and disputed, some jurisdictions now allow a judge to testify to formal matters while retaining his position on the bench.⁸ The articulated objections to his testimony in such cases are threefold. First, while he is assuming the role of witness, there is no available machinery to function as the court.⁹ This objection would be accentuated if a ruling were necessary as to some point of the judge's own testimony or when the judge claims a privilege,¹⁰ but the rationale seems to be based upon the wider ground of jurisdiction.¹¹

The second objection, originating from the fear that such testimony by the judge will unduly prejudice the jury, is grounded in the argument that it is impossible for a jury to weigh justly the testimony given by one who is fulfilling the auspicious role of judge in the case and to give it only as much importance as it deserves.¹² This argument is by

⁵ *Ibid.*

⁶ MODEL CODE OF EVIDENCE rule 302 (1942). This provision of the Model Code was discussed briefly in Torkelson, *Testimony of Judge or Juror*, 1945 Wis. L. Rev. 248, 252 (1945). As is there noted, there are no pertinent Wisconsin cases. By statute, however, if either party in a justice court action makes known, before issue is joined, that the justice of the peace before whom the case is pending is a material witness, the action will be transferred. 1957 Wis. Stat. §301.26.

⁷ MODEL CODE OF EVIDENCE, Comment rule 302 (1942).

⁸ MORGAN, BASIC PROBLEMS OF EVIDENCE 76 (1954).

⁹ *Morss v. Morss*, 11 Barb. 510 (N.Y. 1851); the reasoning of this case was rejected in part by *People v. Dohring*, 59 N.Y. 374 (1874). See also *Ricci v. Bove's Estate*, 116 Vt. 406, 78 A.2d 13 (1951); *Crawford v. Hendee*, 95 N.J. L. 372, 112 Atl. 668 (1921) [Mayor "judging" dismissal hearing held unable to testify therein].

¹⁰ *Rogers v. State*, 60 Ark. 76, 29 S.W. 894 (1894).

¹¹ *Ricci v. Bove's Estate*, *supra* note 9.

¹² "But the most cogent reason why a judge should not become a witness is that

far the stronger and is the one most apropos to the case of a judge testifying to merely formal matters. Even if his testimony is nothing more than a mechanical expression of a fact not in dispute, the psychological effect that his testimony, which inevitably must favor one party at least indirectly, might have on the jury could be an important factor in the disposition of the case. This danger exists no matter how much care the judge might take to impress upon the jurymen that his testimony is not to be regarded as indicating his sympathy with either party's position.¹³

The third argument advanced is based upon the possibility that the judge may be required, even in a jury case, to weigh his own testimony if a motion for a directed verdict is made.¹⁴

One of the earliest American opinions to discuss this problem is *Morss v. Morss*¹⁵ decided in 1851. A statute required a court of three judges and the question arose as to whether one of these three could leave the bench temporarily in order to testify in the action before the court. It was held that this would be improper as it would destroy the power of the court to hear the case. The court said:

The objection to a juror's being a witness rests mainly on a question of public policy, and the objection to a judge being sworn depends on an additional and different ground, viz, that of want of power to discharge the duties of a court while acting as a witness.¹⁶

Speaking of the dual role which the judge-witness would play, the court buttressed its decision with the observation that "the two characters are inconsistent with each other, and their being united in one person is incompatible with the fair administration of justice."¹⁷

This case, which was decided by one of the intermediate courts of appeal in New York, failed to reach the court of last resort in that jurisdiction, and when the highest court of the state finally heard a case in point, it refused to accept the argument of the *Morss* case and decided that a court neither lost jurisdiction of a case nor the power to sit as a court when one of the three required judges took the witness box.¹⁸ The court, however, via dicta, strongly indicated that any testi-

if he testifies it must necessarily be in behalf of one of the parties and against the other, and this tends strongly to influence the jury and to deprive the party against whom he testifies of a fair and impartial trial." *State v. Sandquist*, 146 Minn. 322, 178 N.W. 883, 885 (1920) [This case involved a rape prosecution in which the judge testified, apparently against the interests of the defendant, as to the time an affidavit was filed. The court held it error for him to testify even though he had carefully instructed the jury both before he testified and in his final charge that he was not doing so in behalf of either party.]

