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Criminal Law--Judicial Comment Constituting Prejudicial Error

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the birth of a child is strong evidence of marriage and nothing less than positive proof may impugn the validity of the relation.[12] These presumptions the court did not consider.

The retention of her maiden name by F because she thought a church wedding was necessary is not inconsistent with the alleged agreement. If the consent was consummated by the cohabitation and reputation the marriage status existed without regard to what the parties believed to be the legal effect of their agreement[13] and if the general reputation existed the law will create a common law marriage even though one of the parties purposely avoided the marriage ceremonial,[14] or even though both parties believe a ceremony is requisite to a marriage.[15] Then the common law marriage existed before the petitioners were born and the retention of the maiden name may have been an afterthought which should not have been controlling and which could not invalidate the marriage which was prior in time. The capacity to inherit exists when the child is yet in the womb[16] and a subsequent failure of a third party to give to the child the proper appellation should not be determinative.

—JOHN L. DETCH.

CRIMINAL LAW — JUDICIAL COMMENT CONSTITUTING PREJUDICIAL ERROR. — Appellant was convicted of violating the Federal Narcotic Drug Act. His conviction was affirmed by the Circuit Court of Appeals. On a writ of certiorari to the Supreme Court appellant sought a reversal on the grounds that the instruction of the trial court calling the jury's attention to the fact that the defendant had wiped his hands while giving testimony and stating that such mannerism was an indication of lying, was error. *Held,* that the instruction was prejudicial. Judgment reversed. *Quercia v. United States.*[1]

In the federal courts trial by jury according to the purest

[12] Adger v. Ackerman, *supra* n. 8.
[13] McClurkin v. McClurkin, 206 Ala. 513, 90 So. 917 (1921).
[14] Severance v. Severance, 197 Mich. 327, 163 N. W. 924 (1917).
[15] Richard v. Brehm, 73 Pa. 140 (1873).
[16] W. VA. REV. CODE (1931) c. 42, art. 1, § 8.

[1] 53 S. Ct. 698 (1933).

common law standard is retained.[2] Thus, it is within the province of the judge to assist the jury by explaining, commenting or stating an opinion on the evidence.[3] There are of course some limitations.[4] Comment and opinion must be fair.[5] It must not prejudice the jury against the defendant.[6] Legitimate comment must not become an argument for the prosecution.[7] For, although the federal practice encourages the judge to be more than an umpire, he cannot become an advocate.[8]

The practice in a majority of states limits the power of the judge to comment on the evidence.[9] These courts attempt to base

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[2] "The constitution secures a trial by jury, without defining what the trial is. We are left to the common law to learn what it is that is secured." United States v. Bags of Merchandise, 2 Sprague 85, 88 (1863). Speaking of the common law trial, "It has the advantage of the judge's observation, attention and assistance, in point of law, by way of decision, and in point of fact by way of direction to the jury." 2 HALE, HISTORY OF THE COMMON LAW 156.

[3] Vecchio v. United States, 53 F. (2d) 628 (C. C. A. 8th, 1931).

[4] Hickory v. United States, 160 U. S. 408, 16 S. Ct. 327 (1895).

[5] Foster v. United States, 188 Fed. 305 (C. C. A. 4th, 1911).

[6] The court cannot disparagingly attack the defense, Leslie v. United States, 43 F. (2d) 288 (C. C. A. 10th, 1930); nor belittle the defense, Parker v. United States, 2 F. (2d) 710 (C. C. A. 6th, 1924); nor make a denunciation repudiating defendant's statements as lies, Malaga v. United States, 57 F. (2d) 822 (C. C. A. 1st, 1932). But, he may state his opinion on the credibility of the accused, Russel v. United States, 12 F. (2d) 683 (C. C. A. 6th, 1926); or indicate impartially that, in light of the evidence, he gives little credit to defendant's testimony, Tuckerman v. United States, 291 Fed. 975 (C. C. A. 6th, 1923); or comment on the weight and sufficiency of the evidence, Wallace v. United States, 291 Fed. 972 (C. C. A. 6th, 1923).

