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prudence it seems doubtful. Nevertheless, the adoption of the changes would at least prevent the Legislature from amending city charters (not under special legislative charter) without the consent of the municipality concerned, and that would be a definite improvement over the present status of the law.

Huntington Odom

Prejudicial Remarks of the Trial Judge as Grounds for Reversal in Louisiana Criminal Cases

The basic law in Louisiana on the province of judge and jury in criminal cases is set out in article XIX, section 9, of the Louisiana Constitution, which provides:

“. . . The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.”

The constitutional provision is further amplified by article 384 of the Louisiana Code of Criminal Procedure of 1928, which states:

“It belongs to the jury alone to determine the weight and credibility of the evidence, but the judge shall have the right to instruct the jury on the law but not upon the facts of the case. The judge shall not state or recapitulate the evidence, repeat the testimony of any witness, nor give any opinion as to what facts have been proved or refuted.”

These provisions make clear that, as a rule, issues of fact are within the exclusive province of the jury, while issues of law are to be decided by the judge. However, not every issue of fact in a criminal case is decided by the jury. The Louisiana Supreme Court has indicated that questions of fact are to be decided by the jury only when they have a direct bearing upon the guilt or innocence of the accused, and that procedural issues of fact are to be decided by the judge. For example, although the question of venue is one of fact, it is a procedural matter for the judge to decide.¹

1. *State v. Paternostro*, 224 La. 87, 68 So.2d 767 (1953).

The purpose of this Comment is twofold: first, to determine the instances in which the trial judge's rulings upon evidence or instructions to the jury in Louisiana criminal cases may so violate the provisions quoted above as to constitute reversible error;² and second, to demonstrate that the federal rule pertaining to prejudicial remarks of the trial judge is superior to the Louisiana rule.

Rulings During Trial

Questions of admissibility of evidence are properly within the province of the trial judge.³ While the evidence in question may be directed toward establishing the guilt or innocence of the accused, the question of whether or not it is admissible is neither a matter of fact nor pertinent to the guilt or innocence of the accused.⁴ In explaining his rulings, however, the judge is faced with the problem of phrasing his explanation so that it will convey to counsel an understanding of the ruling, yet not indicate to the jury how an issue bearing on guilt or innocence should be decided.

The trial judge may properly make remarks in the presence of the jury so long as these remarks state only the basis of the court's ruling on the evidence.⁵ Appellate courts are aware that trial judges have no time during the trial to consider the exact language in which these rulings should be phrased. For this reason, the trial judge is allowed more discretion in these instances than in cases where the language is found in the charge to the

2. LA. CODE OF CRIM. PROC. art. 557 (1928) provides: "No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

3. *State v. Thornhill*, 188 La. 762, 178 So. 343 (1937); *State v. Ashworth*, 167 La. 1085, 120 So. 865 (1929); *State v. Dreher*, 166 La. 924, 118 So. 85 (1928), *cert. denied*, 278 U.S. 641 (1928); *State v. Golden*, 113 La. 791, 37 So. 757 (1905); *State v. Green*, 46 La. Ann. 1522, 16 So. 367 (1894).

4. See note 3 *supra*.

5. *State v. Walker*, 204 La. 523, 15 So.2d 874 (1943); *State v. Iles*, 201 La. 398, 9 So.2d 601 (1942); *State v. Vernon*, 197 La. 867, 2 So.2d 629 (1941); *State v. Childers*, 196 La. 554, 199 So. 640 (1940); *State v. Weathers*, 127 La. 930, 54 So. 290 (1911); *State v. Hoffman*, 120 La. 949, 45 So. 951 (1908); *State v. Logan*, 104 La. 362, 29 So. 110 (1901); *State v. Walker*, 50 La. Ann. 420, 23 So. 967 (1898).

jury, which should be well-calculated, accurate, and unbiased statement of the law applicable to the facts of the case.⁶

