St. John's Law Review

Volume 13
Number 2 *Volume 13, April 1939, Number 2*

Article 7

Fair Comment in the Federal Courts

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FAIR COMMENT IN THE FEDERAL COURTS.

Under the federal system of trial by jury the judge is considered more than a mere moderator or referee.[1] It is his duty to aid and advise the jury, and to accomplish that end he is permitted to comment upon the evidence and the credibility of witnesses.[2] It is felt that in this way the jury may best have the aid of his legal experience in helping them to sift through complicated sets of facts.[3] At the same time he supplies a counteracting force made necessary, in many cases, by the tactics and remarks of opposing counsel in addressing the jury.[4]

It is important, however, that the jury be made clearly to understand that any comment the court might make is not binding upon them,[5] for they are to be the sole judges of the facts, *uninfluenced* by anything the judge has to say expressive of his own views.[6] In addition, care must be used in summing up, not to add to, or distort the facts,[7] while at the same time, "the charge must remain upon the whole, impartial, dispassionate and judicial, and must not be argumentative to a degree which makes it characteristically an act of advocacy." [8]

In the lower federal courts it has often been held that the judge may even express his views as to the guilt or innocence of the accused, provided he observes these limitations.[9] Such an expression of opinion has not been deemed to constitute, *per se,* unfair com-

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[1] Quercia v. United States, 289 U. S. 466, 469, 53 Sup. Ct. 698 (1932): "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

[2] *Ibid.;* Vicksburg and Meridian R. R. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1 (1886); Starr v. United States, 153 U. S. 614, 14 Sup. Ct. 419 (1893).

[3] Sunderland, *The Inefficiency of the American Jury* (1915) 13 MICH. L. REV. 302.

[4] *Ibid.*

[5] Quercia v. United States, 289 U. S. 466, 469, 53 Sup. Ct. 698 (1932) ("It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted for their determination.").

[6] Galatas v. United States, 80 F. (2d) 15 (C. C. A. 8th, 1935), *cert. denied,* 297 U. S. 711, 56 Sup. Ct. 574 (1935).

[7] Quercia v. United States, 289 U. S. 466, 53 Sup. Ct. 698 (1932). In that case the trial judge called the attention of the jury to a nervous mannerism of a witness, informing them that it was his experience that whenever a witness did that it was an indication he was lying. The court, in holding this to be adding to the evidence, said that this fact had not been proven at the trial and it was not such a matter of common knowledge that it could be regarded as a safe test of lying. See also United States v. Meltzer, 100 F. (2d) 739 (C. C. A. 7th, 1938).

[8] United States v. Wallace, 291 Fed. 972 (C. C. A. 6th, 1923).

[9] For a complete list of cases see Notes (1935) 95 A. L. R. 785, (1938) 113 A. L. R. 1308.

ment.[10] It can be seen that this is an extremely important power possessed by the court, especially in criminal trials where the jury, if they have a reasonable doubt as to guilt, must acquit. An expression of opinion as to defendant's guilt might well be the deciding factor in resolving away any reasonable doubt. This broad concept of the trial court's powers has recently been criticized and challenged by the circuit court of appeals in *United States* v. *Meltzer*.[11]

Although the trial judge had not expressed an opinion as to the guilt or innocence of the defendants in that case, his instructions to the jury did exceed the bounds of permissible comment as judged by the limitations previously stated,[12] and all three judges were agreed that reversible error had been committed. Then Judge Major, speaking for the majority of the court, felt constrained to take exception to the remarks of his colleague, Judge Evans, wherein the latter had stated that the right of a federal judge to comment even extended to "giving opinions as to the merits of the case, when it is exercised only in exceptional cases and it is made clear that the court's opinion must give way to the jury's on matters of fact, * * *." [13]

Interpreting the term "merits of the case" as meaning the ultimate issue to be decided by the jury,[14] Judge Major proceeds to consider its application in criminal trials. Accordingly, as applied to the latter field, the ultimate issue would mean the determination by the jury of the guilt or innocence of the accused. It is evident that by thus concentrating his attack he is seeking to draw a distinction be-

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[10] A typical illustration of the attitude of the lower federal courts in this regard may be found in Dillon v. United States, 279 Fed. 639 (C. C. A. 2d, 1921). The defendant was charged with violating the Volstead Act, and the following instructions were given to the jury:

