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THE RIGHT OF JUDICIAL COMMENT ON THE EVIDENCE IN MISSOURI*

BY ROBERT E. ROSENWALD

I. INTRODUCTION

The central core of Anglo-American jurisprudence is the common law. A very vital feature of the common law is trial by jury. In this legal system, the jury are known as triers of fact; the judge as expounder of law. Necessarily judge and jury must cooperate, each, however, performing certain specialized functions in the trial of a case. At common law one of the elements which brings the judge and jury into close contact with each other is the judge's comment on the evidence.

The right of the judge to comment on the evidence in the state and federal courts of the United States has been made an issue by legislatures and courts throughout the country. The result has been the abolition of the right of judicial comment on the evidence in a large majority of states, while in a minority of jurisdictions, the original common law rule survives.¹ This paper will deal with the history of judicial comment on the evidence in Missouri from the entrance of Missouri into the Union in 1820 to the present date.

* This study was written under the guidance of Dr. Arnold J. Lien, head of the Department of Political Science of Washington University, to whom the writer acknowledges his indebtedness.

¹ Johnson, *Province of the Judge in Jury Trials*, *Jour. Am. Jud. Soc.*, (Oct. 1928) pp. 76-82.

II. THE COMMON LAW COMMENT

The right of the judge to comment on the evidence in a detailed and formal manner at common law is unquestioned. The judge is authorized in his charge to the jury to express his opinion as to the weight and sufficiency of the evidence and the credibility of witnesses. He may state what evidence seems to him the most valuable, the effect of the testimony of one witness upon another, the damage which has resulted to either party's case as a result of certain testimony; in short, the judge has the authority to express his opinion on the evidence fully and freely without in any way usurping the function of the jury. However, the rule is that the judge should inform the jury that they are not bound by his remarks on the facts of the case. He is simply expressing an opinion. The jury are the exclusive triers of facts. As to the law of the case, the judge may be dogmatic and positive in his charge; as to the facts of the case, the jury must be made to understand that they are not bound by his opinion.²

The rule is nicely set forth by Judge Scott of the Missouri Supreme Court. "When the practice was for the courts to comment on the evidence, the jury were always made to understand the weight to be attached to such comments and to the rules the judges might suggest for weighing the evidence. They were told that such comments were the mere opinions of the judge, who had no right to decide the facts, and were not binding on them; that they might disregard his opinion as to the weight of the evidence; it was mere advice; it was their province to find such a verdict as they deemed right, disregarding anything they might have heard from him."³

III. COMMENT IN CRIMINAL CASES

(a) *The Statute on Comments in Criminal Cases*

The right of the court to comment on the evidence in criminal cases was abrogated by statute in 1831. "The court shall in no

² Hogan, *The Strangled Judge*, Vermont Bar Assn. Pub. (Jan. 1929) pp. 3 and 17; Thompson, *TRIALS*, 2d ed., sec. 2292; 3 Blackstone, *COM.*, 375; Hale, *HISTORY OF THE COMMON LAW OF ENGLAND*, 4th ed., p. 291; Carroll v. Paul's Admr. (1852), 16 Mo. 226, 242; Loehner v. Home Mutual Ins. Co. (1854), 19 Mo. 628, 631.

³ *State v. Schoenwald* (1860), 31 Mo. 147, 156.

instance on the trial of any indictment, sum up or comment upon the evidence given in the cause, unless by the request of both parties or their counsel, but may instruct the jury as to the law of the case."⁴ This statute, modified slightly by amendment, but substantively the same, continues in effect today.⁵

The courts have consistently held that the statute prohibits the judge from giving the jury instructions in the nature of comments on the evidence.⁶ No cases have been appealed in which the trial court has erred to the extent of giving a common law comment on the evidence without the consent of the parties, and there is no indication that the practice of commenting with the consent of the parties has ever been followed. Although it is held improper for the court to comment on the evidence in the course of the trial, neither the Supreme Court nor any of the Courts of Appeals has ever specifically referred to this statute in holding it error for the court to make such comments. However, it is quite plain from the wording of the statute that it is intended to apply to such cases, and a failure to designate the statute is undoubtedly due merely to oversight.

(b) *The Statute of 1839*

In 1839 the Legislature enacted a law "supplementary to an act to establish courts of record, and prescribe their powers and duties." The statute provided that, "it shall not be lawful for any court or judge in any case of jury trial, to sum up or com-

⁴ Laws of Missouri, 1830-31, pp. 33-34.

⁵ R. S. Mo. 1835, p. 492, Sec. 27; R. S. Mo. 1845, p. 880, Sec. 28; R. S. Mo. 1855, p. 1195, Sec. 31; R. S. Mo. 1865, p. 851, Sec. 30; R. S. Mo. 1879, Sec. 1920; R. S. Mo. 1889, Sec. 4220; R. S. Mo. 1899, Sec. 2639; R. S. Mo. 1909, Sec. 5244; R. S. Mo. 1919, Sec. 4038.

⁶ *State v. Dunn* (1853), 18 Mo. 419; *State v. Anderson* (1853), 19 Mo. 241; *State v. Hundley* (1870), 46 Mo. 414; *State v. Bell* (1879), 70 Mo. 633; *State v. Sivils* (1891), 105 Mo. 530, 16 S. W. 880; *State v. Stubblefield* (1911), 239 Mo. 526, 144 S. W. 404; *State v. Pierce* (1912), 243 Mo. 524, 147 S. W. 970; *State v. Thomas* (1913), 250 Mo. 189, 157 S. W. 330; *State v. Rogers* (1913), 253 Mo. 399, 161 S. W. 770; *State v. Creeley* (1913), 254 Mo. 382, 162 S. W. 737; *State v. Burgess* (1914), 259 Mo. 383, 168 S. W. 740; *State v. Finkelstein* (1916), 269 Mo. 612, 191 S. W. 1002; *State v. Adkins* (1920), 284 Mo. 680, 225 S. W. 981; *State v. Peak* (1921), 292 Mo. 249, 237 S. W. 466; *State v. Glenn* (Mo., 1924), 262 S. W. 1030; *State v. Ball* (Mo., 1924), 262 S. W. 1043; *State v. Crump* (Mo., 1925), 274 S. W. 62; *State v. Oliphant* (1907), 128 Mo. App. 252, 107 S. W. 32; *State v. Galliton* (1913), 176 Mo. App. 115, 161 S. W. 848.

ment on the evidence, or give to the jury any charge or instruction on any question of law or fact, except it be in writing and filed in the cause, unless both parties consent that it be done orally; provided, that in no criminal case, shall the instruction be oral.”⁷ The statute, clearly applicable to both civil and criminal cases, was construed by the Supreme Court on only two occasions. In the first instance, the statute was invoked when the trial court gave an oral instruction in a criminal case in 1840,⁸ and in the second instance, the statute was held to have been repealed in the revision of 1845 when the trial court gave an oral instruction in a civil case in 1847.⁹ Judge Scott said, “The prohibition of oral instructions was contained in the statute of 13th of February, 1839, Secs. 1 and 2. The title of the act was ‘An act supplementary to an act to establish courts of record and prescribe their powers and duties.’ Taking together the 19th and 20th sections of the act concerning the revised laws,¹⁰ they must be considered as prescribing the rule that the laws which were revised and published in the code of 1845, after their taking effect, repealed the laws, whether original or amendatory, under the title to which they relate. Any other construction would produce great confusion, and render it almost impossible to ascertain what laws were, or were not in force. The general law concerning courts having been revised we must presume the acts supplementary thereto likewise underwent revision, and that portion of them in relation to oral instructions having been omitted, we must presume that such was the purpose of the Legislature.” According to this opinion, since the statute of 1839 referred both to comment on the evidence and oral instructions, the statute now being constructively repealed, it would follow that under the Revised Statutes of 1845, there was no law prohibiting comments or oral instructions in civil cases. However, the statute first enacted in 1831 prohibiting comment in criminal cases, except by consent was in no way affected by the decision.

(c) *Improper Comment on the Evidence in the Course of Trial*

While the statute of 1831 resulted in the abandonment of the

⁷ Laws of Missouri, 1839, p. 27.

⁸ Mallison v. State (1840), 6 Mo. 399, 402.

⁹ Hogel v. Lindell (1847), 10 Mo. 483, 487.

¹⁰ R. S. Mo. 1845, p. 499, Secs. 19 and 20.

common law comment on the evidence in criminal cases, courts occasionally have been guilty of improper utterances in the course of the trial.

In a prosecution for the illegal sale of a half gallon of whisky, the essential question was whether there was an actual, bona fide sale of three gallons and a setting apart of that quantity for the buyer with his knowledge and consent, or whether the real intention was to buy a half gallon of whisky under a sham arrangement for three gallons. In the presence and hearing of the jury, the judge made the following remark: "I am inclined to think it was not a sale of three gallons; it was a sale of what he got."¹¹ The St. Louis Court of Appeals held that the judge had expressed an opinion on a material issue in the case and that this was a highly prejudicial remark constituting reversible error."

In a case in which the defendant was accused of robbery, the trial court, in excluding a certificate of the defendant's discharge from the army, when offered in his behalf as proof of good character, remarked, "There never was a document better calculated to discharge a guilty man than that one."¹² Clearly the remark must have had some effect upon the jury and the Supreme Court was justified in ordering a reversal.

Where the defendant was on trial for murder, the judge in passing on the defendant's objection to the testimony of a witness, inadvertently remarked that there was evidence of a conspiracy. But the judge, immediately after making this statement, told the jury that he simply was passing on the objection. The court ruled that the explanation left the defendant no ground for complaint.¹³ Undoubtedly it would have been reversible error had the judge not corrected himself. However, it appears that error was committed regardless of the corrective statement. If the court is to be consistent under the statute which forbids comment in criminal cases, surely the grounds for reversal are equally as strong in this case as in those already cited.

