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Evidence--Right of Presiding Judge to Ask Leading Questions or to Testify

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measures, and to seal those that are correct and to condemn those that are inaccurate, in order to protect the public from being defrauded by inaccurate weights and measures. So it would seem that the legislature did not intend to give the word "ton" a definite meaning so that whenever it was used it would mean 2,000 pounds. The fact that the court admits that special contract, showing that the parties contracted upon the basis of another standard, would prevail over the statute, would seem to indicate that the court thought that the legislature had not given a definite meaning to the word "ton," for a contract contrary to statute is invalid. So it is submitted that if upon a very broad construction of the statute, it is held that the statute gives a definite meaning to the word "ton," so that whenever it is used it shall mean 2,000 pounds and that evidence of usage to the contrary is inadmissible, it would seem to follow that evidence of a special contract would be inadmissible. But if, on the other hand, the statute is not so broadly construed, but with a view as to what the legislature intended, which seems to be that the legislature had not given a definite meaning to the word "ton" and which the court virtually admits on the one hand by holding that a special contract would govern, then it would seem that evidence of custom as well as of a special contract would be admissible. (Case also commented on in 39 Harvard Law Review 122).

—W. P. L.

EVIDENCE—RIGHT OF PRESIDING JUDGE TO ASK LEADING QUESTIONS OR TO TESTIFY.—In a prosecution for retailing liquor without having paid the special tax therefor, the defendant denied all the charges. The presiding judge then asked certain leading questions which elicited the fact of an extra-judicial conference with the judge in which the defendant made statements amounting to an admission. Exception. *Held*, the interrogation by the judge was in effect the same as testimony by him and was therefore reversible error. *Terrell v. United States*, 6 FED. (d) 498.

It is generally held that a presiding judge may not testify in a case unless he descends from the bench and another is appointed in his stead to conduct the trial. *Rogers v. State*, 60 Ark. 76, 29 S. W. 894; *People v. Dohring*, 59 N. Y. 374; III WIGMORE, EVIDENCE, § 1909. But did the court in the principal case testify? His questioning achieved the same result as would his testimony from the stand, but the testimony itself all came from the witness. If the same questions had been asked by counsel the objection, if

any, would probably have been that they were leading questions rather than that counsel was testifying. The court generally has wide discretion as to the examination of witnesses. The rule has been thus broadly stated, "We know of no limit to the right which belongs to the court of interrogating witnesses either in civil or criminal cases, especially the latter." Lumpkin, J. in *State v. Epps*, 19 Ga. 106, 118. Indeed, this function of the court has been referred to as a duty rather than a right. *State v. Nickens*, 122 Mo. 607. The court may propound leading questions. *Driscoll v. People*, 11 Mich. 221; although in a few jurisdictions such questions are held to violate constitutional guarantees against expressions of opinion by the court. *State v. Crotts*, 22 Wash. 245, 60 Pac. 403. But see *Wilson v. Ohio River etc. Ry.* 52 S. C. 537, 30 S. E. 406. Is this function of the court to question a witness to be confined to the expansion or explanation of testimony already introduced? Such a limitation would tend to relegate the court to the position of a mere umpire, unable to take the initiative in uncovering facts necessary to secure justice to all concerned. Judges in England have been accorded a more honorable position. I WIGMORE, EVIDENCE, § 784. And although there is some authority in this country restricting the right of a judge to interrogate witnesses, *Dunn v. People*, 172 Ill. 582, 50 N. E. 137; *Harris v. State*, 61 Ga. 359, the courts are naturally somewhat jealous of their power to exercise this function. It seems hardly practical so to limit the right of the judge to assist counsel in uncovering the necessary facts, especially in view of the fact that the judge is the most learned and trustworthy branch of the tribunal. This view has been summed up in these words, "A judge presiding during the trial of a cause is more than a mere moderator between contending parties; he is charged with the grave duty of maintaining truth and preventing wrong, and to this end has a discretion, which if not abused, will not be error." *Huffman v. Cauble*, 86 Ind. 591. A further principle having some bearing on the principal case is the one that it is largely within the discretion of the trial judge to regulate the examination of witnesses, and that he may in his discretion allow counsel to put leading questions. In the exercise of this discretion his rulings are generally not subject to review by an appellate court. *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56; *Peters v. United States*, 94 Fed.

127, 36 C. C. A. 105; *Rainey v. Potter*, 120 Fed. 651, 57 C. C. A. 113. This was apparently the view of the court in a case similar to the principal case, where the interrogation was considered erroneous, but not such error as would justify reversal. *Lepper v. United States*, 233 Fed. 227.

—J. E. W.