¹³ *Ibid.*

¹⁴ *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117 (1896).

¹⁵ *Supra* note 9.

¹⁶ *Id.* at 511.

¹⁷ *Id.* at 515.

¹⁸ *People v. Dohring*, 59 N.Y. 374 (1874).

mony by a judge violated fundamental concepts of fair play. They refused to reverse a lower court ruling allowing such testimony because counsel had failed to object to the testimony at the trial and had based his appellate argument solely on the holding of the *Morss* case. Speaking of the practice of judges testifying, the court said:

. . . it was erroneous, not because in this instance any harm came either to the people or to the defendant, for neither made objection, and both consented; but because such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hinderance of justice, and to the scandal of the courts.¹⁹

In some jurisdictions legislation has already been enacted in this area.²⁰ What is probably the first such enactment was passed in California in 1872 and states that:

. . . the judge himself . . . may be called as a witness by either party; but in such cases it is in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another judge. . . .²¹

Although a literal reading of this statute would place the decision, as to whether he should leave the bench, entirely in the hands of the presiding justice in all cases, court interpretation has confined it to giving a judge substantially the same discretion as he would have under Rule 302 of the Model Code of Evidence. Consequently, it differs from the Uniform Rules only in that it permits formal testimony by one who then remains on the bench.

People v. Connors,²² the first case arising under the statute, turned on the issue of whether a presiding judge could testify to his disposition of a document during a prior trial without disqualifying himself as a judge. The California court failed to meet the question squarely, holding the testimony given in the case too insignificant to constitute reversible error. Before coming to this conclusion, however, they did, albeit by dicta, indicate severe limitations to the statute. After expressing doubt as to its constitutionality, the court stated:

. . . conceding that the legislature has the constitutional right to authorize a trial judge to preside over the trial of a cause and at the same time testify as a witness in the case, the practice is not to be commended and should never be resorted to except in cases where the circumstances imperatively require it, and not

¹⁹ *Id.* at 377.

²⁰ The statutes are collected in 6 WIGMORE, EVIDENCE §1909, n. 5 (3rd ed. 1940).

²¹ Cal. Code Civ. Proc. §1883. It has been suggested that the Uniform Rules of Evidence are in opposition to this statute. Chadbourne, *Uniform Rules and California Law of Evidence*, 2 UCLA L. Rev. 1, 9, and Holbrook, *Witnesses*, 2 UCLA L. Rev. 32 (1955).

²² 77 Cal. App. 438, 246 Pac. 1072 (1926). For a similar interpretation of an identical statute in Montana, see *People ex rel Moser v. District Court*, 116 Mont. 305, 151 P.2d 1002 (1944).

even in such a case in public prosecutions where the judge's testimony directly bears upon or involves a fact or facts without the proof of which a conviction cannot be had. . . . [I]t may now be laid down as a generally accepted rule that a judge is not a competent witness in a case being tried before him, and that even where, as in this state, there is a statute which in effect commits the question whether a judge may so testify to the discretion of the court or the judge himself, it will be deemed an abuse of the discretion so vested in the court or judge if the latter's testimony discloses facts without the proof of which the issue such testimony is designed to support cannot be sustained. . . .²³

The position adopted by Rule 41 represents a change from the generally accepted view of the law in the United States only in those jurisdictions where a judge has discretion to continue hearing the case after testifying to *merely formal matters*. This departure from present law is somewhat less evident in jurisdictions which have no existing legislation on the subject.²⁴ Even in states with statutory provisions similar to those of California where the legislature has placed wide discretion in the hands of the trial judge, the appellate courts impose important limitations.