The problem concerning comments of the trial judge on the admissibility of evidence is well illustrated by those cases where evidence is admissible only after a proper foundation has been laid. The judge is limited in pointing out the evidence or testimony which he deems to constitute a proper foundation for the introduction of the evidence.⁷ In *State v. Logan*⁸ the judge was asked to exclude certain testimony involving two persons, one of whom was the defendant, on the ground that a conspiracy between the two had not been proved. The trial judge stated that he "knew the Supreme Court had ruled that statements and declarations made by one accused out of the presence of the others, without an allegation or proof of conspiracy, were inadmissible, but, knowing the facts in this case as he did, the said evidence ought to be admitted; that, if the Supreme Court knew the facts as he did, it would be admitted." In reversing the conviction, the Supreme Court held that the trial court had conveyed to the jury his opinion that under the facts as known to him, there existed the required conspiracy.

In the case of *State v. Nicolosi*⁹ the trial judge pointed out the evidence which he deemed to constitute sufficient foundation, stating, "[The witness] having testified that the accused was present at the time the solicitation was made, the objection is overruled." The court held that the remark was not a comment on the evidence, but merely a repetition of the testimony and, though there was error, it was not prejudicial.¹⁰ Where the lan-

6. *State v. Farrier*, 114 La. 579, 38 So. 460 (1905); *State v. Mitchell*, 41 La. Ann. 1073, 6 So. 785 (1889).

7. *State v. Hoffman*, 120 La. 949, 45 So. 951 (1908).

8. 104 La. 362, 364, 29 So. 110, 111 (1901).

9. 228 La. 65, 81 So.2d 771 (1955).

10. In these cases, the attitude which is reflected on the part of the judge in his ruling, is often a weighty factor in the appeal court's disposition of the case. See *State v. Hickerson*, 157 La. 852, 103 So. 189 (1925), where the court said that the comment of the trial judge that "until an overt act or hostile demonstration on the part of prosecution witness is shown, evidence of threats is not admissible," was not prejudicial comment. In both the *Hickerson* case and the *Nicolosi* case the trial judge did in fact commit error. In neither case, however, did the Supreme Court reverse, holding instead that there was not sufficient prejudice to merit reversal. See also *State v. Thornhill*, 188 La. 762, 178 So. 343 (1937), where the court said, "the trial judge [in ruling upon whether or not sufficient foundation has been laid] has the discretion of passing on the credibility of the witnesses and the sufficiency of the evidence, and his rulings will not be reversed unless manifestly erroneous." *State v. Beck*, 46 La. Ann. 1419, 16 So. 368 (1894); *State v. Mitchell*, 41 La. Ann. 1073, 6 So. 785 (1889); *State v. Ford*, 37 La. Ann. 443 (1885).

guage of the ruling indicates only a bona fide attempt by the trial judge to demonstrate the basis of his ruling, the Supreme Court is seldom inclined to reverse. However, the language of the ruling may be such as to indicate the possibility that the trial judge was biased or unduly partisan against the defendant. If so, this partisanship can serve to supply the vital element of genuine prejudice to the defendant, required by the Code of Criminal Procedure, before the Supreme Court may reverse because of procedural error.¹¹

There is the further danger that the trial judge, in stating his reasons for a ruling on admissibility, will make statements which will indicate his opinion of the credibility of a particular witness or of testimony. Article 384 of the Code of Criminal Procedure empowers the jury alone to decide on the credibility of evidence insofar as it concerns the guilt or innocence of the accused. In *State v. Ballou*¹² the judge, when requested that the witness be allowed to testify in French since he could not speak English, said, "if he was at the end of his rope he could speak English."¹³ This was held to be error, as indicating to the jury that the judge did not believe the witness. It should be noted, however, that there is reversible error only if the judge comments unfavorably on the credibility of a defense witness. If he comments favorably on a defense witness, or unfavorably on a prosecution witness, there is no prejudice to the defendant and hence no ground for reversal.¹⁴

While it is difficult to draw an accurate line between the remarks which the trial judge will be permitted to make and those which he will not, the following generalization is suggested. There is a strong probability of reversal when, in ruling on the evidence, the trial judge: (1) influences the jury as to what will be accomplished in the trial by this evidence; (2) makes known, directly or indirectly, what weight or credibility he would attach

11. See note 2 *supra*.

12. 140 La. 1086, 74 So. 562 (1917).

