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Practise and Procedure—Reading Dissenting Opinion in Argument to Jury as Cause of Reversal.

In a personal injury action, the North Carolina Supreme Court, with two judges dissenting, recently held that it was not permissible for an attorney to read to the jury a dissenting opinion of the late Chief Justice Clark of that court; and remanded the case for a new trial. The court expressed the view that a dissenting opinion cannot be classified either as a fact or as the law applicable to the facts, but that it is in the same category as newspaper editorials, magazine articles, pamphlets and "other writings which have not received the judicial sanction of a court."

A majority of the courts condemn the reading of law to the jury in civil cases. The basis of this rule is that the determination of the law applicable is not within the province of the jury and that argument by counsel could only be confusing, leading to diversity and uncertainty in the administration of justice. Thus the Supreme Court of Illinois in a recent case held a statute making juries in criminal cases judges of the law and the facts, unconstitutional.

In North Carolina, by statute, "the whole case as well of law as of fact may be argued to the jury." Although its policy has not been openly questioned, the broad language of the statute has been subjected to the following judicially imposed limitations: counsel may read the facts in an adjudicated case, but cannot comment upon them as being similar to the facts in the case at bar; counsel may not detail

3 People v. Bruner, 343 Ill. 146, 175 N. E. 400 (1931); Note (1931), 17 A. B. A. J. 209.
4 The grant of "judicial power" to department created therefor is exclusive and exhausts the entire power. And constitution retaining right of trial by jury, as "heretofore" enjoyed, did not refer to modifications in procedure by statute but related to past; recourse must be had to English common law to determine true meaning; under common law juries could not decide questions of law, but only applied to facts, law stated by the court. People v. Bruner, supra note 3.
5 N. C. Ann Code, Michie (1927) §203 (passed in 1844).
6 Such facts are not read as evidence, but as illustrations of legal propositions involved. Horah v. Knox, 87 N. C. 483 (1882).
The instant case for the first time in England or America raises the question as to the effect of reading a dissenting opinion to the jury. Conceivably, a dissenting opinion may be classified under one of three distinct heads: (1) It may be based upon the same rule of law as relied upon by the majority, and yet arrive at a different conclusion, through another application to the facts. (2) It may state a different rule of law. (3) It may conclude there is no such rule as laid down in the decision of the court. Apparently, however, these and other possible distinctions between different types of dissenting opinions would be without significance under the decision of the majority in the principal case. For one might guess that the Court feels that the statute goes far enough in permitting even majority opinion to become part of the jury's raw material. Or perhaps the Court felt that a dissenting opinion by a judge properly eulogized as one of "our great chief justices" might tend to weaken a subsequent instruction given by a less famous presiding judge.

8 State v. Smallwood, 78 N. C. 560 (1878); McIntosh loc. cit. supra note 7; Gray v. Little, 127 N. C. 304, 37 S. E. 270 (1900).
10 A dissenting opinion may contain a correct statement of an abstract rule of law, such rule of law may be as correct as any abstract rule of law, whether from a text book, a concurring opinion, or the decision of the court. It may be urged that since the law of one case can never be the law of another until so adjudged, counsel must necessarily argue what he thinks is the law applicable—subject, of course, to the discretion of the trial judge—and if counsel must argue correct law then any argument by counsel would be open to objection, since the law of one case in the final analysis can only be determined by the supreme court. Jones v. Detroit Taxicab Co., 218 Mich. 673, 188 N. W. 394 (1922); Ross v. Chicago City Ry. Co., 198 Ill. App. 600 (1922).

The objection to reading a dissenting opinion to the jury, however, would arise through the application of the law to the facts, since this would involve a matter of personal discretion.

11 "It is an elemental principle that an erroneous decision is not bad law, it is not law at all." Suppose that when the case of Mial v. Ellington, 134 N. C. 189, 46 S. E. 964 (1904), was being tried in the lower court, counsel has read to the jury the dissenting opinion of Judge Clark in Taylor v. Vann, 127 N. C. 243, 37 S. E. 263 (1901). The dissenting opinion suggested that the law of the case as determined in Hoke v. Henderson, 15 N. C. 1 (1834), should be overruled. According to the Conn case, the reading of the dissent would have been reversible error. Then upon appeal the court actually overrules Hoke v. Henderson and adopts the dissenting opinion as the law. What would be the result? It would seem that the court has merely corrected a mistake in the former decisions, and that they were "not bad law, but no law at all," and that the dissenting opinion was really the law all the time. But see (1927) 5 N. C. L. Rev. 170.
12 On a second trial counsel cannot eulogize the justice who delivered the opinion and endeavor to impress on the jury the latter's merits and character. Croom v. State, 90 Ga. 430, 17 S. E. 1003 (1892).
It may be the last supposition explains why this particular error became a cause for reversal. For it has been held that if the judge states the law incorrectly in his instructions, he may later recall the jury and correct the mistake; or, that if the judge fails to make this correction, a proper verdict will cure the error.\textsuperscript{13}

EDWIN E. BUTLER.

Suretyship—Liability on Bond in Excess of Statutory Penalty.

The defendant surety company executed an official bond with a penalty of $25,000. The statute requiring such bond specified an amount "not more than $15,000."\textsuperscript{11} In a summary proceeding provided by statute for cases of default on official bonds,\textsuperscript{2} held, that since the surety acted voluntarily and accepted premiums on the larger amount, it is estopped to deny the validity of the bond, and recovery may be had for the full amount.\textsuperscript{3}

When a statutory bond supersedes the statute in the amount of its penalty, three possibilities arise: the bond may be (1) void, (2) valid up to the statutory amount, (3) valid to the full amount of its penalty.

Where the excessive penalty is extorted \textit{colore officii}, or is not given voluntarily, bonds have been held completely void.\textsuperscript{4} But where the larger penalty is voluntarily assumed, the general rule is that the bond is good to the full extent of the penalty if not prohibited by

\textsuperscript{12} "We believe the district attorney's law good, but even if it were bad, verdicts are not set aside because the district attorney has argued bad law to the jury." State v. Wren, 121 La. 55, 46 So. 99 (1908).

\textsuperscript{1} N. C. ANN. CODE (Michie, 1927) §927.

\textsuperscript{2} N. C. ANN. CODE (Michie, 1927) §356.

\textsuperscript{3} State v. Gant, 201 N. C. 211, 159 S. E. 427 (1931) (official bond of clerk of superior court).

\textsuperscript{4} Bail bonds have been held void where the sheriff required a larger penalty than the court directed: Barringer v. State, 27 Tex. 553 (1864); Neblett v. State, 6 Tex. App. 316 (1879); Roberts v. State, 34 Kan. 151, 8 Pac. 246, 6 Am. Crim. Rep. 61 (1885); Waugh v. People, 17 Ill. 561 (1856). Appeal bonds have been held void where the court exacted a larger penalty than the statute required: Commonwealth v. Wistar, 142 Pa. 373, 21 Atl. 872 (1891); Newcombe v. Worster, 7 Allen 198 (Mass. 1863); An official bond was declared void where an excess penalty was extorted \textit{colore officii} by superior officers: United States v. Humason, 6 Savy. 199, Fed. Cas. 15421 (1879). Embargo bonds have been held void for the same reason: United States v. Morgan, 3 Wash. C. C. 10, Fed. Cas. 15809 (1811); United States v. Gordon, 1 Brock. 190, Fed. Cas. 15232 (1811), writ of error dismissed in 7 Cranch (U. S.) 287, 3 L. ed. 347 (1813).