Professor Wigmore sees no good reason for the adoption of a rule excluding a judge's testimony. In his treatise he dismisses the objections to a judge-witness with this observation:

The force of the objections would be most seen and would rise to an appreciable degree only when the judge became a principal witness. . . . In all such instances (which are rare enough), the usefulness of his testimony would be known beforehand, and his own discretion and the parties' could be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony. To suppose here a danger that the inconveniences above noted would occur in any appreciable degree is to be unduly apprehensive.²⁵

Although, as Wigmore argues, in the vast majority of cases no difficulty exists in those jurisdictions wherein a judge may testify to formal matters and remain as judge in the case, the approach of Rule 41 is sound both in theory and in practice. It represents no departure

²³ *Id.* at 246 Pac. 1077.

²⁴ It has been said that "It is undoubtedly the law as sustained both by reason and authority that a judge cannot, over the objection of a party be a witness in an action tried before him, *in the absence of a statute so providing*". [Emphasis supplied]. *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725, 730 (1914). Although it appears to be a reasonably accurate statement of the law, there are some exceptions. *Hale v. Wyatt*, 78 N.H. 214, 98 Atl. 379 (1916).

²⁵ 6 WIGMORE, EVIDENCE, 592 (3rd ed. 1940).

from the philosophy which underlies present statutes and decisions, the only difference being one of degree. There is unanimity of opinion that any testimony by a judge which is prejudicial shall be forbidden. The necessity for answering the question, "What is prejudicial?" or "What is merely formal testimony?" is removed by Rule 42. Also, the danger that a juror, consciously or not, will obtain the impression that the presiding justice's testimony shows an inclination toward one of the parties is avoided.

The rule may result occasionally in delay or cause a party additional labor in presenting evidence. However, it represents an attempt to secure a more important goal than the ease of litigation, namely, fairness of litigation. To this end it is a small, but worthwhile, safeguard against biased tribunals.

THE JUROR AS A WITNESS

When a juror is possessed of factual information about the events which are being portrayed by counsel in the trial before him, several questions arise: "Can he be called as a witness by either party?" "Must he voluntarily disclose his knowledge to the court?" "May he, without taking the stand, disclose his information to the other members of the jury?" "May he personally use this information in the determination of his verdict?" The first of these questions, which is the principal one to be discussed here, goes to the competency of a juror as a witness; the second involves a policy question and the latter two revolve about the hearsay rule and especially the requirement that a witness be subjected to cross-examination.

Different problems are connected with the juror's privilege to refrain from testifying concerning his activities as a juror and with the maxim that a juror may not "impeach his own verdict". These will not be considered herein and they are not relevant to the instant problem. Of concern here is not a juror's part in the jury, but his part in (or knowledge about) the facts of the litigation.

Rule 42 of the Uniform Rules states that "a member of a jury sworn and empanelled in the trial of an action may not testify in that trial as a witness. But if a party or his counsel has been advised or otherwise has knowledge that a prospective juror may be called as a witness, the failure of such party to challenge the juror on that ground shall be deemed to be a waiver on his part of his right to object to the juror as a witness".²⁶ This apparent total rejection of a juror's testimony immediately raises the question of whether it was meant to exclude the testimony of one who, upon being called to the witnessbox from the jury, relinquishes permanently his place in the jury, the trial continuing either with an alternate juror or with a reduced number of members.

²⁶ 1952 Handbook 480 (1952).

No answer is given to this ambiguity by either the rule itself or by the comment which follows. The latter merely states that this rule is a "clear choice of policy . . . which is at substantial variance from the corresponding Model Code Rule".²⁷ In the absence of any contrary indications, and in view of the clear mandate of the rule, it must be taken to exclude a juror's testimony even under such a condition.