"Now you have heard this case. The court's opinion is that the defendant is guilty of the crime charged. In a Federal court the court may inform the jury what his opinion is of the guilt or innocence of the defendant, but I want you to understand the question of his guilt or innocence is solely for the jury to decide. It is not for the court. The court has no part in deciding the guilt or innocence of the defendant, but the court may, if it seems desirable, inform the jury of his opinion." *Id.* at 642. The court distinguished Breese v. United States, 108 Fed. 804 (C. C. A. 4th, 1901) and Cummins v. United States, 232 Fed. 844 (C. C. A. 8th, 1916) among others by saying, "These cases are all of them clearly distinguishable from the case now before us. In the cases referred to, the judge has encroached unduly upon the province of the jury, but this was not done in the instant case, in which the jury could not have been misled, and was properly informed that the question of guilt or innocence was solely for the jury to decide." *Id.* at 643.

[11] 100 F. (2d) 739 (C. C. A. 7th, 1938). See Comment (1939) 33 ILL. L. REV. 558.

[12] Certain facts were regarded as proved by the trial court, although a proper fact controversy for determination by the jury was presented since the defendants contradicted the evidence offered by the prosecution. Further error lay in the biased and derisive manner in which the court treated the defense. Finally, the trial judge was held to have added to the evidence in respect to the way the demeanor of one of the government's witnesses should be accepted by the jury.

[13] United States v. Meltzer, 100 F. (2d) 739, 742 (C. C. A. 7th, 1938).

[14] *Id.* at 742.

tween comment upon the evidence, and the expression of an opinion as to the outcome of the case itself.

From his point of view the right of a trial court to express its opinion as to the guilt of the accused would constitute a deprivation of the fair and impartial trial guaranteed by the Sixth Amendment.[15] It is his contention that the Supreme Court of the United States has never expressly approved the proposition except in a case such as was presented in *Horning* v. *District of Columbia*.[16]

The defendant in that case was charged with doing business as a pawnbroker and charging more than six per cent interest without a license. The facts were undisputed. The trial court, in charging the jury, made a particularly strong expression of opinion as to defendant's guilt.[17] In sustaining the conviction, Mr. Justice Holmes, writing for the majority of the court, stated that the charge was at most, only technical error, since the facts as to defendant's guilt were admitted, and that which appeared to be an opinion by the trial court was, in reality, merely a statement of the law.[18]

Since the important element in this decision was the lack of any dispute as to the facts, Judge Major is of the opinion that comment on the ultimate issue has been confined to situations where the facts are undisputed. Standing alone, the *Horning* case would not support his argument, and it is necessary, therefore, to refer to the decision of *United States* v. *Murdock*[19] which is the latest pronouncement of the Supreme Court on this subject.

In that case we find some features which are similar to the *Horning* case. The defendant was charged with income tax violations, and as to the physical acts constituting a violation of the statute, the facts were admitted. Unlike the crime involved in the *Horning* decision, however, the crime with which defendant was charged re-

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[15] *Id.* at 747.

[16] 254 U. S. 135, 41 Sup. Ct. 53 (1920).

[17] *Id.* at 140: "In conclusion I will say to you that a failure by you to bring in a verdict in this case can only arise from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. Of course, gentlemen of the jury, I cannot tell you in so many words to find the defendant guilty, but what I say amounts to that." This case was decided by a five-to-four margin with Mr. Justice Brandeis delivering a strong dissent.

[18] *Id.* at 138: "The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there is no formal agreement."

This case was decided after the enactment of the statute permitting the court to disregard technical error, defect, or exception which does not affect the substantial rights of the parties on appeal. See 40 STAT. 1181 (1919), 28 U. S. C. A. § 391 (1928).

[19] 290 U. S. 389, 54 Sup. Ct. 223 (1933).

quired a criminal intent,[20] and on this point there was a fact controversy.[21] The trial judge expressed the opinion that the defendant was guilty as charged beyond a reasonable doubt.[22] Requested to charge on the question of good faith, he refused to do so. Although a similar charge had been sustained in the *Horning* case, the court held that in this instance the charge was bad because it took away from the jury a consideration of the possible good faith of the defendant. Distinguishing the earlier decisions the court said:

> "Although the power of the judge to express an opinion as to the guilt of the defendant exists, *it should be exercised cautiously and only in exceptional cases.* Such an expression of opinion was held not to warrant a reversal where, upon the undisputed and admitted facts, the defendant's conduct amounted to the commission of the crime defined by the statute (*Horning* v. *District of Columbia*). The present, however, is not such a case, unless the word 'willfully,' used in the sections upon which the indictment was founded means no more than voluntarily." [23] (Italics ours.)