In a case in which the defendant was indicted for murder, the trial court made an improper remark upon the evidence, but

¹¹ State v. Turner (1907), 125 Mo. App. 21, 23, 102 S. W. 599.

¹² State v. Taylor (1922), 293 Mo. 210, 238 S. W. 489.

¹³ State v. Gatlin (1902), 170 Mo. 355, 370, 70 S. W. 885.

the remark was favorable to the defendant and the Supreme Court refused to reverse the decision. Judge Norton said, "The judge observed that he understood the evidence of witness Lee differently from the way defendant's counsel and the State's attorney had quoted it to the jury, but that they were the exclusive judges of the facts and presumed they remembered the evidence. We cannot see how this remark could have prejudiced the jury; there was nothing in what was said to indicate that he understood the evidence more unfavorably to the prisoner than it had been stated, but from the fact that the remark was made by way of interruption to the prosecuting attorney, the inference, if any is to be drawn, would be that the attorney for the State was stating the evidence of the witness more strongly against the prisoner than the facts warranted."¹⁴ The decision is in accord with common sense, and the court is to be commended for overlooking technicalities in rendering the decision.

Judge White described an improper comment on the evidence in a case where the defendant was accused of statutory rape. "In order to make out a case against the defendant it was necessary to prove the girl was under the age of fifteen years. Her mother swore that she was born June 11, 1904, and said she got her information from the entry in the Bible. Her father testified that she was born on that date, and that he made the entry in the Bible a few days after her birth. When his testimony was offered a discussion arose among the counsel regarding the entry. The entries of the births of several other children were in the book. It was claimed and conceded that the entry opposite the name of Minnie appeared to have been altered; that the figure 4 in 1904 had been written over something else. During the discussion the judge made this remark:

'It looks like if there was any change made it was done at the same time, because the ink and all would indicate that it was all the same age—I don't know.'

Defendant objected and excepted to the action of the court in making this remark. . . . Here was a statement by the judge giving his opinion that there was no alteration in the entry (in the Bible) after the time it was made, a question of

¹⁴ *State v. Sanders* (1882), 76 Mo. 35, 37.

fact for the consideration of the jury. It was wholly improper for the judge to thus comment upon the evidence and give his judgment as to its probative force."¹⁵

The cases cited and others,¹⁶ together with the statute, clearly indicate that it is error for the judge to comment on the evidence in the course of a criminal trial.

(d) *Comment in Instructions*

In the entire field of comment on the evidence, the most difficult problems have been raised and the largest number of errors committed where the courts have given the jury instructions in the nature of comment on the evidence. It is the practice for the court at the conclusion of the trial, and before the jury are retired, to instruct them as to matters of law in the case. Many instructions submitted to juries have been held erroneous in this state for the reason that they commented on the evidence, not deliberately and connectedly, but, as it were, incidentally and inadvertently.

Instructions in the nature of comment on the evidence may be classified in three groups for purpose of illustration. The first group includes instructions containing general comment. The number in this category is exceedingly limited. It is comprised of a few instructions which are clearly bare commentaries on the evidence, and of others, in which the courts have classified the instructions as bare commentaries without setting them forth in the opinions so that they could be examined and properly catalogued.

In a case in which the defendant was indicted for the larceny of hogs the following instruction was held properly refused: "The time, place and manner of killing and taking possession of the hogs, together with the fact that the defendant had hogs in that vicinity, are facts which the jury should consider in making up their verdict." The court ruled that this instruction contained no law and was merely asking the judge to comment upon the facts in proof or to direct the minds of the jurors to such facts.¹⁷

¹⁵ State v. Drew (Mo., 1919), 213 S. W. 106, 107.

¹⁶ State v. Hyde (1910), 234 Mo. 200, 136 S. W. 316; State v. Eudaly (Mo., 1916), 188 S. W. 110, 112; State v. Potter (1907), 125 Mo. App. 465, 102 S. W. 668.

¹⁷ State v. Homes (1852), 17 Mo. 379, 380, 382.

Had this instruction been given, it would have been suggestive that the defendant was guilty of the larceny, for the instruction told the jury to observe that the defendant had hogs in the vicinity. The instruction was directory in that it informed the jury what facts to consider in reaching a verdict. The court was justified in refusing to submit it.

This instruction is to be contrasted with another given in a case in which the defendant was accused of a felonious assault. The court told the jury that, "all the evidence produced and admitted in the cause is legal evidence; and whether it is credible or worthy of credit is a matter for the jury to determine from all the facts and circumstances in the cause."¹⁸ Tested by the view which the Missouri courts have reiterated consistently, this instruction undoubtedly contains a correct declaration of the law. Accordingly, the Supreme Court held the instruction not to be a comment on the evidence.

A typical statement relating to improper instructions is found in an early case. "Some of them (instructions) are mere comments on the evidence, or charges to the jury as to matters of fact, which the law forbids being given without the consent of both parties."¹⁹ The rule has been uniformly followed.²⁰

The second group of instructions in the nature of comment on the evidence contains cases involving instructions commenting on the credibility of witnesses. The law is well settled that the competency of witnesses is for the court to determine, while credibility is a matter for the jury. Therefore, when an instruction is submitted which contains an expression of opinion by the judge as to the competency of a witness, it is held improper as a comment on credibility.

The law is stated by Judge Scott in an early Supreme Court decision. "What is striking in the instructions is, the attempt of the court to prescribe rules to the jury by which they were to ascertain the credit due to a witness. When a witness testifies

¹⁸ *State v. Munson* (1882), 76 Mo. 109, 114.

¹⁹ *State v. Anderson* (1853), 19 Mo. 241, 246.

²⁰ *State v. Ross* (1859), 29 Mo. 32; *State v. Breeden* (1875), 58 Mo. 507; *State v. Jones* (1875), 61 Mo. 232; *State v. Stewart* (1918), 274 Mo. 649; *State v. Shaw* (Mo., 1920), 220 S. W. 861; *State v. Williams* (Mo., 1925), 273 S. W. 1069; *State v. Kuebler* (Mo., 1929), 14 S. W. (2d) 449.

to jurors, they are the exclusive judges of the weight to be given to his testimony.”²¹

Where an instruction was given that “if witnesses of equal credibility swear—the one affirmatively and the other negatively—that is, if one swears affirmatively that he did see or hear a thing, and the other swears negatively that he did not see or hear it, the affirmative testimony must prevail,”²² the court held the instruction incorrect. It was a statement by the court telling the jury what weight to attach to the testimony of two witnesses at the trial. The proper instruction would have been that it was the province of the jury to give credence to one witness or the other according to what appeared to be the real facts of the case.

The Supreme Court upheld a trial judge who refused to give an instruction directing the jury to disregard the entire evidence of a witness if they believed it false in any particular. It was held that such instructions invaded the province of the jury, whose business was to determine the credibility of witnesses, “and who are not to be hampered in exercising their judgment by any inflexible rule on the subject.”²³

The question of instructions commenting on the credibility of witnesses is discussed in detail by Judge Johnson of the Kansas City Court of Appeals in a case in which the defendant was accused of violating the local option law. The following instruction had been refused by the trial court: “The court instructs the jury that if they believe from the evidence that the witness, Samuel J. Cummings, was hired as an informant, detective, or decoy to make a purchase of intoxicating liquor of the defendant for the express purpose of indicting and prosecuting him for the unlawful sale of same, then the testimony of such witness should be received by the jury with the greatest caution and distrust.” After quoting the statute which forbids comment in criminal cases except by consent of the parties, Judge Johnson says, “It is not inconsistent with the mandate of this statute for the court to give a general instruction in which the rules are stated by which the jury should be guided in weighing the evidence and in passing on the credibility of witnesses. But it is one thing to

²¹ State v. Anderson (1853), 19 Mo. 241, 246.

²² State v. Gates (1855), 20 Mo. 400, 404.

²³ State v. Cushing (1859), 29 Mo. 215, 217.

tell the jury that in determining the question of the credibility of a witness they may take into consideration his interest in the cause, bias, prejudice, etc., or the fact that he is a paid detective or informer, and it is another and quite different thing to instruct them that the testimony of a paid detective should be received with the greatest caution and distrust, or with any degree of caution. In the first mentioned class of instructions, the judge keeps strictly within the limits of the statute by doing nothing more than to give to the jury the rules of law by which they should be guided in solving controverted issues of fact, while in the latter, he invades the province of the jury by attempting to determine for them an issue purely of fact. It hardly will be disputed that the question of the credibility of a witness is one of fact, not of law."²⁴

The opinion in this case is significant because it states concisely what are instructions which comment on the credibility of witnesses in the eyes of the court, and also because it refers to the constituent parts of a cautionary instruction which is generally approved and never classified as being in the nature of a commentary.

In this same opinion the judge makes an admission that in an earlier case²⁵ the court had fallen into error by approving an instruction which was a comment upon the evidence, and that in so doing, the court had overlooked the statute forbidding comment except by consent in criminal cases. Save in this one instance in which the Court of Appeals admittedly rendered a wrong decision, the general rule has always been that instructions commenting on the credibility of witnesses are improper and should not be given.²⁶

In criminal cases where the defendant has taken the witness stand in his or her own behalf, the courts have been puzzled with the knotty problem of instructions dealing with the credibility of the defendant as a witness. In a case decided in 1891, in which the defendant was indicted for endeavoring to conceal the birth of a child by burying its body, the judge gave the fol-

²⁴ State v. Oliphant (1907), 128 Mo. App. 252, 264, 107 S. W. 32.

²⁵ State v. Fullerton (1901), 90 Mo. App. 411, 415.