As indicated, in the Model Code of Evidence a different approach to this question was adopted. It was stated there that . . . "a petit juror in an action may be a witness therein. . . . [H]e shall continue as a juror . . . unless the judge finds that to allow him to do so is likely to prevent a fair consideration by the jury of an issue in the action".²⁸ The commentary to this rule expressed the opinion that it was merely a reiteration of the generally prevailing law on the subject.²⁹ Probably because the *voir dire* filters most potential juror-witnesses from the jurybox, there is a paucity of decisions in this area. The few cases which are in point unanimously accept the position of the older Model Code rule in preference to the Uniform Rules. Unfortunately for the legal commentators, this unanimity seems to have been an indication of the acceptance of the rule with little hesitation, and consequently, the rationale of the decisions has remained largely inarticulated.

The only two American cases in which this issue has been discussed at any length are *Howser v. Commonwealth*³⁰ and *Morss v. Morss*.³¹ In the *Howser* case the "objection was not made until after he [the juror-witness] was sworn . . . when it was too late to object to this competency, and . . . they [juror-witnesses] were called to [testify to] incidental and comparatively immaterial points, that did not touch the *corpus delicti*".³² Specifically passing over these answers to the appellant's objections to the testimony, the court held that "jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies them, and there is no rule of public policy that excludes them. On the contrary, it has been our immemorial practice to examine jurors as witnesses when called by either party."³³ In support of this the court cited a statute³⁴ which required jurors possessed of information relating to the matter in controversy to testify.

Two constitutional points were argued by counsel and dismissed by the court after some discussion. The first of these maintained that the acceptance of the testimony of a juror destroyed the constitutional right to an impartial jury in that the testifying juror was predisposed to believe his own testimony. In answering this the court stated that

²⁷ *Id.* at 481.

²⁸ MODEL CODE OF EVIDENCE rule 302 (1942).

²⁹ MODEL CODE OF EVIDENCE, comment to rule 302 (1942).

³⁰ 51 Pa. 332 (1865).

³¹ *Supra* note 9.

³² *Supra* note 30, at 336.

³³ *Id.* at 337.

the opportunity afforded at the *voir dire*, to discover and challenge those called for jury service, was ample assurance that this constitutional mandate would be fulfilled. The second argument, to the effect that the "right to *confront* witnesses would be abridged in the instance of witnesses taken from the jury-box, because their truth and veracity could not be attacked without damage to the attacking party,"³⁵ was refuted by the court's statement that:

As to material witnesses, those, we mean, upon whose testimony the event is essentially dependent, we think they ought not to be admitted into the jurybox, and we believe the general practice is to exclude them where the fact is discovered in time; but we do not think the constitutional provisions alluded to, nor any rule of law, is violated by the examination of a juror as a witness. The a priori presumption is that he is a man of truth and veracity or he would not have been summoned as a juror; and confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused.³⁶

In the *Morss* case the court discussed the objections to a juror's testifying in connection with the issue, then before the court, of whether a judge trying the case could take the witness stand.³⁷ Although the discussion is *obiter dicta*, it is valuable as the only other judicial expression of the reasoning behind these objections to the juror's testifying. The court, in the *Morss* case, said:

A juror is to decide only questions of fact, and is examined before the cause is submitted to him. The objections to his competency rests on public policy. In all cases he has to pass upon his own credibility; and this difficulty would be greatly increased in the case of his impeachment. He may refuse to answer, in which case his commitment would delay the trial. The party against whom he is called is subjected to a great disadvantage, for the juror may be expected to maintain unyieldingly in the jurybox the opinions he has expressed on the witness-stand. It may be plausibly objected, therefore, that respect for the feeling of the juror and regard for justice to the parties should exclude the juror as a witness and require the objection to be made on the calling of the jury, that the party need not suffer for the want of his testimony.³⁸

The *Howser* case has been followed by courts in Georgia,³⁹ Iowa,⁴⁰ Nebraska,⁴¹ and Vermont,⁴² but in none of the reported cases from

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Supra* note 9.

³⁸ *Id.* at 511.

³⁹ *Savannah F. & W. R. Co. v. Quo*, 103 Ga. 125, 29 S.E. 607 (1897); *Tumlin v. State*, 88 Ga. App. 713, 77 S.E.2d 555 (1953)

⁴⁰ *State v. Cavanaugh*, 98 Ia. 688, 68 N.W. 452 (1896).

