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Criminal Law--Verdicts--Integration of Finding of Guilt and Recommendation of Clemency

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CRIMINAL LAW—VERDICTS—INTEGRATION OF FINDING OF GUILT AND RECOMMENDATION OF CLEMENCY.—Defendant was indicted for murder in the first degree. The trial judge charged the jury that "the unanimous agreement of the jury is necessary to a verdict," and later in an attempt to clarify the law respecting jury clemency in first degree murder cases, allowable under 29 STAT. 487 (1897) as amended 35 STAT. 1152 1909), 18 U. S. C. § 567 (1940), the trial judge stated: ". . . before you may return a qualified verdict . . . your decision to do so must *like your regular verdict* be unanimous." (Emphasis added). The verdict returned was "guilty of murder in the first degree", and, as made mandatory by REV. STAT. § 5339 (1875) as amended 35 STAT. 1143 (1909), 18 U. S. C. § 454 (1940), the death penalty was imposed. On appeal the judgment was affirmed. *Andres v. United States,* 163 F. 2d 468 (C. C. A. 9th 1947). Certiorari was granted by the United States Supreme Court. *Held,* that unanimity on both guilt *and* punishment is necessary before *any* verdict can be returned, and reversal required in that the trial court's charge could reasonably have led the jury to believe that it might make two separate decisions, and should there be disagreement as to the qualifying sentence, then an unqualified verdict be returned. *Andres v. United States,* 68 Sup. Ct. 880 (1948).

Section 567 of 18 U. S. C. reads: ". . . where the accused is found guilty of murder in the first degree . . . the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." A mere reading of this provision would seem to support the contention of the government in the principal case that the initial determination for the jury is as to the guilt of the accused, and that upon a finding of guilt the jury should lay that matter aside and decide as to the qualification.

Unanimity in finding a verdict is essential in federal jury cases. *American Publishing Co. v. Fisher,* 166 U. S. 464 (1897). Logically, then, under the government's contention in the *Andres* case, if unanimity as to qualification cannot be achieved, then the unanimous decision as to guilt must be returned without qualification. The Court, in rejecting the construction urged by the government, looked to "considerations not derived from a mere reading of the text" and construed the provision in a manner "more con-

sonant with the general humanitarian purpose of the statute." The interpretation of the act as made by the circuit court and the Supreme Court in the *Andres* case is supported by one other federal decision, *Smith v. United States*, 47 F. 2d 518 (C. C. A. 9th 1931). W. VA. REV. CODE (Michie, 1943) c. 62, art. 3 § 15 provides that if the jury find one indicted for murder guilty of murder of the first degree "they may, in their discretion, *further find* that he be punished by confinement in the penitentiary. If such further finding be not added to their verdict, the accused shall be punished with death. . ." (Italics added). It is apparent that this provision is susceptible to the same argument advanced by the government in the *Andres* case. As in federal jury cases, West Virginia requires unanimity of the jurors for the return of a verdict. *Emory v. Monongahela West Penn Service Co.*, 110 W. Va. 699, 708, 163 S. E. 620 (1938). And, the accused in a criminal case is entitled to an instruction as to unanimity if it is not couched in language which would invite the jury to disagree. *State v. Sibert*, 113 W. Va. 717, 169 S. E. 412 (1933). But, the precise issue presented in the *Andres* case with respect to § 567 of 18 U. S. C. has not been before the West Virginia court as regards § 15, art. 3 of c. 62. It would seem not to be an unwarranted presumption to say that should the issue be squarely presented, the United States Supreme Court's construction of a federal act substantially like the West Virginia statute would be accorded weight in construing the state act.

Assuming that a construction of the West Virginia statute should be made in accordance with the *Andres* case, it is submitted that the following instruction, approved in *State v. Hatfield*, 48 W. Va. 561, 573, 37 S. E. 626 (1900), and in *State v. Staley*, 45 W. Va. 792, 797, 32 S. E. 198 (1899), is improper: "The court . . . instructs the jury that, if they find the prisoner guilty as charged in the indictment, they shall further find whether he is guilty of murder in the first degree or second degree. If they find him guilty of murder in the first degree, they may, in their discretion, further find that he (the prisoner) be punished by confinement in the penitentiary; and, if such further finding be not added to such verdict, the judgment thereupon rendered by the court will be that the prisoner be punished with death." It is true, as stated in the *Staley* case (at p. 798), "The court only propounded the law laid down in the statute." But, if the finding as to both guilt and punishment is single and indivisible, it is not because of the statutory expression but in spite of it. To instruct the jury that

they might "further find" presupposes that they have already found, and it is not unreasonable to say that the jury thereby could be misled into returning an unqualified verdict, though all twelve had not agreed to do so.

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FEDERAL COURTS — VENUE — "RESIDENCE" OF DEFENDANT IN FEDERAL RESERVATION GROUNDED ON STATE LAWS CONCERNING ADMISSION OF FOREIGN CORPORATIONS. — Plaintiff, a Massachusetts citizen, sued defendant Delaware corporation in the Federal District Court for the Eastern District of Virginia to recover for injuries received from a fire in defendant's hotel on the Fort Monroe Military Reservation located in that part of Virginia included in the eastern district. Service was pursuant to a Virginia statute, VA. CODE (Supp. 1946) § 3846a, providing that foreign corporations doing business in Virginia should be deemed to have appointed the Secretary of the Commonwealth as agent to receive service of process. The act of cession of the reservation from Virginia to the United States reserved the right of the state officers to serve process therein. Defendant, who did no business in Virginia except that on the reservation, made timely objection to the venue. After judgment for plaintiff, defendant appealed on the ground of want of personal jurisdiction. *Held,* that under state statutes requiring consent by foreign corporations to constructive service as a condition of entering to do business within the state, a foreign corporation doing its only business in that state on a federal reservation is suable in the locally appropriate federal court on causes of action arising from the business done provided the act of cession from the state to the federal government reserves the right of state officers to serve process in the reservation. *Affirmed. Knott Corp. v. Furman,* 163 F. 2d 199 (C. C. A. 4th 1947).

The federal venue statute indicates the district of residence of either plaintiff or defendant as the only proper venue when federal jurisdiction is based exclusively on diversity of citizenship. 49 STAT. 1213 (1936), 28 U. S. C. A. § 112 (Supp. 1947). However, in *Neirbo v. Bethlehem Steel Corp.,* 308 U. S. 165 (1939), designation of an agent to receive service of process in conformity with a valid state statute as a condition of doing business within the state was held an effective consent to be sued in the federal courts as