13. See also *State v. Sterling*, 205 La. 879, 18 So.2d 327 (1944); *State v. Richey*, 160 La. 667, 107 So. 484 (1926); *State v. Folden*, 135 La. 791, 66 So. 223 (1914). It follows logically that if the judge may not comment upon the credibility of evidence or testimony, then he may not express an opinion that any fact has been proved or refuted. *State v. Johnson*, 139 La. 829, 72 So. 370 (1916); *State v. McLaughlin*, 138 La. 958, 70 So. 925 (1916); *State v. Johnson*, 137 La. 505, 68 So. 843 (1915); *State v. Smith*, 135 La. 437, 65 So. 598 (1914); *State v. Varnado*, 126 La. 732, 52 So. 1006 (1910).

14. *State v. Johns*, 135 La. 552, 65 So. 738 (1914); *State v. Farrier*, 114 La. 579, 38 So. 460 (1905).

to any evidence or testimony; or (3) states that any fact has been proved or disproved.

Charge to the Jury

The Louisiana Constitution and Code of Criminal Procedure provide that the judge's charge to the jury is to be limited to the law of the case. However, as was stated in *State v. Nelson*,¹⁵ "questions of law, as a rule, are so intimately connected with or blended with questions of fact, that it is almost impossible to consider the former without dealing with the latter." Yet in his charge the trial judge is prohibited from indicating to the jury how they should find on any issue pertaining to the guilt or innocence of the accused.¹⁶ Neither can the charge dwell upon unimportant facts,¹⁷ or in any other manner influence the verdict of the jury.

Dwelling on particular facts or evidence. The instructions of the trial judge must cover every important aspect of the crime charged and any defenses raised by the defendant.¹⁸ Nevertheless, it has been held that the judge may not single out particular evidence or testimony and dwell upon it unnecessarily, so as to make such evidence or testimony stand out in the minds of the jurors;¹⁹ nor should he dwell upon facts on which he need not instruct.²⁰

In *State v. Irvine*²¹ the court stated the rule in these terms: "[A]s a general proposition, it is not permissible to make special mention of particular facts, or groups of facts, thereby attracting special attention to them and giving them undue prominence, but the charge must cover every phase of the case, and if one of

15. 32 La. Ann. 842 (1880).

16. In *State v. Burris*, 204 La. 608, 615, 16 So.2d 124, 126 (1943), the court said, "A trial judge is required to limit himself to giving the jurors a knowledge of the law applicable to the case. He is prohibited from stating or recapitulating the evidence in a manner which would influence the decision on the facts, or from repeating or stating the testimony of any of the witnesses, or from indicating what facts have been proved or disproved."

17. *State v. Irvine*, 126 La. 434, 52 So. 567 (1910).

18. LA. CODE OF CRIM. PROC. arts. 384, 385 (1928); *State v. Robichaux*, 165 La. 497, 115 So. 728 (1928); *State v. Short*, 120 La. 187, 45 So. 98 (1907).

19. *State v. Barber*, 167 La. 635, 120 So. 33 (1929); *State v. Rock*, 162 La. 299, 110 So. 482 (1926); *State v. Irvine*, 126 La. 434, 52 So. 567 (1910); *State v. Mehojovich*, 118 La. 1013, 43 So. 660 (1907).

20. *State v. Murphy*, 154 La. 190, 97 So. 397 (1923); *State v. Short*, 120 La. 187, 45 So. 98 (1907).

