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"* * * and hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto and that what is not reason is not law."—Blackstone.

The determinations of courts and the rules by which courts reach such determinations must be measured by the standards of reason, else there can be no excuse for their existence.

The primary purpose of courts of justice is the fair and just determination of controversies between citizens of the state. In such determination, there exists always two primary inquiries: First, an inquiry as to the facts; and, Second, an inquiry as to the rule of law applicable thereto. The determination of the facts of a controverted issue is the most difficult and withal the most important duty of the Tribunal. The importance of this duty has led to the adoption of rules and regulations, methods and practices, which by the common opinion of those most expert in such endeavors will lead effectively and with assurance to the ultimate result, i. e. the truth of the controversy. The rules of common law were not created in an hour, a day, or in a month, but such laws have come into being, have become crystallized and taken form only after they have been tested by the common experience and analysis of long lines of learned men. He who seeks to overthrow a rule of the common law so established should proceed with caution and care.

In the determination of questions of fact, there has been developed a system of rules of evidence which by the experiences of man has been found most efficient. The presiding judge of a court at law has been chosen because of his experience and learning and because of his ability to apply those rules of common law to the concrete case presented to him for trial. In conformity with such experience it has been found to be rational and it is supported by unanimity of authority that the trial judge should be required to pass upon the competency of offered testimony. The rules of evidence of common law are the result of thousands of minds having thousands of experiences tending towards the ascertainment of the truth. Such rules became crystallized only after reason and experience had determined that they were best adapted towards such end. Hearsay evidence is inadmissible because in the light of reason and

experience it has no real probative value. Self-serving declarations are inadmissible because, likewise, experience and reason have taught that such items of evidence are not worthy of credence. Testimony beyond the issues is incompetent because, again, reason and experience teach that such testimony tends only to confuse rather than to enlighten. Competent evidence is such evidence which, when tested in the light of reason and experience, is of value or of weight in proving the issuable facts. In establishing the rules of evidence, all lines of human endeavor have been explored, science and art have come to the aid of the court, and logic has been found to be most useful. So there has been developed out of reason and precedent a scheme of rules which is best adapted for the determination of truth.

When an item of evidence is offered to be introduced in the trial of a cause, the trial judge is called upon in every instance where objection is made thereto to pass upon its competency. In other words, the trial judge must determine, after an examination of the evidence and the rules of law applicable thereto, whether or not, tested by such rules, it has probative value or probative weight. In every cause tried in a court of justice, the trial judge, in applying the rules of evidence, must necessarily pass upon the weight of the evidence. Now, if it be true that reason and authority support this power and duty of the judge, the question at once arises, what reason or what authority supports the rule that it is unlawful for a trial judge in his charge to the jury either to comment upon the weight of the evidence or to give to the jury advice as to the manner in which they should weigh such evidence? There seems to have been no criticism of imposing this power and duty upon the trial judge insofar as the inadmissibility of testimony is concerned. Yet nothwithstanding such power on the court's part, there has arisen in this state a dogma that any comment on the evidence by the trial judge in his charge to the jury is unlawful inasmuch, as the courts say, he then invades the province of the jury.

Is the act of an expert in giving advice on his profession to those not so well learned therein unreasonable? It must necessarily be reasonable that he who is most experienced in the doing of a task is best fitted to accomplish such task. In every other line of human endeavor, reason and experience have supported the proposition that it is most proper to assign a task to him who is best fitted to perform it. The training and experience of a judge have at least supported the rule which requires him to determine the competency of evidence. From the very beginning

of his practice, a practicing lawyer is trained in the analysis of human conduct. In his contact with men of business and affairs, he is always analysing and weighing human motives and human conduct. After his elevation to the Bench, this experience is surely not lost to him. Human nature and its manifestations are always present with him, both as to existing persons and their conduct and motives and as to those who have passed into the realm of history, for after all, the decided cases in the books of law are nothing more nor less than pictures of human nature.

The trial judge is the one best fitted in the trial of a cause to aid and advise the jury in their determinations. He is not an advocate of one man's cause; he has no personal interest in the result of the controversy and so far as human power is concerned, he has been selected because of his ability to disassociate himself from partisan reaction.

As has been most aptly stated by the Dean of American Bar Association, the Hon. Elihu Root, in his masterly address before the American Bar Association in 1916:

> "It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken * * *. From time immemorial it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provisions the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? * * * It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. * * * A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the Bar itself."

Reason would indicate that the best way to ascertain the truth would be to have the impartial expert tell the jury the means and methods which experience has demonstrated are the most efficient towards that end.

What is the authority for the rule that a court may not comment upon the evidence? Not in the courts of common law, for it was always the duty of the court in a trial at common law to instruct the jury as to the law and advise them as to the facts. Not because of legislative enactment, because there is no statute in this state requiring the adoption of such rule. The first

mention of the rule which can be found in the Indiana cases is in the case of *Hackleman v. Moat.*[1] In that case the court says:

"When legal evidence is before a jury tending to prove a particular fact it is for the jury alone to say whether that evidence is strong enough or not for the purposes intended. The court ought not to express to the jury any opinion respecting the sufficiency of the evidence. *Greenleaf v. Berth,* 9 Peters 292. *The court has an opportunity to give an opinion as to the weight of the evidence when a new trial is moved for on the ground that the verdict is not sustained by the testimony.*"

In other words, the court must wait until after error is committed in order to correct it. If this rule were pushed to its logical conclusion in all affairs of life, all doctors would be undertakers.

