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Should Texas Permit Comment by the Judge on the Weight of the Evidence

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SHOULD TEXAS PERMIT COMMENT BY THE JUDGE ON THE WEIGHT OF THE EVIDENCE?

I

AT common law it was generally recognized that the trial judge could properly comment upon the evidence in the presence of the jury, with a few decisions suggesting that it was his duty to comment as well as his privilege.[1] He was permitted to analyze and sum up the evidence as presented by both parties in the case; in fact the only well-defined limitation upon his privilege of comment seems to have been the requirement of an instruction that the ultimate determination of the issues was for the jury.[2] This common-law power of comment by the judge was justified according to Sir Matthew Hale, for the reason that

> "Herein he is able, on matters of law, emerging upon the evidence to direct them, and also, in matters of fact, to give them great light and assistance by his weighing of the evidence before them, and observing where the question and knot of of the business lies, and by showing them his opinion even in a matter of fact; which is a great advantage and light to lay-men."[3]

Inasmuch as such was the practice at common law at the time of the adoption of the constitution of the United States[4] and of the

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[1] State v. Bennett, 2 Treadw. 692 (S. C. 1815); *see* Graham v. United States, 12 F. (2d) 717, 718 (C. C. A. 4th, 1926); Pfaff v. United States, 85 F. (2d) 309, 311 (C. C. A. 7th, 1936); State v. Hummer, 73 N. J. Law 714, 716, 65 Atl. 249, 251 (1906); State v. Casados, 1 N. & McC. 91, 98 (S. C. 1818); 3 BL. COMM. *373-5. *Contra:* State v. Bissonnette, 83 Conn. 261, 76 Atl. 288 (1910). *But see* Allen v. United States, 4 F. (2d) 688 (C. C. A. 7th, 1925).

[2] Carver v. Jackson, 4 Pet. 1 (U. S. 1830); Magniac v. Thompson, 7 Pet. 348 (U. S. 1833); Tracy and Balestier v. Swartwout, 10 Pet. 80 (U. S. 1836).

[3] HALE, HISTORY OF THE COMMON LAW OF ENGLAND (6th ed. 1820) 346.

[4] Trial by jury as guaranteed by the United States Constitution (U. S. CONST. Art. III, § 2) means a trial by jury as understood and applied at common law, and includes all of the essential elements as they were recognized in this country and England when the Constitution was adopted. Patton v. United States, 281 U. S. 276, 288 (1930).

first state constitutions, it became the early practice in the states to permit the judge to advise the jury on the facts and the evidence.[5]

The movement away from this procedure began in 1796 in North Carolina when a statute was enacted abrogating the common-law rule.[6] The Tennessee constitution of the same year embodied a like limitation,[7] and in 1836 Arkansas adopted such a provision in its constitution.[8] This tendency away from the long established common-law practice was the result of a growing lack of confidence in the ability of the judges of the period, and was aided in part by ignorance in developing areas that the restriction on the judge's comment was a local innovation and not the common law. Regardless of the reasons for the movement in favor of limitation on comment the newer practice came to be so widely accepted in the jurisdictions of the United States that at one time only ten jurisdictions followed the common-law rule.[9] The states attained this result by the several methods of constitutional amendment, statutory enactment, or judicial decision. The constitutionality of the statutes prohibiting comment, as well as of those allowing comment, has been questioned,[10] and the courts have generally held that the denial of this power does not violate the constitutional guarantee of trial by jury which preserves only the substance of the right rather than the procedural elements. This departure from the orthodox common-law rule has been viewed by Wigmore as having contributed more than any other single factor to the impairment of the efficiency of the jury trial as an instrument of justice.[11]

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[5] Shank v. State, 25 Ind. 207 (1865); People v. Genung, 11 Wend. 18 (N. Y. 1833); Devlin v. Kilcrease, 2 McMul. 425 (S. C. 1842); see Mitchell v. Harmony, 13 How. 115, 131 (U. S. 1851).

[6] State v. Moses, 2 Dev. 452 (N. C. 1829).

[7] TENN. CONST. (1796) Art. V, § 5.

[8] ARK. CONST. (1836) Art. VII, § 12.

[9] Federal, Connecticut, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont. See Johnson, *Province of the Judge in Jury Trials* (1928) 14 MASS. L. Q. 48.

[10] People v. Kelly, 347 Ill. 221, 179 N. E. 898 (1931); see Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally* (1928) 23 ILL. L. REV. 276.

[11] 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2551.

Notwithstanding the tendency in the state courts, the federal courts have adhered to the common-law rule from the beginning and with the express approval of the Supreme Court of the United States.[12] Moreover in recent years several states have adopted the older practice of allowing the judge to comment.[13] What may well be a movement toward adoption of the orthodox procedure has received impetus, in part, from the decisions defining limitations upon the scope of the rule as applied in both federal and state courts.[14] For example in *United States v. Meltzer*,[15] the federal courts departed from established doctrine[16] in holding that comment by the trial judge on the ultimate issue to be decided by the jury, when the facts were in dispute, exceeded the bounds of permissible comment and was a deprivation of the constitutional right of trial by jury. Generally, however, the decisions have recognized merely the limitations that have been inherent in the rule since its formulation, *i.e.*, that the judge's comment must be fair and dispassionate,[17] without heat or partisanship[18] or argumentation,[19] and must be confined to and supported by the record,[20] with the jury free to perform its function independently[21] after having been

[12] Capital Traction Co. v. Hof, 174 U. S. 1 (1898).