²⁶ State v. Kennett (1910), 151 Mo. App. 637, 132 S. W. 286; State v. Kimmell (1911), 156 Mo. App. 461, 137 S. W. 329; State v. Burlison (1926), 315 Mo. 232, 285 S. W. 712; State v. Tunnell (Mo., 1927), 296 S. W. 432.

lowing instruction: "The defendant is a competent witness in her own behalf, and you should take her testimony with consideration and give it such weight as you may believe it entitled to, and in passing upon her testimony, and weighing her statements, you may take into consideration the fact that she is the defendant, and her interest in the result of the case." Counsel for defendant objected that the instruction commented on the testimony of the defendant. The court ruled, "The same objection has been made to similar instructions and it has been held that, while the instruction is something of a comment upon the testimony of the defendant, it is justified by the terms of the statute,²⁷ under which one on trial for a criminal charge is allowed to testify in his own behalf."²⁸

When a similar instruction was brought to the attention of the court in 1916, the decision arrived at in the earlier case was overruled. The court, purporting to render a fair construction of the same statute, held that it did not authorize comment on the evidence by way of instruction and was therefore improper in view of the statute forbidding comment in criminal cases, *supra*.²⁹ The rule laid down in the 1916 case has been followed consistently.³⁰

Decisions of the Missouri courts concerning instructions dealing with the credibility of the defendant as a witness, show clearly an increasing tendency toward conservatism. Instructions which have recently been declared commentaries on the credibility of defendant should be classified as cautionary instructions, and declarations of law, not declarations of fact. In such instructions, the court expresses no opinion as to the credibility of the defendant, but merely informs the jury that they should weigh the testimony of the defendant just as they weigh the testimony of ordinary witnesses. The courts in this jurisdiction probably would have reached much wiser decisions had they declared such instructions to be of a cautionary nature only, and proper declarations of law.

²⁷ R. S. Mo., 1919, Sec. 4036.

²⁸ *State v. Ihrig* (1891), 106 Mo. 267, 260; 17 S. W. 300.

²⁹ *State v. Finkelstein* (1916), 269 Mo. 612, 619, 191 S. W. 1002.

³⁰ *State v. Goode* (1917), 271 Mo. 43, 195 S. W. 1006; *State v. Gully* (1917), 272 Mo. 484, 199 S. W. 124; *State v. Woods* (1918), 274 Mo. 610, 204 S. W. 21; *State v. Kocian* (Mo., 1918), 208 S. W. 44.

The third group of instructions in the nature of comment on the evidence contains a vast number of cases in contrast to the first two groups. It pertains to instructions which comment on the weight and sufficiency of the evidence. Such instructions are given when the court refers to specific testimony and states its opinion as to the importance which should be attached to that testimony.

Where the defendant was indicted for burglary and larceny, counsel for the defendant excepted to the refusal of the court to give the following instruction, "The court instructs the jury that the admissions made by the accused are regarded in law as the very weakest character of testimony, and should be received by the jury with the greatest caution."³¹ The court, in sustaining the trial judge for his refusal to give the instruction requested, made reference to an earlier opinion in which Judge Wagner remarked of a similar instruction, "The instruction might find countenance and support where the old system of practice prevails, and where it is permissible for the court to make comments on the evidence, and instruct the jury as to its sufficiency and weight. But under our statute the whole rule is changed, and comments by the court are entirely forbidden. . . . It is error for a court to instruct a jury upon the weight and sufficiency of the evidence. It is for the court to determine upon the legitimacy and appropriateness of the evidence, but the jury are the sole and exclusive judges of the credit and weight that is to be attached to it. For a court to single out certain testimony in a cause and tell the jury that it is entitled to either great or little weight is contrary to the statutory provision on the subject."³²

In a case in which the defendant was indicted for murder, the court gave an instruction to the effect that a dying declaration was to be received with the same degree of credit as the testimony of the deceased would be, if examined under oath as a witness.³³ The instruction was found erroneous as constituting a comment on the evidence. It was a statement of the judge's opinion indicating what weight he would have given to

³¹ State v. Bell et al. (1879), 70 Mo. 633, 634.

³² State v. Hundley (1870), 46 Mo. 414, 421.

³³ State v. McCanon (1872), 51 Mo. 160, 161.

the declaration had he been in the jury box. Such an instruction was unquestionably improper under the statute.

Two examples of commentaries on the weight and sufficiency of the evidence were presented in a case in which the defendant was accused of arson. The court instructed the jury that if they believed from the evidence that the defendant, after his arrest for the crime charged, tried to induce the guard to permit him to escape, such an attempt raised a strong presumption of his guilt, which circumstances the defendant would have to explain, and unless explained to the satisfaction of the jury, such fact should be considered with other facts in determining defendant's guilt or innocence. The jury were further instructed that if they believed from the evidence that the defendant tried to procure witnesses to swear falsely for him at this trial, such a fact, if proved, was a strong presumption of his guilt which it devolved upon the defendant to explain. The court held that the instructions were improper because they singled out certain testimony and told the jury what weight should be given to the evidence.³⁴ The instructions were undoubtedly comments upon the evidence, and the court properly ordered a new trial.

The cases to which reference has been made are selections from some three score cases all of which adhere to the general rules which have been laid down by the courts, namely that instructions which comment on the weight and sufficiency of the evidence are improper and should not be submitted at the trial of a cause.³⁵ While there is no doubt about the unanimity of

³⁴ State v. Sivils (1891), 105 Mo. 530, 533, 16 S. W. 880.

³⁵ State v. Dunn (1853), 18 Mo. 419; State v. Schoenwald (1860), 31 Mo. 147; State v. Elkins (1876), 63 Mo. 159; State v. Hill (1877), 65 Mo. 84; State v. Reed (1896), 137 Mo. 125, 38 S. W. 574; State v. Grugin (1898), 147 Mo. 39, 47 S. W. 1058; State v. Hibler (1899), 149 Mo. 478, 51 S. W. 85; State v. Rutherford (1899), 152 Mo. 124, 53 S. W. 417; State v. Knowles (1904), 185 Mo. 141, 83 S. W. 1083; State v. Sublette (1905), 191 Mo. 163, 90 S. W. 374; State v. Mitchell (1910), 229 Mo. 683, 129 S. W. 917; State v. Stubblefield (1911), 239 Mo. 526, 144 S. W. 404; State v. Pierce (1912), 243 Mo. 524, 147 S. W. 970; State v. Thomas (1913), 250 Mo. 189, 157 S. W. 330; State v. Shaffer (1913), 253 Mo. 320, 161 S. W. 805; State v. Rogers (1913), 253 Mo. 399, 161 S. W. 770; State v. Nibarger (1913), 255 Mo. 289, 164 S. W. 453; State v. Burgess (1914), 259 Mo. 383, 168 S. W. 740; State v. Fish (Mo., 1917), 195 S. W. 997; State v. Bersch (1918), 276 Mo. 397, 207 S. W. 809; State v. Stewart (1919), 278 Mo. 177, 212 S. W. 853; State v. Finley (1919), 278 Mo. 474, 213 S. W. 463; State v. Rozell (Mo., 1920), 225 S. W. 931; State v. Adkins (1920), 284 Mo. 680, 225 S. W. 981;

the courts in their support of the rules, there is quite naturally some uncertainty as a practical matter, just when a statement of law in an instruction embodies the opinion of the judge pertaining to certain facts.

Where the accused was being prosecuted for murder, the court gave the following instructions, "Although the jury may believe that Motes did state to Edmonson the next morning after the killing, that 'he emptied his pistol at the negro last night,' and although you may believe that Motes was wrongfully in the company with Jones (the defendant) and others at the shooting of Frank O'Bannon, still, if the testimony of Motes is corroborated by other witnesses, you are at liberty to give his evidence full credit."³⁸ In discussing the instruction, the court clearly was treading on uncertain ground. "It may be objected that it (the instruction) is a comment upon specific portions of the evidence. It is not, perhaps, such an error as would justify a reversal, if the case had been in all other respects fairly tried; but as the judgment will be reversed for reasons hereinafter given, we call attention to the impropriety of such an instruction. We do not mean to be understood that a case might not be presented in which, for this error alone, the judgment would be reversed, but confine the remark to the instruction and the case we are considering."

The opinion indicates that in the belief of the court, instructions which are commentaries in one case are not necessarily commentaries in others. The conclusion seems to be that each

State v. Peak (1921), 292 Mo. 249, 237 S. W. 466; State v. Edelen (1921), 288 Mo. 160, 231 S. W. 585; State v. Johnson (Mo., 1921), 234 S. W. 794; State v. Gore (1922), 292 Mo. 173, 237 S. W. 993; State v. Murphy (1921), 292 Mo. 275, 237 S. W. 529; State v. Wagner (Mo., 1922), 237 S. W. 750; State v. Swarens (1922), 294 Mo. 139, 241 S. W. 934; State v. Yates (1923), 301 Mo. 255, 256 S. W. 809; State v. Long (Mo., 1923), 253 S. W. 729; State v. Glenn (Mo., 1924), 262 S. W. 1030; State v. Hayes (Mo., 1924), 262 S. W. 1034; State v. Ball (Mo., 1924), 262 S. W. 1043; State v. Mahan (Mo., 1924), 267 S. W. 866; State v. Burns (Mo., 1924), 268 S. W. 79; State v. Northington (Mo., 1924), 268 S. W. 57; State v. Cole (1924), 304 Mo. 105, 263 S. W. 207; State v. Jordan (1924), 306 Mo. 3, 268 S. W. 64; State v. Ross (1924), 306 Mo. 499, 267 S. W. 853; State v. Meininger (1924), 306 Mo. 675, 268 S. W. 71; State v. Miller (1924), 307 Mo. 365, 270 S. W. 291; State v. Smith (1925), 313 Mo. 71, 281 S. W. 35; State v. Crump (Mo., 1925), 274 S. W. 62; State v. Hersh (Mo., 1927), 296 S. W. 434.