[7] "The court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. It should not be permitted to do indirectly what it cannot do directly and by its instructions to in effect argue the jury into a verdict of guilty." Weare v. United States, 1 F. (2d) 617 (C. C. A. 8th, 1924).

[8] "The line of demarcation between what the court may say to a jury in a criminal case in expressing his opinion on the facts and what he may not say, is to be drawn between mere expressions of opinion not partaking of such argumentative nature as to amount to advocacy, ..., and such discussion as amounts to an argument, making the court in fact an advocate against the defendant." Cook v. United States, 18 F. (2d) 50 (C. C. A. 8th, 1927).

[9] "The . . . . rule (which obtains by Constitution or Statute in almost every State but not in the Federal Courts) is an unfortunate departure from the orthodox common law rule." 5 WIGMORE, EVIDENCE (2d ed. 1928) § 2551. The first statute was passed in North Carolina in 1796. This statute was severely criticized in State v. Moses, 2 Dev. 452 (N. C. 1830), on the ground that it removed a very important part of the trial by jury. Some states, since this first derogation from the common law rule, have come to believe that the influence of the judge is detrimental. "The trial judge is the Lord's anointed," in the eyes of the jury. McMahan v. State, 61 Tex. Cr. R. 489, 135 S. W. 558 (1911).

the necessity for the departure upon the right to trial by jury,[10] even though the common law trial, which they are supposed to have adopted, included the assistance of the judge.[11] The judge is usually not permitted to comment on the weight of the evidence,[12] on the credibility of the accused,[13] or on the demeanor or conduct of the accused during the trial.[14] But the court may instruct the jury to consider the interest which the defendant has in the result of the trial,[15] and his demeanor on the witness stand.[16] In some states the common law view is partly retained and the courts are permitted to exercise their own discretion as to the judicial comment necessitated in the particular case.[17]

By an early decision the West Virginia judges denied themselves the power of judicial comment.[18] Here, the judge must refrain from indicating any opinion in reference to a matter of fact which will influence the jury.[19] He must not comment on the

[10] "The right to a decision on the facts by the jury uninfluenced and unbiased by the opinion of the judge has been deemed worthy of constitutional guarantee." State v. Harken, 7 Nev. 381, 383 (1872).

[11] THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 188, n. 2.

[12] Field v. State, 126 Ga. 571, 55 S. E. 502 (1906); Briggs v. People, 219 Ill. 330, 76 N. E. 499 (1905); People v. Durham, 170 Mich. 598, 136 N. W. 431 (1912); Leverett v. State, 112 Miss. 394, 73 So. 273 (1916).

[13] Hampton v. State, 50 Fla. 55, 39 So. 421 (1905); People v. Scarback, 245 Ill. 435, 92 N. E. 286 (1910). *Contra*: People v. Casey, 350 Ill. 522, 183 N. E. 616 (1933); State v. Rom, 77 N. J. L. 248, 72 Atl. 431 (1909).

[14] People v. Toohey, 319 Ill. 113, 149 N. E. 795 (1926).

[15] In trial for murder, the court was permitted to instruct the jury that defendant was deeply interested in the outcome of the case and that they were entitled to consider his temptation of testifying facts favorable to himself. Magnuson v. State, 187 Wis. 122, 203 N. W. 749 (1925). Similar instruction in robbery prosecution: People v. Fitzgerald, 297 Ill. 246, 130 N. E. 720 (1921).

[16] Purdy v. People, 140 Ill. 46, 29 N. E. 700 (1892); People v. Tibbs, 143 Cal. 100, 76 Pac. 904 (1904); Denton v. State, 131 Ark. 1, 198 S. W. 111 (1917). The cases universally hold that any comment which is prejudicial *per se* is error and sufficient grounds for reversal. After the comment is once made, it is difficult to cure the error. Fayetteville v. McArthur, 168 N. C. 48, 84 S. E. 39 (1915).

