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THE JUDGE'S POWER TO COMMENT ON THE TESTIMONY IN HIS CHARGE TO THE JURY†

BY FRANK HOYT*

AT COMMON law, in the absence of any constitutional or statutory restrictions, it is not error for the trial court, in its charge to the jury, to express an opinion on a disputed question of fact, provided such questions are ultimately left to the jury for their decision, without any direction as to how they should find the facts. . . . Where this practice prevails the opinion of the court may properly be expressed either directly or indirectly, or inferentially through the drift of its comments and marshaling of the facts in its charge, and the exercise of its discretion cannot be reviewed unless the court fails to submit the questions of fact to the jury without direction as to how they shall find the facts, or plainly abuses its discretion. The fact that the opinion expressed is erroneous does not alter the rule.¹

This power is exercised in England, in Canada, and in our Federal courts. It has been abrogated in a majority of the states. The situation in that regard is thus given by Judge Newcomer:—

In twenty-six states of the United States the trial judge is prohibited by the state constitution from expressing any opinion to the jury on the facts. In one or two of the states the constitution goes so far as to provide that the jury is the judge of both the law and the fact. . . . In eighteen states by court decisions the courts themselves have attempted to deny to themselves the power, the right, to comment on the evidence or to express an opinion on the evidence to the jury. In nine of the states the courts have recognized the right of the trial court to comment on the evidence the same as in the Federal Courts.

Judge Newcomer states that these constitutional prohibitions arose from the pioneer spirit which enjoyed the excitement of the trial of the lawsuit, which was thrilled by the mere sport of the game, which regarded the courtroom as a forensic arena, where lawyers, not the

† Subject of an Address made by the author before Wisconsin Circuit Judges.

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¹ 38 Cyc, pp. 1641-3.

parties, are the winners; where the judge merely umpires between the contesting counsel, not assisting in determining the rights of the contesting parties.

The cause really lies deeper: namely, these constitutional prohibitions were the result of the revolutionary spirit of our ancestors, which opposed placing what they considered too much authority to be exercised by one man, and considered that it was more democratic and safer to leave the determination of their rights to the members of the jury, free from the influence which the comments of the judge would exercise upon their minds. Whatever the motive was, it is clear as will be shown, that these constitutional prohibitions and the judicial decisions of the courts of last resort, prohibiting the exercise of this power by the trial judges, takes away from litigants a most potent factor in securing justice in jury trials.

Wisconsin is one of the nine states whose courts have recognized the right of the trial judge to comment on the evidence, the same as in the Federal courts. Chief Justice Ryan in the opinion in the case of *In re Kindling*² says:

The constitution vests the judicial power of the state in courts which it establishes or authorizes to be established, to be held by judges whose offices it creates or authorizes to be created. . . . And the judges of these courts take, under the constitution creating their offices, the powers of judges of such courts at common law . . . at the time of the adoption of the constitution.

As stated in *Cyc*, among the powers thus possessed by such judges at the common law was that of commenting to a jury on the facts. The following decisions of our Supreme court approve, and prescribe the manner of, the exercise of this power by the judge.

In *Fowler v. Colton*,³ it was held that the expression of an opinion by the court as to the facts in a case, the weight of the testimony, or the character of a witness, is not error, if the question upon which it is expressed is left for the jury to determine.

In *Horr v. C. W. Howard Co.*,⁴ Justice Dodge in the opinion says:

Another group of errors presents the fact that the trial court in charging the jury upon several of the questions submitted, attempted to summarize, and suggest the tendency of, the evidence on both sides. Counsel claims that the practice is erroneous, and that, in so doing, important items of evidence favorable to the defendant were omitted, although with two or three exceptions he leaves it to us to find out, as best we can, what such items were. In England it was recognized not only a legitimate province, but a duty of the trial judge to sum up the

² 39 Wis. 58.

³ 1 Pinney 331.

⁴ 126 Wis. 160, 105 N. W. 668.

evidence, and even to declare his opinion on the weight and effect thereof, with the explanation that his opinion should not control the jury. One or both of these practices have been forbidden by statute and constitution in some states, but not in Wisconsin, where they seem to have been formally approved except in criminal trials.