³⁸ State v. Jones (1877), 64 Mo. 391, 395.

case rests on its own bottom. The court will try to apply the proper rules to the facts under the circumstances of the case. As an abstract proposition of law, the court was not able in the case cited, to state whether or not it was a commentary on the evidence. If the Supreme Court is uncertain in such a case as this, what is to be expected of the trial court? It seems that despite the effort which the judge may make to set forth the rules of law as applicable to the facts, there will creep into his instructions either insidiously or fortuitously a sentence structure which will appear to indicate what the court thinks about the evidence. A study of instructions in many cases is quite convincing that this actually happens time after time.³⁷

In certain instances involving presumptions, the trial court is vested with the legal right to comment on the evidence in an instruction to the jury. In a case in which the defendant was indicted for receiving stolen property, the court gave an instruction concerning an admission made by the defendant, which instruction was excepted to as a comment on the evidence. The Supreme Court held that such an instruction was undoubtedly a comment upon certain parts of the evidence, but it did not constitute reversible error, for the reason that it constituted a legal presumption. The true rule is that, when certain evidence is introduced, which under the statutes or common law as it now exists in this State, is entitled to less or more weight than ordinary evidence, it is not error for the court to instruct the jury how such evidence is to be weighed. "Such instructions are the comment of the law or the rule which the law has prescribed for determining the effect of such special classes of evidence and form statutory exceptions to the general rule that the courts are not in their instructions to single out and comment on evidence."³⁸

IV. COMMENT IN CIVIL CASES

(a) *Termination of the Common Law Comment*

The trial court in Missouri today is no more authorized to

³⁷ State v. Smith (1873), 53 Mo. 267; State v. Robbins (1887), 65 Mo. 443; State v. Owens (1883), 79 Mo. 619; State v. Vickers (1907), 209 Mo. 12, 106 S. W. 999.

³⁸ State v. Greeley (1913), 254 Mo. 382, 396, 162 S. W. 737; Accord; State v. Fenter (Mo. App. 1918), 204 S. W. 733.

make a common law comment upon the evidence in a civil case than in a criminal case. Yet there is no statute now in effect and there has been none since 1845 which forbids the court to comment on the evidence. The statute of 1839, referred to, *supra*,³⁹ was constructively repealed by the Legislature in 1845.⁴⁰

In 1852, in the case of *Carroll v. Paul's Admr.*, the court speaking through Judge Scott, explained that the common law comment was at that time a recognized right of the trial court. Judge Scott ruled that the trial court did not err in refusing certain instructions which the defendant had requested because, "they were comments on, or directions to the jury, to draw inferences from certain facts. Such instructions involved no law, and comments on the evidence are not to be given to the jury by way of instruction. If the judge sees proper to comment on the evidence to the jury, he should do it in such a way as not to infringe on the rights of juries. They are not obliged to take his views of the evidence in a cause, although he may grant a new trial, where justice requires it."⁴¹ The opinion merely shows that a comment at common law is improper which does not allow the jury to decide the case upon the evidence. As matters of fact, the instructions which the trial court refused to give, were faulty because they were mandatory and not expressly advisory.

The proposition which has been asserted, that the trial court had the right to make a common law comment on the evidence in civil cases in 1852 and subsequently, is confirmed by an opinion handed down by Judge Scott in 1854 in the case of *Loehner & Wife v. Insurance Co.* The judge says, "The reading the extract from the opinion of this court in the cause, by way of instruction, (the Supreme Court having heard and remanded the case several years before) as it related to a matter of fact, was not strictly regular, as it was not accompanied with suitable explanations of the province of the jury, under the circumstances. A court should not comment upon the evidence in the authoritative way of an instruction. If it sees fit to make comments on the evidence, it should always be so done that the jury

³⁹ See p. 224, *supra*.

⁴⁰ *Ibid.*

⁴¹ *Carroll v. Paul's Admr.* (1852), 16 Mo. 226, 242.

may know that the views of the court cannot legally control them, but notwithstanding such comments, they are at liberty to find in such way as to them seems right and proper from the evidence, although such finding may be in opposition to the opinion entertained by the court. If a cause is brought to this court and should be sent back for a new trial, it would not be proper to give comments this court may make on the evidence to the jury, by way of instruction. If the court below sees proper to adopt the language of this court, in commenting on the evidence, it should always be with the explanation that such comment is offered to their consideration, and that they should attach only that degree of importance to it which, in their opinion, it deserves. Comments on the evidence, by the court, are not binding on the jury. The jury may rightfully entertain a different opinion in relation to the facts of a cause, from that possessed by the court. The court declares the law. The jurors find the facts, and in their findings cannot be authoritatively controlled by the court, though they will treat its suggestions with that deference and respect which our system of jury trials exacts at their hands."^{41a} The opinion of the Supreme Court is declaratory of the judge's right to give a common law comment on the evidence.⁴²

The two cases just referred to furnish adequate proof that as late as 1854, the common law comment on the evidence was approved in civil cases in this state.

However, Judge Scott speaking in *Morris v. Morris*, a case decided in 1859, pointed out that the trial court no longer possessed the right to comment on the evidence. He says, "The second issue directs two facts to be found, neither of which disposes of the cause, nor both together; but, if found, merely serve as the groundwork of an inference which, if it existed, would be material in determining the controversy. This is rendered plain by the instruction given by the court, and which instruction is objectionable, as it amounts to a comment on the evidence, which the court by statute cannot make but by consent."⁴³

Again in *Choquette v. Barada*, decided in the same year as the

^{41a} *Loehner & Wife v. Home Mutual Insurance Co.* (1854), 19 Mo. 628, 631.

⁴² See p. 222, *supra*.

⁴³ *Morris v. Morris* (1859), 28 Mo. 114, 118.

Morris case, Judge Scott held that, "Where the law fixes the weight or effect of evidence, there is no impropriety in the court's declaring it to the jury; but when one fact or piece of evidence is merely used to show the existence of another fact which is to be found by the jury, the court cannot, by way of instruction, direct the jury that the inference is warranted. If it is so, the law presumes the juror more competent to draw it than the judge. Our law will not allow the judge even to comment on the evidence, where the jury may give what weight they please to the comment. But this practice would, by way of imperative instruction, compel the jury to make an inference or otherwise have their verdict set aside, a consequence of which does not necessarily follow from a refusal on the part of a jury to be governed by the comments of the court."⁴⁴

Thus it appears that between the years 1854 and 1859, the practice concerning the judge's right to comment on the evidence as at common law, underwent a complete change. Two references were made to statutory regulations, the first in the Morris case which held that the court could not comment on the evidence by statute except by consent, and the second in the Chouquette case where the court said that the law would not allow the judge even to comment on the evidence, where the jury could give what weight they pleased to the comment.

A careful study of the session laws and revised statutes does not reveal the law to which Judge Scott made reference. Apparently the court had in mind either the statute of 1839 or the criminal statute. Both state that the judge can comment on the evidence by permission of the parties, but neither statute was applicable to civil cases in 1859, for the statute of 1839 had been constructively repealed, and the criminal statute, by its wording was not intended to cover civil cases.

The Legislature in 1855 enacted a statute pertaining to instructions in civil cases. The statute provided that, "When the evidence is concluded, and before the case is argued or submitted to the jury, or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing, and shall be given or refused; the court may, of its own motion, give like instruc-

⁴⁴ Chouquette v. Barada (1859), 28 Mo. 491, 499.

tions."⁴⁵ This law, amended by addition, but substantively the same, is part of the body of the law of Missouri today.⁴⁶ An exhaustive study of Missouri cases has revealed only four in which this statute has been construed to apply to comment on the evidence.

The first case, *Couch v. Gentry*, was decided in 1892, thirty-seven years after the first enactment of the statute. It involved the contest of a will, and the question arose because of an instruction submitted by the trial court concerning the competency of the testator. The instruction stated that a disposing mind was one capable of discussing and feeling the relations, connections and obligations of family and blood, and of recalling the number, condition and circumstances of those who were the proper objects of the testator's bounty, and also of weighing their deserts, with respect to conduct, capacity and need, remembering all and forgetting none. Judge Black, who wrote the opinion of the court, said, "Such statements as these may be proper in those jurisdictions where the judge may in the form of a charge to the jury discuss and sum up the evidence; but they have no proper place in our system of giving written instructions before argument. . . . Such statements as these given in an instruction must have a tendency to lead the jurors to believe that it is their province to say whether the testator made what they conceive to be a proper disposition of his property and render a verdict accordingly."⁴⁷ Judge Black by his reference to "our system of giving written instructions before argument" probably had in mind the statute concerning instructions in civil cases. Assuming that he did, the decision is directly in point as showing that this statute on instructions prohibited and abolished the common law right of comment on the evidence. Citing the Couch case as authority, in *St. L. K. & N. W. Ry. Co. v. Stock Yards*, decided in 1893, the court reached a similar conclusion.⁴⁸ This is the second case.

Judge Valliant rendered the third opinion in *State ex rel. v.*

⁴⁵ R. S. Mo. 1855, p. 1268, Sec. 47.

⁴⁶ G. S. Mo. 1865, p. 677, Sec. 47; R. S. Mo. 1879, Sec. 3655; R. S. Mo. 1889, Sec. 2188; R. S. Mo. 1899, Sec. 748; R. S. Mo. 1909, Sec. 1987; R. S. Mo. 1919, Sec. 1417.

⁴⁷ *Couch v. Gentry* (1892), 113 Mo. 248, 254, 20 S. W. 890.

⁴⁸ *St. L. K. & N. W. Ry. Co. v. Stock Yards* (1893), 120 Mo. 541, 25 S. W. 399.

Rubber Mfg. Co., decided in 1898. In that case the trial judge commented on the evidence when he engaged in a colloquy with one of the counsel. The court in ordering a new trial of the cause, stated that it was to guard the jury from such influence by the judge that the statute pertaining to instructions was passed. The court referred to the statute by section number.⁴⁹ At common law the trial judge is not prohibited from making casual remarks and commenting on the evidence in the course of the trial. If, as Judge Valliant said, the intention of the statute was to guard against such comments, during the trial, there can be no doubt but that the statute is also intended to do away with the common law right of the judge to sum up and express his opinion of the evidence before the case is submitted to the jury.

