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Evidence -- Trial Judge's Power of Comment

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In the other two it was granted. This does not mean that the Act has not been given liberal interpretation or that the potentialities of the procedure as an alternative remedy⁹ have been overlooked. The denials were based on plaintiff's failure to present an adversary dispute on a question of legal import in connection with his application for a declaratory judgment to settle his racial status;¹⁰ on the belief that probate under provisions of Section 4163 of the consolidated statutes ought still to be the exclusive procedure to determine the validity of a will;¹¹ and on the fact that plaintiff's complaint stated a cause of action which had already accrued under an insurance policy, and not a prayer for anticipatory relief.¹² The two instances in which the Court upheld declaratory judgments illustrate the value of the new remedy. In one a deed was construed in advance of any breach of covenants and the rights of the parties set forth.¹³ In the other, a recent and most important case, the Court determined the rights of the city, the traction company, and the public under a street-car franchise from the city of Raleigh.¹⁴

JOE EAGLES.

Evidence—Trial Judge's Power of Comment.

In *Quercia v. United States*¹ the court charged the jury that defendant had wiped his hands during his testimony and that such a mannerism was almost always an indication of lying, and further, that he thought everything the defendant said was a lie. *Held*: Prejudicial error.

Under the common law, trial judges had the power of commenting and expressing their opinion upon the evidence.² This rule is still followed in English courts³ and in the federal courts of the

⁹ N. C. CODE ANN. (Michie, 1931) §628 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed").

¹⁰ *In Re George C. Eubanks*, 202 N. C. 357, 162 S. E. 769 (1932). See *Miller v. Currie*, 242 N. W. 570 (Wis. 1932) (a declaratory judgment as to plaintiff's legitimacy is possible under the Uniform Declaratory Judgment Act.) Commented upon (1932) 46 HAR. L. REV. 336.

¹¹ *Poore v. Poore*, 201 N. C. 791, 161 S. E. 532 (1931).

¹² *Green v. Inter-Ocean Casualty Co. of Cincinnati*, 203 N. C. 767, 167 S. E. 38 (1932).

¹³ *Walker v. Phelps*, 202 N. C. 344, 162 S. E. 727 (1932).

¹⁴ *Carolina Power and Light Co. v. Isley*, 203 N. C. 811, 167 S. E. 56 (1933).

¹ 77 L. ed. 996 (1933).

² *Capitol Traction Co. v. Hoff*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873 (1899); HALE, HISTORY OF THE COMMON LAW (1792) 291; 16 C. J. 939 §2308b.

³ *Jefferson v. Paskell*, 1 K. B. 57 (1916).

United States, in both civil and criminal cases.⁴ This, however, is not an unrestricted power of comment. It is subject to the general, flexible limitation typically defined as follows: "the line of demarcation between what a court may say to the jury * * * in expressing his opinion on the facts, and what he may not say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts; and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant."⁵ This vague rule permits of widely divergent results.⁶ For example, in a criminal case the court's charge that "in my opinion the defendant is a liar" was held to be prejudicial.⁷ On the other hand a charge that the government's witnesses, who had directly contradicted the defendant, "were telling the truth" was held not to exceed the power of comment.⁸ In practically all cases, the trial judge's comment is held not to be prejudicial if the judge qualifies his remarks by making it clear to the jury that what he says is not binding upon them and that the facts are subject to their consideration and decision,⁹ unless his comment is obviously unfair and argumentative,¹⁰ such as "you are not to be hoodwinked or bamboozled by anybody * * * if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it is a fact, even though he shows you the pole."¹¹ Under the above rule,

⁴ *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968 (1891); *United States v. Phila., Reading R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. ed. 138 (1887); COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (3d ed. 1898) 265.

⁵ *Cook v. United States*, 18 F. (2d) 50 (C. C. A. 8th, 1927); *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575, 579 (1931).