An example of permissible comment is found in *Fowler v. Colton*. (*supra*). The opinion therein, written by Judge Andrew G. Miller, contains the following:

The court in the charge to the jury remarked "that in considering the character of the plaintiff, you will also consider the character of the witnesses for and against, and give their testimony such weight as it may deserve. Such witnesses as Isaac Goodpasture when called upon this subject, will not be entitled to much weight." In this, error is alleged, but there is none apparent. This was, in the opinion of the court, not in the least binding upon the jury. An opinion of a fact, not given as binding on the jury, is not error. . . . A court may give an opinion to the jury on the weight of the evidence, and an opinion of a judge concerning the facts is not error. The court has the right, and it is its duty, to explain to the jury that they are the judges of the fact in the case, and it is their province to give the testimony of the witnesses its proper and legitimate weight and importance. The court in this case did not go farther than the Supreme court of Pennsylvania in the case of *Burr v. Sim* (4 Whart. 156), where it was decided that it was not error in a judge to tell a jury that a witness was a very "willing witness" and that "very little credence was to be placed in her testimony"; or to remark upon the strength or absence of evidence, or to suggest presumptions arising out of the relationship or conduct of one of the parties.

In *Ketchum v. Ebert*,⁵ the court quotes with approval the following portion of the opinion of Chancellor Kent in *Firemen's Ins. Co. v. Walden*:

I am far from wishing to restrain the judges of the courts of law from expressing freely their opinion to the jury on matters of fact. . . . No man can be more deeply sensible of the value and salutary tendency of this judicial aid and discretion. . . . All that I feel it my duty to contend for is that when the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as mere opinion, and not as direction, and that the jury shall be left to understand, *clearly* that *they* are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt.

In *Horr v. Howard Co.* (*supra*) Judge Dodge says (pp.165-6):

There can be no doubt that, after a protracted trial, a fair summarization of the character of the evidence offered on each side of a disputed issue may greatly aid the jury and promote the probability of intelligent

⁵ 33 Wis. 611.

consideration and decision by them. When a trial judge has both the industry and courage to so promote the cause of justice, we are far from suggesting criticism or disapproval. The attempt is, nevertheless, accompanied with danger. A summary of evidence implies the admission of some. The judge and the advocate are almost sure to differ as to the relative importance or cogency of different items. What the former omits as relatively unimportant the latter may consider the cornerstone of his position, and it may so appear to an appellate tribunal. This, while suggesting great care to the trial judges in any such attempt, also justifies the holding that the variant views of the counsel as to the importance of omitted evidence must be promptly notified to the judge, so that he may at least consider it or supply the omission if inadvertent.

Judge Newcomer, in the article referred to, says:

The Constitution of the United States and the Constitution of the State of Ohio, both state that the judicial power is vested in the courts, not granted to the courts. Some powers are granted by the constitutions. The judicial power was in the courts at the time the constitutions were adopted. The constitutions recognized that fact by saying that this power is vested in the courts. The legislature does not have the power to take it away. Is there any reason why the courts should not use it?

Should the judge be a mere umpire between skillful lawyers, or should he guide the trial of the case? Should he remain silent when lawyers depart from the issues, or should he bring them back to the case without waiting for the other side to object?

Should he remain silent when a lawyer does not bring out what a witness knows, or should he by proper questions bring the facts to the attention of the jury? Should he assist the jury in sifting out material evidence, or should he give a colorless charge which contains nothing but general propositions of law? In England, the judge tries the case—the lawyers assist. . . .

In the trial of equity cases, the facts are determined by the court without the assistance of a jury. In the trial of many civil cases, jury is waived and the facts are submitted to the court. Facts are facts, whether investigated on the law or equity side of the court. . . . Is a judge sitting as a chancellor in an equity case, endowed with greater wisdom, with greater ability to sift the evidence and determine the facts, with greater fairness to arrive at justice, than the same judge when sitting in a case tried by the jury?

It is known full well that able lawyers skilled in their particular branch of the law who rely upon their technical knowledge and upon their ability to sway juries, resent any interference by the trial judge in the trial of a case. Notwithstanding this attitude of the bar, it still remains the duty of the bench to try the case so that justice may result.