The fourth opinion was handed down by Judge Broaddus of the Kansas City Court of Appeals in 1907 in the case of *Rose v. Kansas City*. The trial court had commented on the testimony of an expert witness by saying, "I don't think that was the testimony of Dr. Wilson. The jury will remember the testimony." The court, in ordering a reversal of the case and a new trial said, "Under the practice in this state, it is the duty of the judge to instruct the jury as to the law, and the jury under such instructions are to be the sole judges of the facts and the application of the law, as given, to the facts as found. The judge has no power to instruct them what are, or are not, the facts in the case, and, if he does so, he infringes upon the province of the jury."⁵⁰

The question which naturally presents itself is, what caused the appellate courts to reverse their position in declaring, beginning in 1859, that trial courts in Missouri were no longer authorized to comment upon the evidence? The most natural answer seems to be found in the ruling of Judge Scott in the Morris case. Apparently he erroneously applied the criminal statute to a civil case. The subsequent decisions, that is, those rendered prior to the case of *Couch v. Gentry*, all take it for granted that the trial judge should not comment on the evidence.

⁴⁹ State ex rel. v. Rubber Mfg. Co. (1898), 149 Mo. 181, 196, 50 S. W. 321.

⁵⁰ *Rose v. Kansas City* (1907), 125 Mo. App. 231, 236, 102 S. W. 578.

None of the intervening cases are searching in their nature. The rule once laid down, was accepted blindly and finally the four cases cited attributed as a basis the statute on instructions in civil cases.

If this statute is to be construed as authoritative, it is only under the doctrine of *expressio unius est exclusio alterius*, that is, the inclusion of the right to instruct on the law implies the exclusion of the right to comment on the evidence. However, if the statute limiting the right of comment in criminal cases is placed beside the statute concerning instructions in civil cases, it will be seen that the former relates both to comments and instructions, while the latter relates only to instructions. Proponents of the theory that this doctrine should apply in civil cases, will observe that the statute pertaining to civil cases, was passed by the revising legislature of 1855 which also reenacted the criminal statute.⁵¹ In construing legislative intent, it is difficult to arrive at the conclusion that the same legislature intended to imply the exclusion of comments by the judge in civil cases, when in criminal cases, it specifically ruled on comments and instructions in the same statute. This statement is made with the full realization that the statute concerning instructions in civil cases was first enacted in 1855, and that when a case was brought before the Supreme Court involving a comment on the evidence in 1859, judgment was reversed and a new trial ordered.

A final argument against the applicability of the statute on instructions in civil cases, is that it has been cited only on four occasions, where the question of comment was involved, while the statute in criminal cases has been cited seventeen times since the passage of the civil statute.⁵² In the light of the 1859 decisions and of the large number of opinions concerning comments subsequent to 1859 and prior to 1892 without even a reference to the civil statute, it appears that the four decisions cited are legal sports in which the courts attempt to justify a result which had been obtained many years earlier without any reference to the statute in civil cases.

Although it seems probable that the cause for the termination

⁵¹ R. S. Mo. 1855, p. 1195, Sec. 31; R. S. Mo., 1855, p. 1268, Sec. 47.

⁵² See note 6, *supra*, omitting the first two cases cited.

of the common law right of comment on the evidence in civil cases was due to the error of Judge Scott in the case of *Morris v. Morris*, and regardless of other theories which may be propounded, the rule is now firmly established under the doctrine of *stare decisis*, that the trial court has no more authority to comment on the evidence in civil cases than it has in criminal cases which are regulated by statute.

The decisions in civil cases relating to comment on the evidence, are, for the most part, identical with the decisions in criminal cases. That is, the results of the decisions are that the trial court is forbidden both to comment on the evidence in the course of the trial and in instructions. There are no well considered cases (the four cases in which the civil statute was cited having been discussed) which account for the rule denying the judge the right of comment. Each case is like a grain of quicksand. The judge either cites no authorities for the decision, or cites as authority an earlier case. An examination of the cited case invariably discloses that the court pursued the same policy in its decision. This has been the consistent practice of the courts since 1859. There is no bottom to the decisions.

While virtually all of the decisions in civil and criminal cases are in accord, citations of authority and special references to leading cases are pertinent.

(b) *Improper Comment in the Course of the Trial*

In an action to set aside a will, the trial court in excluding evidence remarked on the character of Dr. Wood, whose deposition was about to be read, "Dr. Wood's character and standing as an eminent physician is part of the history of Missouri, and if the courts and juries take notice of facts of history, the evidence is immaterial." The Supreme Court held that the remarks of the judge were improper, and should not have been made, but did not constitute reversible error.⁵³

Where the plaintiff brought suit for damages as a result of accident, one of plaintiff's witnesses was a man who had been a conductor on the car which struck plaintiff but who was no longer employed by the defendant. The witness failed to give the answers which the plaintiff desired or was expecting, and

⁵³ *Thompson v. Ish* (1889), 99 Mo. 160, 178, 12 S. W. 510; *Accord; Buck v. Buck* (1916), 267 Mo. 644, 185 S. W. 208.

being pressed by the plaintiff, the defendant objected to leading and suggestive questions. In ruling on the objection, the court said:

"The court rules that this witness is a reluctant witness, and for that reason he has a right to put leading questions to him. The objection will be overruled."

When the defendant again objected to the "cross examination of the plaintiff's own witness," the court replied:

"Objection overruled. Mr. Conkling, we had just as well understand each other, this witness, from his appearance to the court, I rule that the attorneys have a right to put leading questions to him, and he must tell the truth, and if he will not, they can put leading questions to him."

The defendant objected to the remark of the judge as a comment upon the credibility of the witness. The Kansas City Court of Appeals held that, "The reasons assigned by the court for allowing plaintiff to cross examine his own witness were perhaps sufficient to justify the court in permitting such questions to be asked; but it was not necessary for the court to state his reasons for so ruling, or, if he did state them, they should not have been stated in the hearing of the jury. It was clearly reversible error to thus comment upon the credibility of the witness."⁵⁴

If there is any distinction between this case, and the preceding case, it is a distinction of degree. The cases illustrate the general principle that comment by the court in the course of the trial is improper, but they are significant also because they illustrate the very tenuous line of demarcation between an improper remark not constituting reversible error, and an improper remark constituting reversible error. The courts are prone to rule conservatively. The law is well settled that remarks commenting on the evidence are improper and should not be made.⁵⁵

⁵⁴ *McElwain v. Dunham et al.* (Mo. App., 1920), 221 S. W. 773, 774.

⁵⁵ *State ex rel. v. Rubber Mfg. Co.* (1898), 149 M. 181; 50 S. W. 321; *Schmidt v. Railroad* (1898), 149 Mo. 269, 50 S. W. 921; *Wright v. Richmond* (1886), 21 Mo. App. 76; *McGinniss v. Railroad* (1886), 21 Mo. App. 399; *Dreyfus v. Railroad* (1907), 124 Mo. App. 585, 102 S. W. 53; *Rose v. Kansas City* (1907), 125 Mo. App. 231, 102 S. W. 578; *Landers v. Rail-*

(c) *Comment in Instructions*

Essentially the same rules are applied by the courts in cases involving instructions in the nature of comment on the evidence in civil as in criminal cases. The classification of cases into those pertaining to general comment, comment on the credibility of witnesses, and comment on the weight and sufficiency of the evidence is as suitable in civil as in criminal cases.

General comments on the evidence are held improper in civil cases. Such comments are found in relatively few cases, and are classified in this category either because the court fails to state the instruction in the opinion and refers to it as a bare comment or a mere comment, or because the instruction is essentially factual in nature.

In an action for damages for personal injury, the plaintiff requested the court to give the following instruction, "And if you find from the evidence that while the car was standing at the east side of main street a number of its passengers began to get off, and the plaintiff stood up to allow a passenger to get into the aisle for the purpose of getting off in determining whether those in charge of the car were guilty of negligence, you are instructed that while the plaintiff was in this situation it was the duty of those in charge of the car to use the highest degree of care and caution which ordinary prudent persons would use under the same or similar circumstances, to see that the car was not so suddenly started as to throw the plaintiff down and injure him. And it is for the jury to determine from all the evidence whether the car was started in a negligent manner."⁵⁶ The court in criticising the instruction simply stated that it was wholly unnecessary and was little more than a bare commentary on the evidence within the meaning of the adjudged cases in Missouri. The courts are in accord that such instructions should not be given.⁵⁷

road (1908), 134 Mo. App. 80, 114 S. W. 543; *Belk v. Stewart* (1912), 160 Mo. App. 706, 142 S. W. 485; *Clear v. Van Blarcum* (Mo. App., 1922), 241 S. W. 81; *Wair v. Foundry Co.* (Mo. App., 1926), 285 S. W. 155; *Fauntroy v. Schirmer* (Mo. App., 1927), 296 S. W. 235.

⁵⁶ *Pryor v. Metropolitan St. Ry. Co.* (1900), 85 Mo. App. 367, 374.

⁵⁷ *Tyler v. Hall* (1891), 106 Mo. 313, 17 S. W. 319; *Burtch v. Railroad* (Mo., 1921), 236 S. W. 338; *McDermott v. Judy's Admr.* (1896), 67 Mo. App. 647; *Robards v. Murphy* (1898), 75 Mo. App. 39; *Garner v. Met.*

Instructions commenting on the credibility of witnesses are strictly prohibited in civil cases. The appellate courts examine with great caution any instruction which might be construed as instruction purely as one of law or also of fact, the courts unhesitatingly order a reversal.

