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RECENT CRIMINAL CASES

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CRIMINAL PROCEDURE — EVIDENCE —POWER OF JUDGE TO COMMENT UPON EVIDENCE. — [Illinois] The defendant was found guilty of larceny in stealing an automobile, and was sentenced to the penitentiary. A writ of error was sworn out to reverse the judgment on the grounds that the trial judge, in his charge to the jury, commented upon the evidence and orally instructed the jury as to the law in the case. *Held:* on appeal, that these acts of the judge were prohibited by the Practice Act: Ill. Rev. Stat. (Cahill, 1931) ch. 110, secs. 72, 73. Judgment reversed: *People* v. *Kelly* (1931) 347 Ill. 221, 179 N. E. 898. (Rehearing denied Feb. 3, 1932.)

The decision of the lower court was reversed on the theory that the judge had violated provisions in the Practice Act which state that the court in charging the jury shall only instruct as to the law of the case, and that such instructions shall be reduced to writing: Ill. Rev. Stat. (Cahill, 1931), ch. 110, secs. 72, 73. These enactments were held to be constitutional and not to infringe upon the right of trial by jury as enjoyed at common law. It is submitted, however, that these provisions, which forbid the judge to express his opinion on the evidence and require written instructions to be given to the jury, may not only encroach upon the right of trial by jury as enjoyed at common law, but also may be unconstitutional.

It is generally conceded in Illinois that "trial by jury" relates to the practice in vogue under the common law: *People* v. *Bruner* (1931) 343 Ill. 146, 175 N. E. 400; *Sinopoli* v. *Chicago Ry. Co.* (1925) 316 Ill. 609, 147 N. E. 487. The State Constitution provides that the right of trial by jury as heretofore enjoyed shall remain inviolate, and the constitutions of 1818 and 1848 import the same meaning in similar language: Ill. Const. 1870, Art. 2, sec. 5; 1818, Art. 8, sec. 6; 1848, Art. 13. The Supreme Court of Illinois held that the right of trial by jury is the right as it existed at common law and at the time of the adoption of the respective constitutions: *Liska* v. *Chicago Ry. Co.* (1925) 318 Ill. 570, 147 N. E. 487.

At common law it was the duty of the judge to sum up the evidence on both sides of a case, assist the jury by commenting upon the evidence in their presence, with the reservation that the ultimate determination of the issue would be left with the jurors: 3 *Blackstone* "Commentaries on the Laws of England" (Cooley Ed. 1884) 373, 374; 2 *Hale* "The History of the Common Law" (Runnington Ed. 1794) 147; *Scott* "Trial by Jury and the

Reform of Civil Procedure" (1918) 13 Harv. L. Rev. 669; *Solarte* v. *Melville* (1827) 7 B. & C. 430, 1 M. & R. 198; *Lincoln* v. *Power* (1893) 151 U. S. 436, 14 Sup. Ct. 387. In the United States, the first deviation from the common law rule occurred in North Carolina in 1796 when a statute was passed forbidding the judge to comment upon the evidence in a trial. In other states statutes were enacted, constitutions were amended, or the courts rendered judicial decisions prohibiting the judge to execute this common law duty: *Johnson* "Province of the Judge in Jury Trials" (1928) 12 Jour. of Am. Jud. Soc. 76; for history of jury development, see *Sunderland* "The Inefficiency of the American Jury" (1915) 13 Mich. L. Rev. 307; *Forsyth* "History of Trial by Jury" (1876). The common law practice was abrogated in many cases because of the acts of one or several judges, or because of enmity between the legislature and the bench: *Johnson* "Province of the Judge in Jury Trials" *supra;* for Illinois historical sketch see *Cartwright* "Present But Taking No Part" (1916) 10 Ill. L. Rev. 537.