⁶ *Hicks v. United States*, 150 U. S. 442, 14 Sup. Ct. 144, 37 L. ed. 1137 (1893); *Allison v. United States*, 160 U. S. 203, 16 Sup. Ct. 252, 40 L. ed. 395 (1895); cf. *Horning v. District of Columbia*, 254 U. S. 135, 41 Sup. Ct. 36, 65 L. ed. 185 (1920); *Shea v. United States*, 251 Fed. 440 (C. C. A. 6th, 1918).

⁷ *Malaga v. United States*, 57 F. (2d) 822 (C. C. A. 1st, 1932).

⁸ *Tuckermann v. United States*, 291 Fed. 958 (C. C. A. 6th, 1923).

⁹ *Buchanan v. United States*, 15 F. (2d) 496 (C. C. A. 8th, 1926); *Weiderman v. United States*, 10 F. (2d) 745 (C. C. A. 8th, 1926); *Tuckermann v. United States*, *supra* note 8, at 965.

¹⁰ *Starr v. United States*, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. ed. 841 (1894) (trial judge voiced his indignation in a sarcastic charge ridiculing the defense); *Mullen v. United States*, 106 Fed. 892 (C. C. A. 6th, 1901) (the court charged "that if these defendants desired or anybody desired to have colored men deprived of the right to vote, it would be in such a precinct as this and it is not improbable that just such men as these defendants would be chosen to carry that object into execution"); *Parker v. United States*, 2 F. (2d) 710 (C. C. A. 6th, 1924).

¹¹ *Carney v. United States*, 295 Fed. 606 (C. C. A. 9th, 1924).

comment is allowed only upon the evidence in the case¹² and it should be given so as not to mislead the jury in ultimately deciding controverted questions of fact.¹³

The trends, if any, in respect to the use of the above rule seem to be: (1) that greater emphasis is allowed in the federal courts in commenting on the evidence;¹⁴ and (2) that some distinction is drawn in a few jurisdictions between the application of the rule in criminal and in civil cases, some states limiting the extent of comment in criminal cases.¹⁵ Federal courts, however, as regards the comment rule, are not bound by the practice in the jurisdictions in which they are sitting.¹⁶

Although only twelve states follow the practice of the English and federal courts,¹⁷ it would seem that such is the better policy since it does not deprive the jury of the experience and knowledge of the trial judge. Those who oppose this policy on the ground that he will usurp the jury's function have little to fear in view of the

¹² *Mullen v. United States*, *supra* note 10, at 895; *O'Shaughnessy et al. v. United States*, 17 F. (2d) 225 (C. C. A. 5th, 1927); *City of Minneapolis v. Canterbury*, 122 Minn. 301, 142 N. W. 812 (1913).

¹³ *Rudd v. United States*, 173 Fed. 912, 97 C. C. A. 462 (1909); *State v. Greene*, 33 Utah 497, 94 Pac. 987 (1908); *Seviour v. Rutland R. Co.*, 88 Vt. 107, 91 Atl. 1039 (1914).

¹⁴ *United States v. Phila.*, Reading R. Co., *supra* note 4, at 139; *Weiderman v. United States*, *supra* note 9, at 746; *cf. State v. Greene*, *supra* note 13, at 989; *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698 (1904).

¹⁵ *People v. Lee*, 2 Utah 441 (1878); *State v. Dolliver*, 150 Minn. 155, 184 N. W. 848 (1921); *Ames v. Cannon River Co.*, 27 Minn. 245, 6 N. W. 787 (1880).

¹⁶ *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286 (1875) (The supreme court in commenting upon the act of Congress, June 1, 1872 (17 Stat. 197 (1872), 28 U. S. C. A. 724 (1928)) which states that the practice of the circuit and district courts shall conform to that of the state courts in which such circuit or district court is held, says—"The identity required is to be in practice, pleadings and forms and modes of proceeding. The personal conduct and administration of the judge in the discharge of his separate functions is in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context.")

¹⁷ Colorado—*Kolkman v. People*, *supra* note 5.