We note that one of the most important differences between the *Horning* and *Murdock* decisions is that in the former the crime in question did not require a criminal intent, whereas in the latter the word "willfully" contained in the statute was held to mean a bad purpose or intent. There is an indication in the opinion that if "willfully" had meant no more than voluntarily the result might have been the same as in the former case.[24] One might possibly draw the inference, therefore (as Judge Major seems to do) that where the crime involves the presence of a criminal intent which is denied by the defendant an expression of opinion as to guilt will constitute reversible error, and that the "exceptional case" referred to has reference to a situation where the crime is *malum prohibitum* and the facts are undisputed.

Whether this is a correct interpretation of the *Murdock* case is open to some question. In the first place we do not know the exact

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[20] 44 STAT. 116, 26 U. S. C. A. § 1265 (Supp. 1926): "Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, * * * shall * * * be guilty of a misdemeanor * * *."

[21] The defendant contended that he had failed to testify concerning his income tax returns because he believed it would incriminate him. *Id.* at 391.

[22] The judge had stated that in his opinion "the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt." *Id.* at 393.

[23] *Id.* at 394.

[24] *Ibid.*

scope of an "exceptional case", as that term was not defined. It is true that *Horning* v. *District of Columbia*[25] was cited as an illustration, but at the same time it was not expressly made the only exception permitted.

A second and very important factor, apparently overlooked by Judge Major, was the refusal of the trial court to charge the jury as to defendant's good faith. It is quite possible that if this had been done the court would have sustained the conviction. There is authority for this conclusion to be gathered from an examination of the Supreme Court's previous treatment of the right to express an opinion,[26] and it would seem that these cases should have been held to be overruled, or at least modified, if the court intended to break with the past.

Before any attempt is made at examining these decisions one thing should be borne in mind. For all practical purposes, so far as the jury is concerned, many things may be said by the trial court which, while not in so many words constituting an express opinion as to guilt, must nevertheless have the same effect.[27] It is not difficult, for example, to determine the judge's opinion when he tells the jury that the evidence entered in behalf of the defendant is not credible, but that he believes the Government's witnesses are telling the truth.[28] The test, therefore, is not in the form of the words of the charge, but in their effect.

With this in mind we turn to a consideration of those instances, prior to the *Horning* case, where the Supreme Court has passed upon the problem of expressing an opinion upon the merits. The first question that arises has to do with the interpretation given to the constitutional guaranty of a fair and impartial trial.[29] It might, perhaps, be thought that this would be a bar to the right to voice an

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[25] 254 U. S. 135, 41 Sup. Ct. 53 (1920).

[26] Rucker v. Wheeler, 127 U. S. 85, 8 Sup. Ct. 1142 (1888). In the following instances charges which were equivalent to expression of opinion as to guilt were upheld:

Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171 (1891) (discussed in text, *infra*); Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36 (1894) (discussed in text, *infra*): Ching v .United States, 118 Fed. 538 (C. C. A. 4th, 1902), *cert. denied,* 189 U. S. 509, 23 Sup. Ct. 849 (1903); Tuckerman v. United States, 291 Fed. 958 (C. C. A. 6th, 1923), *cert. denied,* 263 U. S. 716, 44 Sup. Ct. 137 (1923).

The Supreme Court has approved the right to voice an opinion on the facts in civil cases, and in discussing the right of the trial judge to comment in these cases has stated the right is the same in both criminal and civil actions. See Carver v. Jackson, 4 Pet. 80 (U. S. 1830); Vicksburg and Meridian R. R. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1 (1886).

[27] Ching v. United States, 118 Fed. 538 (C. C. A. 4th, 1902), *cert. denied,* 189 U. S. 509, 23 Sup. Ct. 849 (1903); Tuckerman v. United States, 291 Fed. 958 (C. C. A. 6th, 1923), *cert. denied,* 263 U. S. 716, 44 Sup. Ct. 137 (1923).

[28] Weiderman v. United States, 10 F. (2d) 745 (C. C. A. 8th, 1926).