In a condemnation proceeding, the court instructed the jury that they should take into account similar claims to those of the defendant which the witnesses might have against the plaintiff, and "that if they believed that the opinion of any witness as to the value of the lands or the damages done to them was not based upon an intelligent reason, but is merely arbitrary or unreasonable, the jury may disregard such opinion."⁵⁸ The court ruled that the instruction had gone quite too far and was an invasion of the province of the jury. It was held to be a comment on the facts and therefore improper.

The application of the rule of strict construction is very apparent in this case. It is doubtful that this instruction had any such insidious effect upon the minds of the jury as to cause them to render a verdict for the plaintiff. A jury has the right to disregard the testimony of a witness if it is arbitrary and unreasonable, and a declaration of such right, should not be construed as a comment on the credibility of witnesses.

Another startling illustration of the narrow construction of the appellate courts is found in a recent case where the action was for damages for injuries sustained in an accident. One of the instructions submitted to the jury was as follows, "The court instructs the jury that the mere fact that a witness is in the employ of the defendant at the time he testified does not in itself affect his credibility, and you are not justified in disregarding his testimony on that account. You are to weigh and consider his testimony the same as that of any witness, being governed by the same consideration heretofore explained to you in these instructions about the testimony of witnesses."

The court in criticising the instruction said, "This instruction singled out and commented on the testimony of witnesses in de-

Street Ry. Co. (1907), 128 Mo. App. 401, 107 S. W. 427; Ford v. Gray (1908), 131 Mo. App. 240, 110 S. W. 692; Webb v. Baldwin (1912), 165 Mo. App. 240, 147 S. W. 849.

⁵⁸ Kansas City N. & Ft. S. Ry. Co. v. Dawley (1892), 50 Mo. App. 480, 489.

fendant's employ. The jury should weigh the testimony of witnesses in the employ of the parties to the suit by the same scales with which it weighs the testimony of other witnesses. In determining the weight and credit to be given to the testimony of any witness, the jury has the right to consider the interest or want of interest of such witness in the result of the trial and his relation to and feeling for or against the parties to the suit. Instruction 5-D (the instruction cited) singled out witnesses in the employ of defendant, and told the jury in effect that they should not consider the relation of such witnesses to the defendant. It is for the jury to say, under all the circumstances, whether the fact that any witnesses is in the employ of a party to the suit at the time he testifies has any effect on the weight to be given to his testimony, and, if so, how much.⁵⁹

It would require the careful scrutiny of a keen observer to find merit in the ruling of the Supreme Court in this case. The instruction applied to certain witnesses, but it left the jury free to determine the credibility of the witnesses for the defendant on the same basis as they should determine the credibility of other witnesses. Surely no jury would be justified in disregarding the testimony of a witness merely because he was in the employ of the defendant. No reasonable jury would be unduly influenced by the instruction which the court criticised and it seems that the court erred in ruling the instruction to be a comment on the credibility of witnesses.

An instruction concerning the credibility of a party to an action was declared proper in a decision handed down by the Supreme Court in 1901.⁶⁰ But the court was not concerned whether or not such an instruction was a comment on the credibility of a witness. In two cases decided in 1904 where the same point was involved, the court raised the question of comment and ruled that it was not necessarily error to refuse to give such instruction, depending on the facts of the case, and the giving of the usual cautionary instructions.⁶¹

The same question arose again in 1907 when the following instruction was given, "The court instructs the jury that while

⁵⁹ *Brown v. Forrester & Nace Box Co.* (1922), 243 S. W. 330, 332.

⁶⁰ *Feary v. Metropolitan Street Ry. Co.* (1901), 162 Mo. 75, 62 S. W. 452.

⁶¹ *Montgomery v. Railroad* (1904), 181 Mo. 477, 79 S. W. 930; *Conner v. Railroad* (1904), 181 Mo. 397, 81 S. W. 145.

the plaintiff was a witness in his own behalf the jury are the sole judges of his credibility. All statements made by him, if any, which are against his interest may be taken as true, but his statements in his own behalf are only to be given such credit as the jury under all the facts and circumstances in the evidence deem them entitled to." In this case, the court overruled the 1901 decision in concluding that the instruction was erroneous because it singled out the plaintiff as a witness and usurped the province of the jury in weighing his evidence. "Such instructions . . . are a direct comment upon the weight of the plaintiff's testimony, and are not to be tolerated."⁶²

The rule has been uniformly followed that it is error for the courts to give instructions which comment on the credibility of parties to a lawsuit.⁶³

The courts have been somewhat more liberal with instructions concerning expert witnesses. The following instruction has been approved: "The court instructs the jury that they are not bound to accept as true the opinion of expert witnesses, but the jury may give the opinion of expert witnesses such weight as the jury may under all the evidence in the case consider them entitled to, or the jury may altogether disregard such opinions, if the jury from all the facts believe such opinions to be unreasonable."⁶⁴

The Kansas City Court of Appeals in ruling on this instruction stated that it amounted to a commentary on the evidence, but was proper since it had been sanctioned by the Supreme Court. In both of the cases cited by the Kansas City Court as authority for its holding, the Supreme Court did consider similar instructions, but in neither did it hold that such instructions were in the nature of comments on the evidence.⁶⁵ The decision in the Court of Appeals is not well considered. The instruction

⁶² Zander v. Transit Co. (1907), 206 Mo. 445, 461, 103 S. W. 1006.

⁶³ Stetzler v. Met. Street Ry. Co. (1908), 210 Mo. 704, 109 S. W. 666; Huff v. Ry. Co. (1908), 213 Mo. 495, 111 S. W. 1145; Quinn v. Met. Street Ry. Co. (1908), 218 Mo. 545, 118 S. W. 46; Steele v. Railroad Co. (1914), 265 Mo. 97, 175 S. W. 177; Jones v. Railway Co. (1920), 287 Mo. 64, 228 S. W. 780; Brown v. Railroad Co. (1907), 127 Mo. App. 614, 106 S. W. 551; Copeland v. Insurance Co. (1911), 158 Mo. App. 338, 138 S. W. 557.

⁶⁴ Wiley v. Gas Co. (1908), 132 Mo. App. 380, 386, 111 S. W. 1185.

⁶⁵ Hoyberg v. Henske (1899), 153 Mo. 63, 55 S. W. 83; Markey v. Railroad (1904), 185 Mo. 348, 84 S. W. 61.

was proper. It was a declaration of law and not of fact, and therefore was properly given to the jury. This proposition seems to be supported in a more recent case in which it was held that such an instruction was never considered to be an undue comment on the evidence, nor a singling out of testimony.⁶⁶

The cases to which reference has been made and others⁶⁷ are illustrative of the general rule that it is improper for the judge to comment on the credibility of witnesses. No further consideration need be given to the conservatism and narrow interpretation of the appellate courts in construing instructions pertaining to the credibility of witnesses.

In civil as well as in criminal cases, the law is firmly established that instructions which comment on the weight and sufficiency of the testimony are improper and should not be given. In the entire field of comment on the evidence, instructions which err in this particular are by far the most frequent. The appellate courts have pointed out many times that instructions which comment on the weight and sufficiency of the testimony are those in which the judge indicates his opinion concerning the evidence by singling out certain facts and stating what weight should be attached to such facts.⁶⁸

One of the most satisfactory opinions pertaining to comment on the weight and sufficiency of the testimony was written by Judge Philips in the case of *Forrester v. Moore*.⁶⁹ In that case the judge laid down certain fundamental principles which are basic in an analysis of instructions which comment on the weight and sufficiency of the evidence.

The court said, "Principles of law and rules of practice, while they have an unvarying character, and be as guide-boards at all times, yet care must ever be vigilantly exercised to limit their

⁶⁶ *Bank v. Wright* (1914), 184 Mo. App. 164, 174, 168 S. W. 355.

⁶⁷ *Winter v. Supreme Lodge* (1902), 96 Mo. App. 1, 69 S. W. 662; *Imboden v. Trust Co.* (1904), 111 Mo. App. 220, 86 S. W. 263.

⁶⁸ *Anderson v. Kincheloe et al.* (1860), 30 Mo. 520; *Fine et al. v. St. Louis Public Schools et al.* (1866), 39 Mo. 59; *Rose v. Spies* (1869), 44 Mo. 20; *Jones v. Jones* (1875), 57 Mo. 138; *Bank v. Armstrong et al.* (1876), 62 Mo. 59; *Chouteau v. Jupiter Iron Works* (1884), 83 Mo. 73; *Bertram v. Peoples' Railway Co.* (1899), 154 Mo. 639, 55 S. W. 1040; *Ward v. Fessler et al.* (Mo., 1923), 252 S. W. 667; *Ward v. Mo. Pac. Ry. Co.* (1925), 311 Mo. 92, 277 S. W. 908; *Steinwender v. Creath* (1891), 44 Mo. App. 356; *Webb v. Baldwin* (1912), 165 Mo. App. 240, 147 S. W. 849.

⁶⁹ *Forrester v. Moore* (1883), 77 Mo. 651, 659.

proper application. They must be just so flexible as to recognize the reasonable difference in the legal status and qualities of cases as they arise. For instance, because in a given class of cases, and under peculiar phases of facts incident to them, it is permissible to array these facts in an instruction and declare to the jury the result which the law attaches to such facts when proven, counsel must not conclude that under the sanction of the language employed therein by the court license is given to indite legal essays or inject an argument to the jury in an instruction." This is a succinct statement of the proposition that since the facts vary from case to case, instructions which may be comments on the weight and sufficiency of the testimony in one case are not necessarily such in another.⁷⁰

The court then quoted from Lord Coke, "With respect to the question of law, the jury must not respond, but only the judges. So, or in like manner, or under like restrictions, the judge must not respond to questions of fact, but only the jury." This vital conclusion was then reached, "It is the recognition of this province of the jury that has so repeatedly and persistently induced our courts to pronounce against instructions commenting on the evidence, or singling out one or more facts of the case and directing the attention of the jury that way—and this for the reason that such instructions unduly influence from the bench the judgment of the jury, and tend to substitute for their estimation and analysis of a given fact, the mental and moral bent of the judge. If this may be done in one case, it can in another, until the judge from the bench will invade the jury box and displace the twelve triers of the facts."