[13] People v. Ottey, 5 Cal. (2d) 714, 56 P. (2d) 193 (1936); Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931); State v. Oehoa, 41 N. M. 589, 72 P. (2d) 609 (1937); People v. Lewis, 264 Mich. 83, 249 N. W. 451 (1933).

[14] Quercia v. United States, 289 U. S. 466 (1933); United States v. Murdock, 290 U. S. 389 (1933); United States v. Marzano, 149 F. (2d) 923 (C.C.A. 2d, 1945); La Rosa v. United States, 15 F. (2d) 479 (C. C. A. 4th, 1926); People v. Dail, 22 Cal. (2d) 642, 140 P. (2d) 828 (1943); People v. Lintz, 244 Mich. 603, 222 N. W. 201 (1928); People v. Padgett, 306 Mich. 545, 11 N. W. (2d) 235 (1943); State v. Ochoa, 41 N. M. 589, 72 P. (2d) 609 (1937); Commonwealth v. Wiswesser, 124 Penn. 251, 188 Atl. 604 (1936).

[15] United States v. Meltzer, 100 F. (2d) 739 (C. C. A. 7th, 1938).

[16] Simmons v. United States, 142 U. S. 148 (1891).

[17] Frantz v. United States, 62 F. (2d) 737 (C. C. A. 6th, 1933).

[18] Graham v. United States, 12 F. (2d) 717 (C. C. A. 4th, 1926).

[19] Weare v. United States, 1 F. (2d) 617 (C. C. A. 6th, 1901).

[20] Mullen v. United States, 106 Fed. 892 (C. C. A. 6th, 1901).

[21] Hickory v. United States, 160 U. S. 408 (1896).

informed that it is sole judge of the facts.[22] Inasmuch as the comment is allowed in order that the judge may give assistance to the jury, mere statements as to the court's belief in the guilt or innocence of the accused, without an apt analysis of the evidence, should be precluded as failing to offer aid to the jury. Moreover, such limitations are believed not to have impaired the usefulness of the judge's comment for the purpose for which it is intended.

II

The influence of Tennessee and the other states which had departed from the common-law practice of permitting comment was felt in Texas as early as 1846 when the Legislature enacted a statute providing that the judge should not charge nor comment upon the weight of the evidence in either civil or criminal cases.[23] It may be doubted whether the early Texas lawmakers realized that they had deviated from the common-law procedure of comment by the judge, inasmuch as the "North Carolina jury trial," which had originated a mere fifty years before, had become the general rule rather than the exception.

The Texas Constitution of 1876 guarantees the right of trial by jury and empowers the legislature to pass laws to maintain its "purity and efficiency."[24] The present Code of Criminal Procedure provides that the jury "are the exclusive judges of the facts[25] and of the weight to be given to the testimony;"[26] that the judge shall

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[22] Starr v. United States, 153 U. S. 614 (1894).

[23] Tex. Laws 1846, p. 390, 2 Laws of Texas (Gammel, 1898) 1696.

[24] Tex. Const. (1876) Art. 1, § 15: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

[25] Tex. Code Crim. Proc. (1925) art. 657: "The jury are the exclusive judges of the facts, but they are bound to receive the law from the court and be governed thereby."

[26] *Id.*, art. 706: "The jury, in all cases, are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence."

not comment when deciding on the admissibility of evidence,[27] nor shall he express any opinion upon the weight of the evidence.[28] By these enactments the judge has been made a mere moderator of the trial.

The courts on a few occasions, however, seem to have gone far in holding the judge's comment not to constitute reversible error. These holdings are generally based on the reasoning that the comment, although on the evidence, was not injurious to the appellant's cause.[29] However, such decisions are few in number when compared to the many cases in which seemingly less significant comments have been held to be unauthorized comment on the weight or credibility of the evidence and result in a reversal. The extent to which the Court of Criminal Appeals has gone in preventing comment under the Code provisions is indicated by the decisions establishing that such comment is reversible error if it states that the evidence is proof of a fact,[30] that it is very material[31] or that

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[27] *Id.*, art. 707: "In ruling upon the admissibility of evidence, the Judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case."

[28] *Id.*, art. 658: "In each felony case the judge shall before the argument begins, deliver to the Jury, except in pleas of guilty where a Jury has been waived, a written charge, distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the Jury. Before said charge is read to the Jury, the defendant or his Counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection."