[29] U. S. CONST. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

opinion.[30] On the contrary, however, it presents no such obstacle, for it has been held that the Sixth Amendment is to be read in the light of the practice existing at the common law in England when the Constitution was adopted.[31] The rule there was, and still is, that the trial court has the right to comment and express an opinion.[32]

The English rule was referred to and approved by the Supreme Court in *Simmons* v. *United States*.[33] The jury in that case, being unable to reach an agreement as to whether defendant was guilty of embezzlement, had returned to the courtroom and asked to be discharged. In refusing to do so, the trial judge said:

> "I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Whenever in the opinion of the court the evidence is convincing, it is the duty of the court to hold the jury together." [34]

Although not expressly stating that he thought defendant guilty, it is obvious that such was the effect of the charge. The conviction was sustained.

In *Allis* v. *United States* [35] the jury were recalled after they had deliberated some time without being able to reach a verdict. The trial court then proceeded to give an illustration in the form of a question. Objection was made to this as being, in reality, an expression of opinion. The Supreme Court held that the illustration was fair, since put in the form of a question, and no affirmation made as to the intent to be presumed therefrom. The following *dictum* was then uttered: "Even if it contained an expression of opinion, such expression is permissible in the Federal courts." [36]

Certiorari was denied defendant convicted of conspiring to de-

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[30] This is the view taken by Judge Major in United States v. Meltzer, 100 F. (2d) 739 (C. C. A. 7th, 1938). For a discussion of the inapplicability of the Sixth Amendment see Weissberger, *The Right of the Trial Judge in Federal Courts to Comment on the Evidence* (1936) 5 BROOKLYN L. REV. 272.

[31] "And as the guaranty of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the 6th Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, * * *." Callan v. Wilson, 127 U. S. 540, 549, 8 Sup. Ct. 1301 (1888); Thompson v. Utah, 170 U. S. 343, 350, 18 Sup. Ct. 620 (1898): "It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; * * *."

[32] Weissberger, *supra* note 30.

[33] 142 U. S. 148, 12 Sup. Ct. 171 (1891).

[34] *Id.* at 151.

[35] 155 U. S. 117, 15 Sup. Ct. 36 (1894).

[36] *Id.* at 123.

fraud the Government, in *Ching* v. *United States*.[37] The trial court, speaking to the jury after they had failed to reach a verdict, had stated:

> "It is a matter of great surprise to me that you have difficulty in arriving at a verdict. * * * it is surprising to me to find that you are perplexed as to the weight of the testimony." [38]

In *Tuckerman* v. *United States* [39] the defendants were prosecuted for giving a bribe to a Government official. The trial judge, commenting upon the evidence offered by the prosecution's two key witnesses, stated that he was unable to find any motive on the part of these witnesses unless they were telling the truth. Since they had testified to defendant's participation in the crime, it was equivalent to saying that he thought the latter guilty. The circuit court of appeals held that this was not reversible error, and the Supreme Court refused to grant *certiorari*.[40]

In all of these cases the convictions were sustained by the Supreme Court although the presence of a criminal intent was a necessary element in the crime charged and in spite of the fact that the defendants, in each instance, denied any such intent. It would thus appear that Judge Major was in error when he stated that the Supreme Court had never approved the right of a federal trial judge to comment on the ultimate issue except in a case where the facts are undisputed.[41] Further, it would seem that the *Murdock* case is to be distinguished upon its own facts.[42]

One thing, however, cannot be overlooked, and that is the word of warning sounded by the court in the *Murdock* opinion to the effect that the right to comment upon the guilt of the accused should be used cautiously. It is probable that the court has realized that in many instances, in spite of all the safeguards that may be taken, the rights of the defendant would be prejudiced, and while not wanting to go so far as to abrogate the practice, nevertheless wishes to impress upon trial judges that, in the interests of a wise discretion, they should use the power sparingly, and then only in instances where it can do little harm, as where the facts are undisputed.

It is evident that this caution has had some effect upon the lower courts. In the past, when considering the fairness of the charge, the appellate courts were concerned not so much with the contents there-

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[37] 118 Fed. 538 (C. C. A. 4th, 1902), *cert. denied*, 189 U. S. 509, 23 Sup. Ct. 849 (1903).

[38] *Id.* at 541.

[39] 291 Fed. 958 (C. C. A. 6th, 1923), *cert. denied*, 263 U. S. 716, 44 Sup. Ct. 137 (1923).

[40] *Ibid.*

[41] United States v. Meltzer, 100 F. (2d) 739, 749 (C. C. A. 7th, 1938).