Connecticut—*State v. Cianeflone*, 98 Conn. 454, 120 Atl. 349 (1923).

Michigan—*People v. Burlingame*, 257 Mich. 252, 241 N. W. 253 (1932);

MICH. COMP. LAWS (1929) §17322.

Minnesota—*Ames v. Cannon River Co.*, *supra* note 15.

New Hampshire—*Flanders v. Colby*, 28 N. H. 34 (1853).

New Jersey—*Merklinger v. Lambert*, 76 N. J. L. 806, 72 Atl. 119 (1909).

New York—*Hurlbutt v. Hurlbutt*, 128 N. Y. 420, 28 N. E. 651 (1891).

Ohio—*Sandoffsky v. State*, 29 Ohio App. 419, 163 N. E. 634 (1928).

Pennsylvania—*Johnston v. Commonwealth*, 85 Pa. St. 54 (1877).

Rhode Island—*Smith v. Rhode Island Co.*, 39 R. I. 146, 98 Atl. 1 (1916).

Utah—*People v. Lee*, *supra* note 15.

Vermont—*Sawyer v. Phaley*, 33 Vt. 69 (1860).

tendency on the part of appellate courts to rigidly supervise his exercise of discretion.¹⁸

E. D. KUYKENDALL, JR.

Insurance—Construction of "Violation of Law" Exception in Policy.

An action was brought on a life insurance policy which provided that double indemnity should not be payable if death resulted from violation of law. Insured was killed when he ran his car into a culvert on the left side of the highway. The court below instructed the jury that if insured "inadvertently and involuntarily drove his car upon the left hand side of the road, he may have been guilty of negligence, but he was not guilty of violation of law in so doing." *Held*, that this instruction was erroneous.¹

Some courts in construing such conditions have held that there must be a violation of the criminal law.² Generally, this clause includes the commission of a misdemeanor,³ but where the associated exceptions impute the commission of a felony, the courts hold, in accordance with the maxim *noscitur a sociis*, that the exception extends only to a violation of law which amounts to a felony.⁴ The resulting death may be accidental⁵ or caused by the intentional act of another.⁶ However, in order that the insurer may be discharged the

¹⁸ *Hickory v. United States*, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. ed. 474, 480 (1896) and cases cited.

¹ *Mutual Life Ins. Co. of New York v. Grimsley*, 168 S. E. 329 (Va. 1933).

² *Ragan v. Provident Life & Acc. Ins. Co.*, 209 Iowa 1075, 229 N. W. 702 (1930) (riding in box car held no crime such as to avoid accident policy); see *Cluff v. Mutual Ben. Life Ins. Co.*, 13 Allen (Mass.) 308, 317 (1866) (attempting to forcefully take personal property from debtor).

Some courts say it need not necessarily be a violation of the criminal law. *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469 (1884). In *Travelers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. ed. 155 (1873) where insured was killed in horse race, the court said, "It was against the general species of danger attending nearly all infractions of law that the exception was directed."

³ *Travelers' Ins. Co. v. Seaver*, *supra* note 2 (horse-racing made a misdemeanor); *Wolff v. Conn. Mut. Life Ins. Co.*, 5 Mo. App. 236 (1878). *Contra*: *Supreme Council of Royal Arcanum v. Quarles*, 23 Ga. App. 104, 97 S. E. 557 (1918).

⁴ *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506 (1854) ("if insured should die in consequence of a duel, or by the hands of justice, or in the known violation of any law of this state"); *cf.* *Brown v. Supreme Lodge K. P.*, 83 Mo. App. 633 (1900) (all the associated exceptions were not felonies).

⁵ *Murray v. New York Life Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658 (1884).

⁶ *Osborne v. People's Benev. Industrial Life Ins. Co. of La.*, 19 La. App. 667, 139 So. 733 (1932).

In some cases the test has been whether the insured was the aggressor. *Woodmen of the World v. Walters*, 124 Ky. 663, 99 S. W. 930 (1907); *Payne*