21. 126 La. 434, 442, 52 So. 567, 570 (1910).

the phases depends upon certain particular facts, or groups of facts, these may have to be alluded to in order to convey to the jury a practical idea of the law of the case." The Supreme Court has held it to be error, however, for the judge to instruct that a complaint made by the victim to her mother three months after the alleged crime was not too late to serve as evidence of the crime,²² or that "there was one witness who has testified specifically to the commission of the crime,"²³ or that certain acts committed by only one of several defendants could constitute the crime charged.²⁴

While it is generally permissible to charge the jury that it may consider the interest of the witness in the outcome of the trial in determining that witness's credibility,²⁵ the Supreme Court has held it to be reversible error to charge the jury that it could consider the interest of the defendant in the outcome of the trial in weighing his testimony.²⁶ But, in *State v. Rini*,²⁷ no reversible error was found when the judge charged that the jury could consider the interest of any witness to determine his credibility, and then charged that the testimony of the defendant was to be weighed in the same manner as that of any other witness.

In *State v. Kelly*²⁸ the court held that the judge was not guilty of reversible error when he stated that the defendant must satisfactorily account for his possession of goods if those goods were proved to have been stolen. This charge was deemed to be proper because the judge merely reminded the jury that a legal presumption arises from the defendant's possession of stolen goods, which is a charge on the law of the case.

Gratuitous remarks. Gratuitous remarks inserted by the trial judge into his charge often cannot be fitted into the explicit prohibitions of the Constitution or the Code of Criminal Procedure quoted above, yet they may be prejudicial to the defendant. These remarks may take a variety of forms, such as a charge that the evidence is short, clear and to the point (though not directly

22. *State v. Fontenot*, 157 La. 556, 102 So. 668 (1925).

23. *State v. Watkins*, 106 La. 380, 31 So. 10 (1901).

24. *State v. Murphy*, 154 La. 190, 97 So. 397 (1923).

25. *State v. Elby*, 145 La. 1019, 83 So. 227 (1919).

26. *State v. Newman*, 157 La. 564, 102 So. 671 (1925); *State v. Hataway*, 144 La. 138, 80 So. 227 (1918); *State v. Smith*, 135 La. 427, 65 So. 598 (1914); *State v. Carroll*, 134 La. 965, 64 So. 868 (1914).

27. 151 La. 163, 91 So. 664 (1922).

28. 50 La. Ann. 597, 23 So. 543 (1898).

saying in whose favor);²⁹ that there is little room for doubt;³⁰ that a life sentence does no good because the prisoner is apt to be pardoned or paroled;³¹ or that if a certain verdict is brought in, it is without the judge's consent.³² It has been held not to be a ground for reversal, however, when the trial court charges that if the jurors think they know more law than the judge, they have the power so to think;³³ or that, although they have the power to disregard the law, they have neither the moral nor the legal right to do so.³⁴

Here again it is impossible to state a rule by which any language of the court can be evaluated. It is suggested, however, that the judge is in danger of reversal whenever he instructs in an area which is not of sufficient importance to the case to merit such instructions or otherwise inserts into his charge expressions of opinion or explanation not necessary to a clear exposition of the law. Moreover, if, in this surplusage, there is an indication that it was inserted to sway or that it had the effect of swaying the jury on any important point, then the trial judge is guilty of prejudicial comment.

Tracing the facts of the case hypothetically. In instructing the jury as to the elements of a particular crime, the judge may state a hypothetical fact situation to illustrate the application of the law. All such charges are regarded as free of reversible error when the judge charges that particular acts constitute the crime charged,³⁵ states that such an act is justified if certain other facts are proved,³⁶ stresses that the jury is the sole trier of fact and law, or uses some saving language, such as "if it has been proved."³⁷

In *State v. Williams*³⁸ the theory of the state was that the accused had killed the deceased because the deceased spat tobacco juice on the window or floor of the accused's poolroom. The trial judge, tracing these facts, instructed the jury that such provocation would not justify killing a man. The Supreme Court found

29. *State v. Asberry*, 37 La. Ann. 124 (1885).