This opinion stated the reason why our appellate courts have ruled so strictly in construing many instructions as commentaries upon the weight and sufficiency of testimony.

Where the plaintiff brought an action of replevin for a mule, an instruction was given for the plaintiff as follows: "The court further instructs you, if you believe from the evidence that Richmond's mule was four years old last spring, and that the mule in controversy was only three years old last spring, your verdict ought to be for the plaintiff, . . . "

The court ruled that this was literally a comment on the

⁷⁰ *Mathews v. St. Louis Grain Elevator Co.* (1875), 59, Mo. 474.

weight of the evidence constituting reversible error. The age of the mule was not in issue on the record, and could not, as a legal conclusion determine the rights of either party. It was only an incidental fact from which a rational conclusion might possibly have been inferred, as to the identity of the mule, or the consequent right of possession in one party or the other. The court further held that the question should have been left to the jury and that such an instruction was opposed to the whole spirit and meaning of the jury system of this state.⁷¹

In an action upon a promissory note, the court said, "The fifth instruction declared, that if the jury believed from the evidence, that the defendant promised Beattie that he would pay this note as soon as he could get a settlement with Weakley, in the Weakley, Gunn and Dolman matter, then this may be considered by the jury as evidence tending to prove that the whole amount of the note was due. It is argued that the instruction is bad, being a comment on the evidence. But we think not. It simply tells the jury, that they may consider certain evidence as tending to prove a particular fact, but makes no comment as to its weight, or what its effect may be."⁷² In a very recent case, where the court in an instruction made reference to certain facts and said if those facts were true, the jury were at liberty to draw certain inferences, the court held that, "although the jury was warranted in inferring, from the facts mentioned in this instruction and other facts in the case" the inferences, "nevertheless it was not the province of the trial court to tell the jury that they were 'at liberty' to draw this or any other inference from the facts proven. This instruction singled out certain facts and commented on their legal effect." "It invaded the province of the jury in suggesting to them a course of reasoning to follow in determining the question of defendant's negligence."⁷³ The inconsistency of the court is marked in these two cases. Applying the rule of the first case to the second, the instruction in the latter case would have been held proper; applying the rule of the second case to the first, the instruction in the former case would have been held improper. The rules in

⁷¹ Wright v. Richmond (1886), 21 Mo. App. 76, 80.

⁷² Beattie v. Hill (1875), 60 Mo. 72, 77.

⁷³ Kennedy v. Phillips (Mo., 1928), 5 S. W. (2d), 32, 39.

both cases show that decisions often depend on the particular factual set up and that cases cannot always be harmonious.

Instructions which refer to the facts in the evidence, but do not indicate the opinion of the court as to their weight and sufficiency, have always been held not to be comments; but instructions which refer to the facts in the evidence, and also indicate the opinion of the court as to their weight and sufficiency have always been held to be comments and therefore objectionable and improper.⁷⁴

⁷⁴ *Couch v. Gentry* (1892), 113 Mo. 248, 20 S. W. 890; *Lloyd v. St. L. I. M. & S. Ry. Co.* (1895), 128 Mo. 595, 29 S. W. 153; *Meriwether v. Publishers* (1909), 224 Mo. 617, 123 S. W. 1100; *Andrew v. Linebaugh* (1914), 260 Mo. 623, 169 S. W. 135; *Rice v. Transit Co.* (Mo., 1919), 216 S. W. 746; *Land v. Adams* (Mo., 1921), 299 S. W. 158; *Littig v. Heating Co.* (1921), 292 Mo. 226, 237 S. W. 779; *Keppler v. Wells* (Mo., 1922), 238 S. W. 425; *Hely v. Hinerman* (1923), 303 Mo. 147, 260 S. W. 471; *Willi v. United Railway Co.* (Mo., 1925), 274 S. W. 24; *Lauch v. Reis* (1925), 310 Mo. 184, 274 S. W. 827; *Hartman v. Hartman* (1926), 314 Mo. 305, 284 S. W. 488; *Sturtevant Co. v. Ford Mfg. Co.* (1926), 315 Mo. 1025, 288 S. W. 59; *Laible v. Wells* (Mo., 1927), 296 S. W. 428; *Irons v. American Express Co.* (Mo., 1927), 300 S. W. 283; *Kleinlein v. Foskin* (Mo., 1929), 13 S. W. (2d) 648; *Miller v. Marks* (1886), 20 Mo. App. 369; *Rothschild v. Frensdorf* (1886), 21 Mo. App. 318; *Weil v. Schwartz* (1886), 21 Mo. App. 372; *Blair v. Mound City Ry. Co.* (1888), 31 Mo. App. 224; *Copp v. Hardy* (1888), 32 Mo. App. 588; *Benjamin v. Metropolitan Street Ry. Co.* (1892), 50 Mo. App. 602; *McClure v. School District* (1896), 66 Mo. App. 84; *Orscheln v. Scott* (1899), 79 Mo. App. 534; *Swink v. Anthony* (1902), 96 Mo. App. 420, 70 S. W. 272; *Pace v. Roberts, Johnson & Rand Shoe Co.* (1903), 103 Mo. App. 662, 78 S. W. 52; *Gage v. Mears* (1904), 107 Mo. App. 140, 80 S. W. 712; *Shanahan v. Transit Co.* (1904), 109 Mo. App. 228, 83 S. W. 783; *Milling Co. v. McWilliams* (1906), 121 Mo. App. 319, 98 S. W. 828; *Feddeck v. Car Co.* (1907), 125 Mo. App. 24, 102 S. W. 675; *Hardware Co. v. Fighting the Flames Co.* (1908), 135 Mo. App. 266, 115 S. W. 467; *Disbrow v. Storage & Fuel Co.* (1909), 138 Mo. App. 56, 119 S. W. 1007; *Turner v. Snyder* (1909), 139 Mo. App. 656, 123 S. W. 1050; *Collins v. Tootle Estate* (1911), 156 Mo. App. 221, 137 S. W. 273; *Leggett v. Exposition Co.* (1911), 157 Mo. App. 108, 137 S. W. 893; *Bank v. Enderle* (1908), 133 Mo. App. 222, 113 S. W. 262; *James v. Insurance Co.* (1908), 135 Mo. App. 247, 115 S. W. 478; *Bamberge v. Supreme Tribe Ben Hur* (1911), 159 Mo. App. 102, 139 S. W. 235; *Exposition Co. v. Emerson* (1911), 163 Mo. App. 465, 143 S. W. 843; *Ogle v. Sidwell* (1912), 167 Mo. App. 292, 149 S. W. 973; *Price v. Railroad* (1914), 185 Mo. App. 432, 170 S. W. 925; *Anderson v. White* (1921), 210 Mo. App. 275, 235 S. W. 834; *Burgess v. Garvin & Price Merc. Co.* (1924), 219 Mo. App. 162, 272 S. W. 108; *Lowry v. Fire Ins. Co.* (1924), 219 Mo. App. 121, 272 S. W. 79; *Moody v. Cowherd* (Mo. App., 1917), 199 S. W. 586; *Foster v. Aubachon* (Mo. App., 1920), 221 S. W. 741; *Hearon v. Lumber Co.* (Mo. App., 1920), 224 S. W. 67; *Thomas v. Bank* (Mo. App., 1922), 236 S. W. 376; *Empire Plow Co. v. Lumber Co.* (Mo. App., 1922), 237 S. W. 137; *Jourdan*

V. CONCLUSION

Profoundly important have been the opinions rendered by Judge Scott pronouncing it error for the courts to comment on the evidence either in instructions or by word of mouth in the course of the trial. In the twenty one years during which Judge Scott sat on the Supreme Court of Missouri, the significant decisions were handed down which have shaped the policies of the appellate courts on the matter of comment to the present day. When the judge ascended the bench in 1841, not one opinion had been pronounced denying the judge the right to comment on the evidence. When, in 1861 Judge Scott descended from the bench, he had handed down opinions in eight of eleven leading cases which served as precedent for the prohibition of the right of comment.⁷⁵

The multitude of evils which have resulted from the abrogation of this common law right cannot be charged to the rulings of Judge Scott alone. In criminal cases, the judge was bound hand and foot by a statute. In civil cases, either the judge was bound by a statute, or he unquestionably believed that he was so bound. The results which have been obtained, with the exception of many narrow interpretations, cannot be laid at the feet of the judiciary, least of all, to a particular member of the judiciary. The responsibility must unquestionably fall upon the legislature. The legislature enacted the criminal statute prohibiting comment except by consent, and if the civil statute on instructions is not applicable to comment in civil cases, and the practice has grown up of denying the trial judge this right, then the legislature is equally responsible for its failure to pass a

v. Sheets (Mo. App., 1923), 248 S. W. 641; Farmers' Bank v. Harris (Mo. App., 1923), 250 S. W. 946; Finn v. United Ry. Co. (Mo. App., 1924), 267 S. W. 416; Ham v. Hammond Packing Co. (Mo. App., 1925), 277 S. W. 938; Murphy v. Insurance Co. (Mo. App., 1926), 285 S. W. 772; Biskup v. Hoffman (1926), 220 Mo. App. 542, 287 S. W. 865; Messer v. Gentry (1927), 220 Mo. App. 1294, 290 S. W. 1014; Vernon v. Rife (1927), 317 Mo. 141, 294 S. W. 747; Finn v. Indemnity Co. (Mo. App., 1927), 297 S. W. 175; Nyborg v. Wills (Mo. App., 1929), 14 S. W. (2d) 529.