[17] State v. Alderman, 83 Conn. 243, 78 Atl. 331 (1910); State v. Skillman, 76 N. J. L. 464, 70 Atl. 83 (1909); Cross v. City of Syracuse, 200 N. Y. 393, 94 N. E. 184 (1911); Commonwealth v. Webb, 252 Pa. 187, 97 Atl. 189 (1916).

[18] See, (1933) 39 W. VA. L. Q. 177.
State v. Hurst, 11 W. Va. 54 (1877). This case followed the rule set out in the Virginia civil case, McDowells Ex'or v. Crawford, 11 Gratt. 377 (Va. 1854), which strictly limits the power of judicial comment. The W. Va. Court said, "If the rule applied to prevent comment in a civil case it certainly should apply in a criminal case." Hence, they have applied the rule consistently and apparently make little distinction between the remarks of the judge in a criminal case and a civil one. State v. Thompson, 21 W. Va. 741 (1882); State v. McCausland, 82 W. Va. 525, 96 S. E. 938 (1918); Ward v. Brown, 53 W. Va. 227, 44 S. E. 488 (1903); Seiver v. Coffman, 80 W. Va. 425, 92 S. E. 669 (1917).

[19] State v. Waters, 104 W. Va. 80, 140 S. E. 139 (1928); State v. Price, 167 S. E. 862 (W. Va. 1933).

weight of evidence in an instruction to the jury,[20] or in a ruling on the admissibility of evidence during the trial.[21] He may classify witnesses in respect to the weight and value of their testimony when such classification is based on a well defined distinction as to their opportunities to know the truth.[22] He should not comment on the credibility of the defendant.[23] He is, however, permitted to instruct the jury that they should consider the conduct and appearance of the witness and his interest and motive in testifying,[24] so long as the instruction does not amount to an inadvertent remark reflecting upon the character of the accused.[25] It is the duty of the trial judge to participate directly in the trial and his necessary remarks to facilitate its orderly progress will not constitute error, unless, they discriminate against or prejudice the defendant's case.[26]

In the principal case the instruction that wiping the hands was an indication of lying is beyond the most liberal rule of judicial comment. It is not unusual for habitual criminals to remain calm while being subjected to a severe examination. On the other hand, an innocent person, confronted with a judge, a jury, and a court room filled with curious spectators, may be extremely nervous.[27] A mere nervous mannerism such as the act of the defendant in this case, should not be the basis for a complete repudiation of his testimony. The very purpose of the rules limiting the power of judicial comment is to prevent this result.

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[20] White v. Sohn, 63 W. Va. 80, 59 S. E. 890 (1907); State v. Kittle, 87 W. Va. 526, 105 S. E. 775 (1921); State v. Ison, 104 W. Va. 217, 139 S. E. 704 (1928).

[21] Neil *et al.* v. Rogers Bros. Produce Co., 38 W. Va. 228, 18 S. E. 563 (1893); State v. Kerns, 47 W. Va. 266, 24 S. E. 734 (1899).

[22] Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493 (1888); State v. Croston, 103 W. Va. 380, 137 S. E. 536 (1927).

[23] State v. Staley, 45 W. Va. 792, 32 S. E. 198 (1898); State v. Ringer, 84 W. Va. 546, 100 S. E. 413 (1919).

[24] State v. Counts, 90 W. Va. 338, 110 S. E. 812 (1922).

[25] State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919).

[26] State v. Hamrick, 112 W. Va. 163, 163 S. E. 868 (1932). In civil cases the court may explain to the jury the way in which they may consider the evidence if he expressly tells them that they are the sole and exclusive judges of the evidence. Cobb v. Dunlevie, 63 W. Va. 398, 60 S. E. 384 (1908).

[27] "Blushing has been declared to be an evidence of guilt; but many guilty men never blush at all, and some innocent men would blush at the mere idea that they are being looked at to see if they are blushing. Terror also has been noticed; but nervousness is not always an incident of guilt, nor absence of nervousness an incident of innocence." WHARTON, CRIMINAL EVIDENCE (10th ed. 1912) 1498.