30. *State v. Collins*, 47 La. Ann. 578, 17 So. 128 (1895).

31. *State v. Melvin*, 11 La. Ann. 535 (1856).

32. *State v. Hicks*, 113 La. 779, 37 So. 753 (1905).

33. *State v. Horn*, 167 La. 190, 118 So. 884 (1928).

34. *State v. Newton*, 28 La. Ann. 65 (1876).

35. *State v. Richey*, 198 La. 88, 3 So.2d 285 (1941).

36. *State v. Mitchell*, 41 La. Ann. 1073, 6 So. 785 (1889).

37. *State v. Burris*, 204 La. 608, 16 So.2d 124 (1943).

38. 155 La. 9, 98 So. 738 (1924).

no reversible error in this charge. In this type of case, it seems to be the feeling of the court that such instructions constitute charges on the law, not on the facts of the case.³⁹ The final decision is still in the hands of the jury, for it may still accept or reject the evidence offered to prove those facts commented upon by the judge in his charge.⁴⁰

Summary

In light of the cases, the following four questions may serve as a practical guide in determining whether or not a charge violates the Constitution or Code of Criminal Procedure: First, did the facts in question constitute an important enough area in the case to justify the giving of an instruction? Second, granting that the law is correctly stated, does the application of the law to the facts leave the jury complete freedom in its decision on the guilt or innocence of the accused? Third, does the charge give the facts only such mention as may be necessary to demonstrate the law? Fourth, even if the charge be erroneous, is the error so inconsequential that the defendant would not be seriously prejudiced by the charge? A negative answer to any of these questions indicates danger of reversal.

The Federal Practice

Limitations upon the trial judge, such as are imposed by the Louisiana Constitution and Code of Criminal Procedure, are not a part of the common law. Where such limitations are imposed, it is only by constitutional and statutory regulations.⁴¹

39. *State v. Dennison*, 44 La. Ann. 135, 10 So. 599 (1892), upheld the charge that persuading the wife of the accused to leave the accused was not sufficient provocation to kill, even upholding the charge that "the extreme legal effect of such provocation would be to support the charge of malice." *State v. Holbrook*, 153 La. 1025, 97 So. 27 (1923), upheld the trial judge's charge that the poisoning of a dog was insufficient provocation to justify killing the poisoner.

40. *State v. Irvine*, 126 La. 434, 52 So. 567 (1910); *State v. Kelly*, 50 La. Ann. 597, 23 So. 543 (1898); *State v. Lima*, 48 La. Ann. 1212, 20 So. 737 (1896); *State v. Smith*, 11 La. Ann. 633 (1856). See also *State v. Burris*, 204 La. 608, 16 So.2d 124 (1943); *State v. Broussard*, 202 La. 458, 12 So.2d 218 (1942); *State v. Boone*, 194 La. 977, 195 So. 511 (1940); *State v. Williams*, 189 La. 355, 179 So. 452 (1938); *State v. Alphonse*, 34 La. Ann. 9 (1882).

41. 1 BRANSON, *THE LAW OF INSTRUCTIONS TO JURIES* 101, § 33 (3d ed. 1936); 4 BARRON, *FEDERAL PRACTICE AND PROCEDURE* 244, § 2233 (rules ed. 1951); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 680 (1918). Provisions like those of Louisiana are found in many other states. For examples, see GA. CODE ANN. § 27-2301 (Harrison 1935); MISS. CODE ANN. tit. 10, c. 3, § 1530 (1942); MO. REV. STAT. § 546.040 (1949); NEV. COMP. LAWS § 109586 (1929); ORE. COMP. LAWS ANN. §§ 26-903, 26-928 (1940); TEX. CODE CRIM. PROC. arts. 657, 658 (Vernon 1941). For further details as to

The federal courts, however, have retained the rule of the common law.⁴² Under the federal practice, the trial judge may comment on the evidence or the testimony, or express any opinion as to how an issue should be decided, so long as he informs the jury that it is his opinion and is not binding upon them to find similarly.⁴³