Supplementing Judge Newcomer's statements, and for the purpose of illustrating the difference in the effect upon the jury where the judge comments to them upon the evidence, and where he fails to exercise this power, let us assume that a personal injury action is on file, that voluminous testimony has been given therein, and that the attorneys

for each side have completed their arguments to the jury. It then becomes the duty of the judge to instruct the jury as to the law applicable to the case. It is the duty of the jury to act upon the law as received by them from the judge. If the jurymen comprehend the meaning of the instructions thus given them, and apply the law as thus laid down in arriving at their verdict, then the object of the law is accomplished and justice results. A contrary result follows if the jurymen fail, either to understand the instructions or properly to apply them.

The legal phraseology used in giving the instructions is in many instances imperfectly comprehended by the average jurymen. Take, for example, the instructions on proximate cause.

In *Eichman v. Buchheit*,⁶ the court says:

The correct definition of proximate cause has been so frequently given by this court in recent years that an inaccurate definition now seems hardly excusable.

In that case Justice Marshall says, that proximate cause

may be defined as the efficient cause; that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause, as a person of ordinary intelligence and prudence, ought reasonably to foresee that a personal injury to another may probably follow from such person's conduct. It is not necessarily the immediate, near, or nearest cause, but one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole reaching from the first or producing cause to the final result.

To the trained mind of a lawyer this statement is a most complete definition of proximate cause; but, if the court, in its charge to the jury gives the instruction in the language of Justice Marshall and stops there, certainly the average jurymen, the butcher, the grocer, the plumber, the dressmaker, will have no just comprehension of its meaning or application.

The same is true, although probably in a lesser degree, where other instructions in such a case, expressed in abstract terms, are given without full explanation as to how the law set out therein is to be applied by the jurors in considering the determining of the particular facts involved in the case. The result is that the jurors retire to consider their verdict, confused by the mass of testimony they have listened to, unable from lack of experience to discriminate clearly

⁶ 128 Wis. 385, 107 N. W. 325, citing *Deisenrieter v. Straus-Merkel M. Co.*, 97 Wis. 279, 72 N. W. 735.

between evidence that is material, and that which is immaterial, and incapable of applying intelligently the law as stated in the instructions, the meaning of which they only dimly comprehend, to the real issues of the case.

In England, Canada, and the Federal courts this situation would be remedied by the exercise by the trial judge of his right to comment on the facts to the jurors.

Let us assume that the judge in the supposed case avails himself of that right and proceeds as follows: He begins by first advising the jurors, substantially in the language of Chancellor Kent, that "they are to understand clearly that they are to decide the facts upon *their own views* of the evidence, and that he interposes his opinion *only* to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt." He then, as Justice Dodge suggests, makes a thorough summarization of the evidence offered on each side of each disputed issue, remarking, as authorized by the *Felton* case (*supra*), on the strength or absence of evidence and, if necessary, suggests presumptions arising out of the relationship or conduct of a party and in the case of a witness whose statements and conduct on the stand warrant such action, states to the jurors that very little confidence is to be placed in his testimony. He then corrects statements, if any, made by counsel in their arguments tending to distract the attention of the jury from the real issues of the case, or to bring into play any passions or prejudices on their part. When this is done, the jurors will understand clearly what they should consider and what they may disregard, in determination of the facts at issue. He then instructs the jurors on the principles of law involved in the case and points out how these principles are to be applied by them in reaching their verdict. Is it not clear that by so proceeding the judge aids the jurors and promotes the probability of an intelligent consideration and decision by them?

The judge incurs no risk of reversal because of the comments, if he covers fairly and sufficiently the evidence presented by both sides. Under the authorities cited, a mere error in the opinion of the judge is not the subject for review. As stated by Justice Dodge, the sole remedy of the attorney who holds views varying from such opinion is promptly to notify the judge of his position so that he may consider it and correct his error, if inadvertent, or supply an omission. True, this course requires great care, industry and courage on the part of the judge, but should it not, in the interests of justice, be adopted?