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Should Comment by the Trial Judge be Authorized in West Virginia?

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Statutes for the admission of evidence of persons deceased or insane might be extended by analogy to the business entries rule to the admission of all evidence of persons actually unavailable in court.[20] It is thought, however, that there is greater reason for, and would be less opposition to the admission of the evidence of only those dead or insane.[21] Consequently the adoption of the following uniform statute is urged:

> "A declaration, whether written or oral, of a deceased or insane person shall not be excluded from evidence as hearsay if the court finds that it was made and that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."[22]

The adoption of these proposals would make available much relevant evidence; but it would give no advantage to any group or interest — it would merely permit the jury to know that which it must now only surmise. These provisions have been found workable in other states. May West Virginia gain the same advantages.

—TRIXY M. PETERS.

SHOULD COMMENT BY THE TRIAL JUDGE BE AUTHORIZED IN WEST VIRGINIA?

Whatever else familiarity may breed, with lawyers it has bred opposition to all change in the customs and practices of their profession. But some (and perhaps often, much) opposition to change is inevitable in a profession founded on tradition. Thus the return of the common law power of judicial comment has been long delayed. Only a few leading lawyers[1] and jurists[2] have sponsored its return.

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[20] THE LAW OF EVIDENCE, *supra* n. 16, at 49.
[21] So long as a witness is competent and living there is at least a possibility of getting a deposition.
[22] THE LAW OF EVIDENCE, *supra* n. 16.

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[1] Judge Ritz, in speaking of judicial comment said, "I think it is true in this state, that we have a system that does not allow our judges in the state courts to intelligently try a case," (1928) PROC. W. VA. BAR ASS'N 70. Judge McClintic, at the same meeting said that in 1921 when he was a member of the legislature, he introduced a bill permitting the circuit judge to comment if both parties agreed. Of the twenty-three lawyers in the House of Delegates, twenty-one opposed the bill. Three circuit judges lobbied against it because, as they stated, it would make them pay too close attention during the trial, (1928) PROC. W. VA. BAR ASS'N 162.
[2] "The . . . . rule (which obtains by Constitution or statute in almost

Judicial comment was a part of the jury system at common law.[3] It still exists in the English courts,[4] in several states,[5] and, in spite of criticism,[6] in the federal system.[7]. It has never been satisfactorily explained why the majority of states have deprived judges of this power.[8] Like Virginia,[9] West Virginia, has expressly denied the trial judge the privilege of comment.[10]

The dangers inhering in the common law system are alleged to be: the injustice of autocratic power, the destruction of lay experience which a judge is said not to possess, undue judicial influence upon the verdict, and excessive power in a politically elected judiciary. But the trial judge was not intended to be an

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every State, but not in the Federal Courts) 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." 5 WIGMORE, EVIDENCE (2d ed. 1928) § 2551.

"It is not too much to say of any period, in all English History, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with facts." THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 188, note.

[3] Vicksburg & Elec. Ry. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1 (1886).

[4] Darby v. Ousley, 1 H. & W. 1, 156 Eng. Rep. 1093 (1856).

[5] State v. Main, 69 Conn. 131, 37 Atl. 80 (1897); State v. Means, 95 Me. 364, 50 Atl. 30 (1901); State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (1913); Hamilton v. Pitt. R. R. Co., 190 Pa. 59, 42 Atl. 369 (1899); State v. Quigley, 26 R. I. 263, 58 Atl. 905 (1904).

[6] The Caraway Bill (H. R. 9354), introduced in the House of Representatives in 1918 provided: (a) that a federal judge could not comment on weight of evidence, (b) must not express opinion on credibility of witness, and (c) must give instructions before arguments of attorneys. But see, Note (1918) 31 HARV. L. REV. 1011.

[7] Vicksburg & Elec. Ry. Co. v. Putnam, *supra* n. 3.

[8] North Carolina in 1793 was the first state to adopt such a statute. It is said that North Carolina passed the law to satisfy the personal desires of three or four criminal lawyers, who had political influence in the legislature, and who disliked certain circuit judges. See THE LAW OF EVIDENCE, (1927) Yale University Press, pages 9-21. The American spirit of independence and fear of power, no doubt facilitated the statute's adoption in other states.

[9] Whitelaw's Ex'r. v. Whitelaw, 83 Va. 40, 1 S. E. 407 (1887).

[10] State v. Hurst, 11 W. Va. 54 (1877). The court summarizing in the syllabus said: "It is error for a court in the trial of a criminal cause, to make a remark to, or in the presence of the jury, in reference to matters of fact, which might in any degree influence them in their verdict."

As to weight of evidence see Harmon and Crocket v. Maddy Bros. 57 W. Va. 66, 49 S. E. 1009 (1905); White v. Sohn, 63 W. Va. 80, 59 S. E. 890 (1907); State v. Long, 88 W. Va. 669, 108 S. E. 279 (1921); State v. Winans, 100 W. Va. 421, 130 S. E. 607 (1925); State v. Waters, 104 W. Va. 217, 139 S. E. 704 (1927); State v. Ison, 104 W. Va. 433, 140 S. E. 139 (1927). As to credibility of a witness, State v. Ringer, 84 W. Va. 546, 100 S. E. 413 (1919); State v. Staley, 45 W. Va. 792, 32 S. E. 198 (1899). But courts can classify witnesses in respect to weight and value of their testimony in an instruction to the jury, if the instruction is based on a well defined distinction as to the opportunity of the witness to know the truth, see State v. Croston, 103 W. Va. 380, 137 S. E. 536 (1927); Ward v. Brown, 53 W. Va. 227, 44 S. E. 488 (1903).

automaton to rule on motions and give long instruction which no juror can understand.[11] The judge should take an active part in the conduct of the trial to the end that its course may be directed by an impartial expert rather than by the conflicting interests of partisans. It is true the opinion of the judge may on occasion influence the verdict of the jury. This will not of itself cause a miscarriage of justice. Cases from the federal reports refute the charge.[12] There has been no criticism of undue influence in Pennsylvania or Connecticut.[13] Are not West Virginia judges worthy of a similar trust?

West Virginia should enact the following statute:

> "The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part of it."[14]

The adoption of this statute would (if the experience of other state is a guide) speed the examination of jurors, reduce the trial time and speed verdicts, give the judge a real part in the trial, and afford the jury valuable aid in clarifying complicated evidence and complex instructions.[15] The merits of the old common law would be revived — there were few dangers — many benefits.

—CHARLES W. CALDWELL.

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[11] Some West Virginia trial judges question the witnesses, but without the expression of opinion.

[12] The judge's comment to the jury—"I regard the testimony as convincing," Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171 (1891), where the court commented: "It (the court) is of the opinion that you should find for the plaintiff," United States v. Phil. & Reading Ry. Co., 123 U. S. 113, 8 S. Ct. 77 (1887); and where the judge declared that the jury could find for the plaintiff, but, "If you should do so, I would be much surprised at your verdict, and would not be surprised if I should set it aside," Cal. Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 S. Ct. 365 (1899) — did not unduly influence their decision. In no jurisdiction is the judge permitted to instruct the jury on certain facts; but this is quite another thing from commenting on the evidence or the witnesses.

[13] See THE LAW OF EVIDENCE, *supra* n. 8, at Appendix A pp. 69-87.

[14] See THE LAW OF EVIDENCE, *supra* n. 8, at p. 9.

[15] See THE LAW OF EVIDENCE, *supra* n. 8, at pp. 20-21.