Perhaps the two strongest arguments expressed by opponents of the federal rule are first, that a partisan judge may defeat justice by his ability to sway the jury; and second, that this system is unconstitutional under article III, section 2, of the United States Constitution, which establishes the right to a jury trial in criminal cases.⁴⁴ The answer to the first of these contentions is that while the judge may comment on the evidence and express his opinion, he is not relieved of the duty of being fair and impartial, and his being partisan is still a ground of reversal.⁴⁵ The second contention is answered by the fact that the jury trial assured by the Constitution was the jury trial as it was then known, that is, the jury trial of the common law. At the time the assurance of a trial by jury was made, the judge had the same right to comment on evidence and testimony which he is granted under the federal system today.⁴⁶

The uncertainty which confronts a Louisiana trial judge who makes an explanation of his rulings or his charge to the jury has been shown above. It is submitted that to remedy this un-

the variations in these rules, see A.L.I., CODE OF CRIMINAL PROCEDURE, PROPOSED FINAL DRAFT §§ 335, 337, commentaries (1930).

42. *Bartlett v. United States*, 166 F.2d 928 (10th Cir. 1948); *Frederick v. United States*, 163 F.2d 536 (9th Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *Wheatley v. United States*, 159 F.2d 599 (4th Cir. 1946).

43. Some additional limits on the federal trial judge were stated by Chief Justice Hughes in *Quercia v. United States*, 289 U.S. 466, 470 (1933): "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. . . . This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'. . . . He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered.'" See also *United States v. Marzano*, 149 F.2d 923 (3d Cir. 1945).

44. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 457 (1947).

45. *Quercia v. United States*, 289 U.S. 466 (1933); *Smith v. United States*, 18 F.2d 896 (8th Cir. 1927).

46. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 457 (1947).

certainly the Legislature might well consider the adoption of the federal practice. The probable decrease of reversals on technical grounds would seem ample justification for such legislative action. But, in addition to this end, the aim of rendering justice to the defendant should be considered. Wigmore has said that this "unfortunate departure from the orthodox common law rule . . . has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice."⁴⁷ Another authority has said that a rule such as Louisiana's "tends to debase a trial by jury into a contest of skill between opposing counsel," and that "it deprives the jury of the opinion of the only impartial expert present."⁴⁸ Perhaps the most appropriate criticism is one made of the former Illinois practice which, prior to the passage of the Illinois Civil Practice Act,⁴⁹ had the same limit on the trial judge that Louisiana has now: "Under our system, verdicts of juries are, in the main, the result of chance and compromise. They are influenced by prejudice and passion. Newspapers have it in their power to increase or decrease the volume of convictions or acquittals. Not infrequently they influence the verdict in a specific case. . . . Only by placing the responsibility upon the judges to supervise the trial properly, advise and guide the jury, can the evils of the present system be minimized."⁵⁰

The logic of the attacks on restricting the trial judge seems sound. The evil of an excessive number of technical reversals is apparent. Some states, recognizing this evil, have adopted the federal rule.⁵¹ Louisiana would do well to follow suit.

Robert J. Jones

Dedication of Land to Public Use

Three methods by which land may be dedicated to public use have been recognized by the courts of this state. These are: (a) statutory dedication, (b) "tacit" dedication, and (c) implied

47. 5 WIGMORE, EVIDENCE 557, § 255 (3d ed. 1940).

48. *Ibid.*

49. ILL. REV. STAT. c. 110, §§ 125-259.72 (Smith-Hurd 1948).

50. Fisher, *The Effect of the Civil Practice Act Upon Instructing Juries in Criminal Cases*, 28 ILL. L. REV. 451, 457 (1933).

51. Illinois, Michigan, South Dakota, Colorado, Maine and Massachusetts have adopted the Federal Rules either by statute or by judicial decision. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 458 (1947).