[29] McGee v. State, 37 Tex. Crim. Rep. 668, 40 S. W. 967 (1897) (in order to require a reversal under such circumstances the action of the court must be reasonable calculated to operate prejudicially to the accused); Herridge v. State, 127 Tex. Crim. Rep. 284, 76 S. W. (2d) 522 (1934); Bevins v. State, 110 Tex. Crim. Rep. 52, 7 S. W. (2d) 532 (1928); West v. State, 116 Tex. Crim. Rep. 468, 34 S. W. (2d) 253 (1930); Welburn v. State, 129 Tex. Crim. Rep. 323, 87 S. W. (2d) 259 (1935); English v. State, 85 Tex. Crim. Rep. 450, 213 S. W. 632 (1919); *cf.* Brady v. State, 116 Tex. Crim. Rep. 427, 34 S. W. (2d) 587 (1931); Jones v. State, 131 Tex. Crim. Rep. 650, 101 S. W. (2d) 265 (1937).

[30] Secrest v. State, 38 Tex. Crim. Rep. 43, 40 S. W. 988 (1897).

[31] Coleman v. State, 90 Tex. Crim. Rep. 297, 235 S. W. 898 (1921).

it is immaterial,[32] that it is of less importance than other evidence,[33] that it corroborates or reenforces the testimony of another witness,[34] or that the testimony is admitted for the purpose of showing the existence of a particular fact.[35] The wording of the statutes is altogether plain and precludes any participation by the judge in the trial by way of comment or opinion as to the evidence. However, it is thought that the court has gone beyond the letter and the spirit of the statute in interpreting Article 707 of the Code in several cases[36] including the recent case of *Wilson v. State*.[37] It has been held in these decisions that the trial judge's statement in his charge concerning the admission of testimony from an impeaching witness, that the testimony was admitted for impeachment purposes only or to affect credibility and that the jury should not consider it for any other purpose, is a comment on the evidence and constitutes reversible error. However, the Court's decisions have not been consistent in this matter; there are cases in which similar instructions have been held not to be an expression of the court's opinion as to the legal effect or weight of the evidence, but merely a restriction limiting the jury's use of such evidence to the purpose for which it was proffered and admitted.[38]

III

The proposal for acceptance of the historic common-law procedure permitting comment by the judge has been approved in recent years by various organizations concerned with recommendations

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[32] Sackheim v. State, 94 Tex. Crim. Rep. 43, 249 S. W. 867 (1923).

[33] Gribble v. State, 85 Tex. Crim. Rep. 52, 210 S. W. 215 (1919).

[34] Bradshaw v. State, 44 Tex. Crim. Rep. 222, 70 S. W. 215 (1902).

[35] Niles v. State, 104 Tex. Crim. Rep. 447, 284 S. W. 568 (1926).

[36] Taylor v. State, 50 Tex. Crim. Rep. 560, 100 S. W. 393 (1907); Lozano v. State, 83 Tex. Crim. Rep. 174, 202 S. W. 510 (1918); *cf.* Stull v. State, 47 Tex. Crim. Rep. 547, 84 S. W. 1059 (1905).

[37] Wilson v. State, 140 Tex. Crim. Rep. 424, 145 S. W. (2d) 890 (1940).

[38] Rodgers v. State, 91 Tex. Crim. Rep. 38, 236 S. W. 748 (1921); Campbell v. State, 92 Tex. Crim. Rep. 12, 240 S. W. 937 (1922); Edwards v. State, 80 Tex. Crim. Rep. 485, 191 S. W. 542 (1917).

for the improvement of criminal procedure. The Model Code of Evidence adopted by the American Law Institute in 1942 contained the following provision:

> "After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and are not bound by the judges comment thereon."[39]

A similar recommendation was made by the American Law Institute in the Code of Criminal Procedure adopted in 1930.[40]The principal benefit to be derived from allowing such comment would be its aid to the jury in reaching just verdicts. A trained and experienced judge is better able to analyze complicated factual situations and correctly apply the law thereto. Moreover, the judge is the only person qualified to perform this function in a trial who is unbiased; the attorneys are qualified but partisan, while the jury is unbiased but unqualified. Thus it would seem that criminal justice would be served by a removal of restrictions which necessitate a loss of the benefit of the judge's competence by making of him nothing more than a referee. Among other benefits to the judicial process which would follow from allowing comment by the judge are a reduction in the number of new trials, and a speeding up of the trial, since counsel would be less exacting in selecting a jury and would spend less time in impanelling the jury, and since the deliberations of the jury would be less prolonged. Finally it has been suggested that the opportunity to make such comment

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[39] *E.g.*, New York Committee on the Administration of Justice and the American Bar Association Committee on Improvement of the Rules of Evidence. See AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE (1942) Rule 8.

[40] AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 325, part 1: "The court shall instruct the jury regarding the law applicable to the facts of the cause, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause. It shall if requested inform the jury that they are the exclusive judges of all questions of fact and, whether requested or not, the court shall so inform them if it comments on the evidence, the testimony or the credibility of any witness."

would prove an incentive to the trial judge to pay greater attention to the course of the trial.

Resistance to proposals for allowing comment perhaps finds its origin in a fear that the judge may misuse the privilege and invade the province of the jury. The limitations on the comment at common-law as developed in this country should, however, offer an adequate safeguard.

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