However, the above case does not seem to have been cited in succeeding authorities; so, it may be said that the leading case on the point in Indiana is the case of *Killian v. Eigenmann.*[2] In that case there was a controversy between a contractor and the owners of a church. The controversy involved the number of bricks that were placed in the building. Insofar as the opinion discloses, there were two witnesses, each of whom testified unequivocally concerning the number of bricks in the building. Their testimony was in conflict so the court in charging the jury told them that one witness stated that he was an architect and that he had measured the brick work and that it contained a certain number of bricks; that another witness testified that he also was an architect and that he had measured the brick work and it contained a different number of bricks; that it was for the jury to say, after a consideration of the evidence of these two witnesses and from the evidence of all the other witnesses, what number of bricks was used in the building of said church. The cause was reversed because of this instruction, the court saying that it improperly stated positively to the jury what the testimony of the witnesses was upon a material point, and that it was not for the court, but for the jury, to say what was the testimony of the witnesses. We assume that a logical result of this rule would be for the court to hold that naming the plaintiff in the case in an instruction would be an invasion of the province of the jury, for, forsooth, the name of the plaintiff always comes from the mouths of witnesses. It will be noted that no authority is cited to sustain this proposition, and it is quite obvious that the court could find no authority in the books of the common law.

1 4 Blackford, 164.
2 57 Ind. 480.

Nevertheless, this case has been followed by a long line of authorities.

The next case is the case of *Wood v. Deutchman,*[3] wherein the Supreme Court condemned an instruction whereby the lower court attempted to tell the jury the effect of certain portions of the evidence and how to compare one portion with another. The condemnation of the instruction is supported by the case of *Killian v. Eigenmann, supra.*

The case of *Fulwider v. Ingels,*[4] condemns an instruction wherein the court attempted to give the jury the benefit of his experience in weighing evidence. The commissioner in that case condemns an instruction which, *though true in point of fact,* does not amount to a legal presumption.

In many cases in Indiana an instruction is condemned on the ground of invading the province of the jury, where in truth and in fact the judge in charging the jury has adopted a false standard of fact. For instance, in *Veatch v. State,*[5] the court told the jury that there existed a presumption that once one knew a thing, he always remembered it.[6]

In other cases, the court erroneously told the jury that the evidence of one who testified in the presence of the court was entitled to greater weight than the evidence of one who testified by deposition.[7] These cases can be supported in the light of reason for an unreasonable basis was adopted by the court in charging the jury.

Many other interesting cases are found in the books, most of them citing *Wood v. Deutchman.* For instance, *Muncie Pulp Co. v. Keesling,*[8] condemned an instruction wherein the court told the jury that when witnesses were equally credible and their testimony entitled to equal weight, greater weight and credit should be given to those whose means of information were superior and also to those who swear affirmatively to a fact rather than to those who swear negatively or to a want of knowledge or recollection. The condemned instruction in this case is not unreasonable in point of fact. It is a rule by which ordinary business transactions are determined. It is a rule which the common man follows in his search for the truth. Yet the cause was reversed because, on the authority of *Wood v. Deutchman* and

[3] 75 Ind. 148.
[4] 87 Ind. 414.
[5] 56 Ind. 584.
[6] See also, *Hinds v. Harbou,* 58 Ind. 121.
[7] *Millner v. Eglin,* 64 Ind. 197; *Works v. Stevens,* 76 Ind. 181.
[8] 166 Ind. 479.

Killian v. Eigenmann, it was deemed erroneous for a court to express in his charge to the jury a means of ascertaining the truth which in every other line of human endeavor is followed. Is it not true that when one seeks medical information, he goes to those whose means of information concerning such matters is superior? Is it not true that when one seeks information concerning a business transaction, he gives greatest weight to those persons who tell him positive things concerning it rather than to those who remember nothing about it? It seems indeed strange that in that great laboratory for the ascertainment of truth, the courts of this state, there has arisen a rule which, when tested by every other human experience, is a false rule and that such rule should have arisen out of the case (*Killian v. Eigenmann, supra*) which ran counter to the rules of the common law, which cited no authorities in support of its ruling, and which, when tested by the light of experience and reason, falls short.

The case of *Haughton v. Aetna Life Insurance Company,*[9] seeks to support the rule, against the court advising the jury on the evidence, on the ground that the constitutional provision, "In all civil cases the right of trial by jury shall remain inviolate," has been invaded. Yet this, in the face of a well considered rule in this state that the quoted clause means, the right of trial by jury as it existed at common law.[10]

In *Callahan v. Nickel Plate,*[11] the facts were undisputed that the plaintiff was a passenger on the defendant's train; that a collision occurred and as a result of such collision, she was injured. The court directed a verdict for the plaintiff, leaving the question of damages to the jury. This case was reversed on the ground that the court in its instruction had invaded the province of the jury. The court says: "The only testimony as to the collision and as to the injury is the testimony of the plaintiff." It does not appear that there was any contradiction of this testimony. Yet, the cause was reversed because the trial court had the temerity to exercise common sense in its charge to the jury. *Haughton v. Aetna Life Insurance Company, supra,* was cited to support the ruling. Constitutional rights were invaded it is charged by the court, yet at that very time it was the law of Indiana that one of the causes for a new trial was that the verdict was not sustained by the evidence, and it was also the law that in passing upon this motion, the trial court must weigh the

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[9] 165 Ind. 32.

[10] See *L. E. W. and St. L. R. R. Co. v. Heath,* 9 Ind. 558; *Allen v. Anderson,* 57 Ind. 388.

[11] 40 Ind. App. 223.

evidence and determine whether or not, in his judgment, the evidence was of sufficient weight to sustain the verdict. An example of logic and reason which must have given great pleasure to the professors of philosophy.

To revert again to the quotation from Blackstone at the head of this article:

"* * * what is not reason is not law."

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