[42] It would seem that the determinative factor in the *Murdock* case was the failure to present properly the question of defendant's lack of criminal intent to the jury. United States v. Murdock, 290 U. S. 389, 54 Sup. Ct. 223 (1933).

of, but rather with the manner and method of delivery to the jury, with particular emphasis placed on determining whether the jury had been left free to determine the facts.[43] Today, we see a shift in emphasis, with the appellate court looking at the evidence to see whether the facts are undisputed as to defendant's guilt.[44] This changed attitude is illustrated in a circuit court of appeals decision [45] decided after the *Murdock* case. The trial court had informed the jury that in its opinion "the government had established the facts which ought to convince reasonable men beyond a reasonable doubt, * * *." [46] The court, on appeal, in sustaining the conviction, distinguished the *Murdock* case by saying that there had been a question of disputed fact in that decision which was not present in the case under consideration. The opinion then went on: "In the instant case there is no question of intent or wilfullness, and the evidence may be said to be undisputed." [47]

It is fairly easy to see the influence of the *Murdock* decision on the court in the case just discussed. Although not going far enough, it is still a change for the better. Permitting the trial judge, where the facts are disputed, to offer to the jury, by way of *advice,* his opinion as to defendant's guilt does not strike one as being altogether con-

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[43] In Morse v. United States, 255 Fed. 681 (C. C. A. 4th, 1918), conflicting testimony was offered as to whether defendant was engaged in the liquor traffic. Upon an examination of the charge the court said, "Since the ultimate conclusion was left to the jury, there was no error in the instruction." *Id.* at 682. In Perkins v. United States, 228 Fed. 408 (C. C. A. 4th, 1915), the conviction was reversed because of other error. It is interesting, however, to note the attitude of the court on appeal in respect to the judge's power to comment. "The alleged indication of the District Judge in his charge that he thought the defendant guilty does not furnish ground for a new trial. A large latitude is allowed to a trial judge in the federal courts in expressing his opinion to the jury, so long as he leaves the ultimate issue of the guilt or innocence to their decision; * * *." *Id.* at 420. To like effect see Savage v. United States, 270 Fed. 14 (C. C. A. 8th, 1920); Graham v. United States, 12 F. (2d) 717 (C. C. A. 4th, 1926).

[44] The change might be said to have taken place even before the *Murdock* case. Thus, in Dwyer v. United States, 17 F. (2d) 696 (C. C. A. 2d, 1927), *cert. denied,* 274 U. S. 756, 47 Sup. Ct. 767 (1927), we find the appellate court saying: "The right, and indeed the duty of a trial judge in respect to comment on the facts is most strikingly illustrated in Horning v. District of Columbia. The facts in this case, being in dispute, did not call for the application of that case; * * *." *Id.* at 698. In Notto v. United States, 61 F. (2d) 781 (C. C. A. 2d, 1932), the court, at p. 783, charged, "that on the undisputed evidence this man is guilty, and it is your duty to convict him." This charge, although admitted to be drastic, was held not to be error since the facts were undisputed.

For a decision decided after the *Murdock* case which concentrated on determining whether the facts are undisputed, see Hartzell v. United States, 72 F. (2d) 569 (C. C. A. 8th, 1932) discussed in text, *infra.*

[45] Hartzell v. United States, 72 F. (2d) 569 (C. C. A. 8th, 1934). It seemed, according to the undisputed evidence, that a fraud had been carried on for years, said facts constituting a violation of the statute under which defendant was indicted.

[46] *Id.* at 586.

[47] *Ibid.*

sistent with a fair and impartial trial.[48] The practice, it is submitted, has nothing to sustain it. It is easy enough to say that no harm is done if it is made clear to the jury that they are not to be influenced, but in practical operation this does not always follow. Evidence of this can be seen in those cases [49] where the jury, unable to agree, come back into court, only to be told by the judge that he is surprised and perplexed that they are unable to reach a verdict,[50] or informed that "whenever in the opinion of the court the evidence is convincing, it is the duty of the court to hold the jury together." [51] It would seem that the resultant verdict of guilty is not so much the product of advice designed to guide as it is the product of moral coercion designed to influence and command.