⁴¹ *Chicago R. I. & P. Ry. Co. v. Collier*, 1 Nebr. (Unof.) 278, 95 N.W. 472 (1903).

⁴² *Dunbar v. Parks*, 2 Tyler 217 (Vt. 1802).

these jurisdictions is the rationale behind the ruling expressed. In other states, statutes have been enacted to the import.⁴³

The law in the United States is presently at variance with the Uniform Rule 42 as proposed. However, in none of the above cases was the testimony of the juror vital to the issue about which he testified, and it would seem that the apparent solidarity with which the courts have met the problem is, in reality, not convincing. A reading of the decisions that have touched upon the problem indicates that the courts have never seriously considered the question in a case in which the result turned upon this issue. In the *Morss* and *Howser* cases, wherein is found the only discussion of the problem, such discussion is dicta. In the remaining cases the courts failed to offer any rationale beyond the statement that it was a time honored practice to hear the testimony of jurors.

Another aspect of this problem which should be considered in connection with Rule 42 is raised by statutes and decisions requiring a juror, possessed of evidential knowledge, to testify in open court. The California code, for instance, provides that:

If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial . . . [and] the juror making the statement must be sworn as a witness and examined in the presence of the parties.⁴⁴

Twenty-three additional states⁴⁵ have legislation which, although varying to some degree from that found in California, is still substantially the same. In four states the same result has been reached through judicial decisions.⁴⁶

Such statutes are based upon the desire to guard against jurors using personal knowledge, untested as to its reliability and credibility by subjection to cross-examination and other evidential safeguards, in the determination of their verdict and in their juryroom discussions. This is a sound reason for their retention as the objective of the science of evidence is frustrated when a juror is allowed to "testify" outside the courtroom to his fellow jurors, and Rule 42 should not be read as effectuating any change on this point. The technical trial difficulties which Rule 42 has the potential of causing detract from its apparent attractiveness. Although the primary purpose of all evidential rules is to insure justice, still an eye must be kept to the objective of insuring quick and efficient courtroom action. In face of the present

⁴³ Collected in 6 WIGMORE, EVIDENCE §1910 n. 1 (3rd ed. 1940).

⁴⁴ Cal. Pen. Code §1120.

⁴⁵ Citations are collected in 6 WIGMORE, EVIDENCE §1800 n. 2 (3rd ed. 1940).

⁴⁶ *Murdoch v. Sumner*, 22 Pick. 156 (Mass. 1839); *Falls City v. Sperry*, 68 Nebr. 420, 94 N.W. 529 (1903); *Curtis v. Boston & M. R. R.*, 78 N.H. 116, 97 Atl. 743 (1916); *Stone v. State*, 116 Tex. Cr. 319, 31 S.W.2d 822 (1930).

delays which are often met by litigants and crowded calendars facing judges, the question of possible further delay is of importance.

Professor Wigmore believes that no statutory restriction upon the availability of jurors as witnesses is necessary. He would place the burden of sifting potential juror-witnesses upon the attorneys at the *voir dire*, and where, whether through the neglect of counsel or otherwise, one who has been allowed to sit on the jury is in a position to testify, he would allow it trusting that the other eleven jurors would balance any bias caused thereby.⁴⁷

It would seem, however, that the principle of Rule 42 is sound and that it is not always possible for the other jurors to sufficiently compensate for the bias that one must feel when he is called to testify. Once a juror is a witness, he probably tends to associate himself in some particular way with the cause for which he has testified no matter how innocuous his testimony might be. This leads, as Professor Morgan has said, to "the situation . . . that the witness-juror must . . . [be] a man of extraordinary intellectual and emotional capacity to be able to give an unbiased decision upon the issue concerning which he testified."⁴⁸

⁴⁷ 6 WIGMORE, EVIDENCE §1910 (3rd ed. 1940).

⁴⁸ MORGAN, BASIC PROBLEMS OF EVIDENCE 76 (1954).

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