⁷⁵ Hogel v. Lindell (1847), 10 Mo. 483; Carroll v. Paul's Admr. (1852), 16 Mo. 226; State v. Dunn (1853), 18 Mo. 419; State v. Anderson (1853), 19 Mo. 241; Loehner & Wife v. Home Mutual Ins. Co. (1854), 19 Mo. 628; Morris v. Morris (1859), 28 Mo. 114; Chouquette v. Barada (1859), 28 Mo. 491; State v. Schoenwald (1860), 31 Mo. 147.

statute affirmatively granting the court the power to comment on the evidence.

Judge Scott, himself, seems to have been opposed to the principle of abolishing comment. In one of his last opinions the judge said, "Now, because his (the trial judge's) right has been taken away from the courts, an effort is made to substitute for the advice formerly given to juries, which they would receive or reject as they thought right, authoritative rules, by which the jury are bound to be governed in determining the weight to be given to the evidence. If they are not bound by the instruction, then it is a comment and not warranted by law. These instructions are generally asked for by the counsel for the accused, and the motive to them is the hope that they may operate with the jury as an endorsement by the judge of an onslaught on the character of a witness, thinking that the jury will take such an instruction as an intimation from him that there is a ground for disbelieving the evidence. In my experience, the squabbles about such instructions have proved a great delay in the administration of justice, when it must be obvious to all that they have no influence, and that there is no occasion for them, as the evidence of the witnesses is always open to the comment of counsel, who will only ask such instructions with the hope that they will operate with the jury as a sanction by the judge of the comment that may have been made."⁷⁶ In a general way, what the court here says is applicable also in civil cases. A study of civil cases indicates that "such instructions" do "prove a great delay in the administration of justice."

The late Judge Graves of the Supreme Court pronounced a contrary opinion to that of Judge Scott in a recent case. He said, "It is clear that the party who drew instruction No. 3 had been drawing inspiration from the federal courts (where the common law rule prevails). Suffice it to say that but few states tolerate undue comments upon the evidence in the case, and less of them tolerate the usurpation of the jury's province by the court, and most certainly Missouri is not one of the number which tolerate either practice. Speaking, not as a prophet, but only as one who can hear the mutterings of an oncoming storm and visualize the outcome thereof, it is safe to say that the

⁷⁶ State v. Schoenwald (1860), 31 Mo. 147, 156.

present federal practices in these regards will be wiped out by statutes if not corrected by the courts. If we are to have jury trials at all, both court and jury should be kept strictly within their respective fields of action in the course of the trial."⁷⁷

In a measure, these opinions express the opposing views which are presented whenever the right of comment is the subject of discussion. Neither opinion, however, represents an adequate treatment of the problem. The question has been dealt with in various jurisdictions, and generally throughout the entire United States,⁷⁸ but there has been no intensive criticism of the system in Missouri.

Judge Graves in his criticism of the federal system, fell into error when he said that the practice of commenting on the evidence should be corrected by the courts. The courts, since they adhere to the practice under the common law, cannot correct it. The practice is part of the common law system, unless modified by legislation, or judicial legislation which is not a satisfactory means of altering the common law. Moreover, the suggestion that the court and jury should be kept strictly within their respective fields, operates upon the premise that at common law they did have restrictive and exclusive duties. In this particular, Judge Graves again fell into error. At common law, the cooperation of the judge and jury is a striking feature, and the point of greatest contact is in the charge in which the judge tells the jury the law and expresses his opinion of the facts. Judge and jury are conceived of as partners in the conduct of a trial rather than strict legal bodies, the functions of which are not allowed to overlap.⁷⁹

The denial to the trial court of the right of comment in Missouri has introduced many unfortunate evils into the system of jury trial. In the first place, it is to be noted that new grounds for reversal have been introduced. Courts have commented upon the evidence innocently in the course of the trial, and they have given instructions construed to be comments on the evidence, simply because of the difficulty of self expression without

⁷⁷ Laible v. Wells (Mo. 1927), 296 S. W. 428, 429.

⁷⁸ Hogan, *The Strangled Judge*, Vermont Bar Assn. Pub. (Jan., 1929); Johnson, *supra*.

⁷⁹ Hogan, *op. cit.* pp. 14-20, *supra*.

such comments. Under the practice, however, the intention does not govern. The appellate courts have construed strictly. Consequently, many instructions which appear proper at a first glance, when examined critically, have furnished grounds for reversal and new trials in scores of cases.

Second. The time which is consumed in scrutinizing instructions to avoid those which comment on the evidence, both at nisi and on appeal is enormous. Despite a careful inspection, the number which are submitted on the motion of the court or counsel indicate that the courts have been unable to cope with the problem.

Third. Counsel instead of submitting instructions which correctly set forth the law, endeavor to induce the court to give instructions which are clearly commentaries, because they believe that such errors will not be noticed, and will influence the jury materially.⁸⁰

Fourth. The jury is left without the advice of the court in all factual matters. The trial judge is an expert, not only of law, but also of fact. When he cannot advise the jury as to his own opinion, they are left at the mercy of counsel in the case, who may influence the jury to a greater or less degree depending on their respective skill. Yet the jury is supposed to decide the case on its merits. This becomes exceedingly difficult, when the most skilful lawyers are hired by parties who are culpable.

Fifth. The "trial judges are forced to assume the humiliating position of a timid figure head, or of a colorless umpire,"⁸¹ for they can exert no influence with the jury, and must exercise the greatest restraint in ruling on the admissibility of evidence and giving instructions in order to avoid reversals.

Sixth. Under the present practice in this state, the selection of the jury is a slow and laborious undertaking for the reason that the parties to an action wish to secure ignorant, unintelligent jurors who may be influenced easily by the emotional appeal of attorneys. If the trial court were empowered to comment on the evidence, jurors would be selected rapidly, because the judge could exercise a wholesome influence upon the jury by his remarks after counsel had concluded their argument.

⁸⁰ See *State v. Schoenwald* (1860), 31 Mo. 147.

⁸¹ Hogan, *op. cit.* p. 1, *supra*.

Such remarks would at least tend to neutralize the effect of a prejudicial address, and bring the jury to understand the true nature of the case. The fact that the trial court could comment upon the evidence, would negative the value of an ignorant jury, for they would be brought under the influence of an analytical court. Therefore, if the judge possessed the right of comment, counsel would prefer to have an intelligent jury who would better appreciate the significant facts of the trial.

Lastly, a statement by the judge of his opinion of the facts, would doubtless give the jurors a clearer understanding of the issues than they now possess. Comments would enable juries to reach quicker and more intelligent verdicts and therefore would avoid new trials which are so often caused by hung juries, and verdicts against the weight of the evidence.

Let it be assumed that in Missouri, the court possessed the right to comment on the evidence under the common law practice. Let it be admitted that in the course of the trial the judge stated his opinion concerning the credibility of certain witnesses, and further, that in his instruction the judge singled out a particular set of facts and commented on their legal effect. A common law comment that any opinion expressed by the court was merely advisory, would cure the defects which constitute reversible error under the present system. The point which cannot be over emphasized is that at common law, the jury still decides the facts. The jury can render a verdict which is clearly *contra* to the opinion of the court, but nevertheless a common law comment cures errors which are fatal under the practice in this state, and gives the jury the manifold benefits of the advice of an expert.

The problem of the right of comment is not so simple as it has been stated. It is aggravated by the prevalent inefficiency of the court. However, the trial judge cannot be expected to become more efficient when he virtually is gagged and his relationship to the jury minimized; nor is the defect cured by requiring an incapable judge to frame abstract instructions which are almost meaningless, but which constitute error if they single out facts. The present system encourages the giving of abstract and technical instructions to juries of rare stupidity after astute lawyers have tried themselves in forensics before the twelve

peers who are selected to determine the facts according to the merits of the case.

Most writers who criticise the jury system in the United States find fault with the abolition of the common law right of comment. Dean Wigmore believes that the practice in such states as Missouri "is an unfortunate departure from the orthodox common law-rule. It has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice. Since it remains the law by grace of statute only, in most states, it can and should be readily abolished. A new birth of long life will then be opened for the great beneficent institution of Trial by Jury."⁸²

Thompson in his excellent treatise on *Trials* says of juries in those jurisdictions in which the common law right of comment has been abandoned, "It is no wonder the verdict of a jury has the reputation of being that whose import no man can predict—unless there is something outside of the law and the facts, such as sympathy, prejudice or the adroitness of counsel, giving a sword for the Gordian knot into which (for the jury) the law and the facts have been tied." "When we consider that a multitude of such decisions (similar to those in this state) comes down from our courts every year, any number we may instance must of necessity be regarded as a very few."⁸³

President Hogan of the Vermont Bar Association in a recent address stated that the return of the common law right of comment on the evidence was imperative to the maintenance of vitality in the jury system.^{83a} His conclusion is based on the analysis of many legal publications and cases which show that the abandonment of the present practice in a majority of jurisdictions would be an untold benefit.⁸⁴

In the light of Missouri decisions and of the unfortunate results which have been obtained in this state because of the abandonment of the common law right of comment on the evidence, one is led to conclude with Professor Sunderland, "Many

⁸² Wigmore, *EVIDENCE*, 2d ed., Sec. 2551.

⁸³ Thompson, *TRIALS*, 2d ed., Sec. 2280.

^{83a} The opposite view is lucidly expounded and defended by Sterling E. Edmunds of the St. Louis Bar in "Trials by Jury, or by Judge," *AMERICAN MERCURY* (April, 1929) p. 438.

⁸⁴ Hogan, and authorities cited, *supra*.

are the complaints against the modern procedure, and many are the remedies proposed, but the writer believes that no single reform would have so wide-reaching and wholesome effect in promoting the efficiency of courts and improving the quality of justice obtainable there, as a return to the sensible and effective rule of the common law permitting, and in its spirit requiring, that judges should generously aid juries in reaching just conclusions on matters of fact."⁸⁵

⁸⁵ Sunderland, *The Inefficiency of the Jury*, 13 MICH. LAW REV. 302, 316.