In the instant case, the court admits that the essential requirements of the right of trial by jury are (1) twelve (2) impartial (3) qualified jurors, who should (4) unanimously decide the facts in controversy; (5) under the direction and superintendence of a judge. At common law, "under the direction and superintendence of a judge" included his duty to give the jurors assistance by weighing the evidence before them: 2 *Hale* "History of the Common Law," *supra.* It seems that this construction of the common law practice is more tenable than the theory employed by the court in holding that the constitutional provision retains the "substance" and not the particular method and procedure known to the common law trial by jury. The suggested construction of the common law practice is supported by decisions in several jurisdictions, where, incidentally, the constitutional provisions pertaining to trial by jury are similar to those in Illinois: New Jersey Const. 1844, Art. 1, sec. 7; *Merklinger* v. *Lambert* (1909) 76 N. J. L. 806, 72 Atl. 119; New York Const. 1894, Art. 7, sec. 2; *Hurlburt* v. *Hurlburt* (1891) 128 N. Y. 420, 28 N. E. 651.

The sections of the Illinois Practice Act, on which the court relies in rendering the decision in the instant case, encroach upon the fundamental principle of the division of the powers of government into legislative, executive and judicial departments: Ill. Const., 1870, Art. 3. The legislature, in decreeing that the judge shall not comment upon the evidence in a trial and that his instructions shall be in writing, is clearly transgressing the domain of the judiciary. The General Assembly is forbidden to pass local or special laws regulating the practice in courts of justice: Ill. Const., 1870, Art. 4, sec. 22. If any implication of legislative power to enact such statutes is to be found in this provision, it is covered by the article which states that either department is forbidden to exercise any other department's powers except as "hereinafter expressly directed and permitted": Ill. Const., 1870, Art. 3. It is axiomatic, that the courts cannot dictate to the legislature what methods of practice or procedure it must follow; and yet we have the anomalous situation where the highest tribunal of the state sanctions

legislative dictation of court practices. The legislature exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties: *Wigmore* "All Legislative Rules for Judiciary Procedure Are Void Constitutionally" (1928) 23 Ill. L. Rev. 276.

The principle enunciated in this case may be questioned on the ground that it retards the efficient administration of justice. The reported experience of many trial lawyers fortifies the theory that the return to the orthodox common law rule would aid greatly in the dispensation of justice. To permit the presiding judge to express his opinion concerning the weight of the evidence would make of him more than an umpire and constitutional arbiter while on the bench. Less time and a minimum of expense would be required in impanelling a jury: "The Law of Evidence" (Committee, Commonwealth Fund, 1927) 21. The introduction of evidence would be facilitated. The judge would be able to exercise much more effective control over the conduct of the trial. It would simplify the task of instructing the jury on the law. Few reforms would have so wide reaching and wholesome effect in promoting efficiency of courts and improving the quality of justice obtainable there, as a return to the common law rule of permitting the judge to comment on and weigh the evidence, and to instruct the jury orally on points of law when necessary. *Sunderland* "The Inefficiency of the American Jury," *supra.*

ROGER R. CLOUSE.

VERDICT—COERCION BY JUDGE.—[Ohio] The defendant was prosecuted for presenting false vouchers to county officials, the trial extending over a period of two weeks. The jury had been considering the case for more than twenty-four hours when it was brought back into open court by the order of the judge and was instructed as follows: "It seems to me that the failure of this jury to agree upon verdicts in this case must be due to the fact that some of you are permitting yourselves to be influenced by matters extraneous to and outside of the evidence of the case. The trial of this case has been lengthy and a very expensive thing to this community and no member of this panel should refuse to join with his fellow jurors in a verdict on each of these indictments for any trivial or personal reason or consideration not arising from the evidence or the lack of evidence in the case. You have heard all the testimony and examined all the exhibits in the case, and under the instructions I have given you as to the law applicable herein you either are or are not convinced beyond a reasonable doubt of the truth of the charges made in these indictments. Whichever is the fact you should say so. You are all members of the regular jury panel of this court, and if you are unable to agree in this case after all the consideration of it you would be unable to agree in any case and your further service as members of this panel would not only be useless but a waste of time and money to the litigants and the citizens of this community. I am now sending you out again for the further consideration of the case and I feel certain if you confine yourselves to the evidence and the law as I have given it to you you will have no difficulty in agreeing upon verdicts as to each of

these indictments." The defendant was found guilty, and he appealed, claiming that he was deprived of an impartial jury trial by reason of this instruction. *Held:* that the judgment be reversed and the case remanded, on the ground that the charge given by the trial court coerced the jury to return this verdict: *Zimmerman* v. *State* (Ohio 1932) 182 N. E. 354.