Objection might also be raised against permitting the judge to voice his views as to guilt in a case where the facts are undisputed.[52] Under the rule of the *Horning* case any prejudicial error in the charge (on the subject of comment) is regarded as merely technical error, not affecting the substantial rights of the accused.[53] At the same time, under federal practice, the trial court may not direct a verdict of guilty and if this is done, it will constitute more than technical error.[54] Yet, as pointed out by Mr. Justice Brandeis in his dissenting opinion in the *Horning* case,[55] the effect of the charge there was tanta-

[48] Judge Major, in United States v. Meltzer, 100 F. (2d) 739 (C. C. A. 7th, 1938), is particularly emphatic in denouncing the practice. "To my mind such procedure is productive of the following situation: Government's counsel says to the jury, 'The evidence presented proves the defendant's guilt'; defendant's counsel says, 'The evidence is insufficient to establish such guilt,' and the Judge says, 'My opinion is that he is guilty.' How any defendant could have a fair and impartial trial after such a proceeding is beyond my ability to comprehend. Under such circumstances the right of trial by jury becomes an idle and useless ceremony. The verdict is not their independent judgment but represents a judgment altered and modified to conform to the court's desire in the matter. But it is said this power must only be exercised in 'exceptional cases'. Who is to determine the 'exceptional case' and if its use in such cases is wholesome, why would it not be equally so in all cases?"

[49] Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171 (1891); Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36 (1894); Ching v. United States, 118 Fed. 538 (C. C. A. 4th, 1902), *cert. denied*, 189 U. S. 509, 23 Sup. Ct. 849 (1903); Tuckerman v. United States, 291 Fed. 958 (C. C. A. 6th, 1923), *cert. denied*, 263 U. S. 716, 44 Sup. Ct. 137 (1923) (in this case the trial judge had voiced his opinion when he first charged the jury, and when the jury came back, unable to agree, he once again told them what he thought).

[50] Ching v. United States, 118 Fed. 538, 541 (C. C. A. 4th, 1902).

[51] Simmons v. United States, 142 U. S. 148, 151, 12 Sup. Ct. 171 (1891).

[52] See dissenting opinion of Brandeis, J., in Horning v. District of Columbia, 254 U. S. 135, 139, 41 Sup. Ct. 53 (1920).

[53] Horning v. District of Columbia, 254 U. S. 135, 139, 41 Sup. Ct. 53 (1920) ("If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt.").

[54] Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273 (1895).

[55] Horning v. District of Columbia, 254 U. S. 135, 140, 41 Sup. Ct. 53 (1920) ("In my opinion, such a charge is a moral command, and being yielded to, substitutes the will of the judge for the conviction of the jury. The law which in a criminal case forbids a verdict directed 'in so many words,' forbids such a statement as the above.").

mount to a direction of a verdict. Thus we find a method of doing indirectly that which is not permitted to be done directly.

There have been some abortive attempts to pass legislation prohibiting the federal trial judge from commenting [56] and thus follow the lead of most of the states. It does seem, however, that the proposed changes would have tied the hands of the court a little too completely.[57] Undoubtedly, the trial court may be of great assistance to the jury by giving them the benefit of training and experience, and so making a little less formidable the oftentimes imposing array of witnesses and testimony. To take away this power would be hindering rather than furthering the ends of justice. The solution to the whole problem seems to have been arrived at in the following extract taken from the circuit court of appeals opinion [58] in the *Murdock* case:

> "It is true the trial court has an important duty to perform in assisting the jury to arrive at a true verdict. There is, however, in practical operation, we fear, considerable danger of the court's substituting its opinion for that of the jury. It would seem the better practice to comment upon the character of the evidence, and, if and when an opinion is expressed, to limit it to a basic fact, or an issue involved, upon which the guilt of accused is in part dependent. By so doing, the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time the court fully meets its very important duty of assisting the jury in reaching an intelligent verdict." [59]

JOHN L. CONNERS.

LIABILITY OF PUBLIC OFFICIALS FOR THE DEFAULTS OF THEIR SUBORDINATES.

Any consideration of the problem of the liability of an officer entrusted with public funds for the defaults of his subordinates, assumes a three-fold aspect,—the relation of the officer to the subordinate, the liability of the officer under his official bond, and finally, public policy. Much confusion exists both in the decisions of the courts

[56] For a discussion of the proposed bills see Osborne, *Some Problems of Procedural Reform* (1921) A. B. A. J. 249; Editorial (1928) 14 A. B. A. J. 200; (1935) 19 J. AM. JUD. SOC. 23; (1937) 23 A. B. A. J. 521; Parker, *The Federal Judiciary* (1938) 24 A. B. A. J. 239.

[57] For a discussion of the contemplated legislation and its effects see (1937) 23 A. B. A. J. 521.

[58] Murdock v. United States, 62 F. (2d) 926 (C. C. A. 7th, 1933).

[59] *Id.* at 927.