The reviewing court, it must be remembered, basing its decision on the record, has no means of knowing the manner in which the instructions were given in the lower court. Thus instructions apparently coercive according to their written content actually may be mild and ineffective. On the other hand, instructions which appear merely suggestive and advisory and in no way forceful, may be coercive when articulated by the judge. One writer tells of a distinguished member of the bench whose custom it had been to deliver instructions so drastic in nature that a defendant rarely escaped conviction, and yet the cases were never reversed. The record would show that the judge had charged: "If [scornfully] you *believe* the defendant's testimony you will of course acquit him. He is *presumed* [with a shrug of the shoulders] to be innocent until the contrary is proved. If you have [another shrug] any *reasonable* doubt as to his guilt, you must give him the benefit of it. *On the other hand,* if you accept the testimony offered in behalf *of the People,* you may *and* WILL *convict him!*" (The last few words in tones of thunder.) *Train* "Prisoner at the Bar" (1908) p. 179.

In the early days coercion of verdicts was not an unusual occurrence and it generally has become the practice in this country that the court may properly admonish the jury as to the importance of coming to a verdict, but care should be taken not to suggest what verdict is proper, nor to give instructions having a tendency to coerce the jury into agreeing on a verdict: *People* v. *Becker* (1915) 215 N. Y. 126, 109 N. E. 127; *Spick* v. *State* (1909) 140 Wis. 104, 121 N. W. 664. Where the facts show a clear case of coercion, the courts have not hesitated to reverse and remand the cause: *Quong Duck* v. *U. S.* (C. C. A. 9th, 1923) 293 Fed. 563 (where the judge instructed the jury that he could not understand why verdict was not promptly rendered and that in his opinion the case was one where a verdict ought to be reached); *Kendrick* v. *State* (1930) 180 Ark. 1160, 24 S. W. (2d) 859 ("I held one jury one time here for six days and they agreed. I have never started out with a jury that they didn't agree."); *Palmer* v. *State* (1873) 50 Ala. 154 (The judge told the jury that he would keep the court open until they did agree; that they had nothing to do but to find defendant guilty.)

It may be clear in other instances that there has been no coercion to any degree, but merely an admonition as to the importance of coming to a verdict: *Israel* v. *U. S.* (C. C. A. 6th, 1925) 3 F. (2d) 743. (Although the court expressed regret because of the jury's inability to reach a verdict, he hoped that they might be able to reconcile their individual views, but never desired to coerce any juror to decide against his own conscience); *People* v. *Quon Foi* (Cal. App. 1922) 206 Pac. 1028. ("Your exclusive province is to judge the facts, but I wish to impress the advisability of coming to your conclusion, and rendering a

verdict. I sincerely trust that with further consideration of this case, you will be able to agree upon some form of verdict.")

Somewhere between these two extremes cases arise in which a reasonable person may differ in deciding whether there has or has not been coercion in the particular case: *Stewart* v. *U. S.* (C. C. A. 8th, 1924) 300 Fed. 769. (Instruction to jury that the court desired in no wise to influence them at all in respect to a verdict but simply to emphasize the fact that if they can consistently, and by consultation with each other reach a verdict, and if a verdict can be conscientiously arrived at, it is highly desirable—held erroneous); *Commonwealth* v. *Tenbroeck* (1919) 265 Pa. St. 251, 108 Atl. 635. ("You must agree. It is your duty to undertake to agree"—held proper); *Yancy* v. *State* (Ga. 1931) 160 S. E. 867. ("Mistrials are a serious matter and in many ways hinder justice"—held proper.)

Only one case has been found which disposes of a situation substantially the same as that in the principal case, and it was there held erroneous to threaten to discharge the jury for failure to agree on a verdict: *People* v. *Strzempkowski* (1920) 211 Mich. 266, 178 N. W. 771.

It has been said that the trial judge possesses very broad discretion and that it needs a "pretty plain case of prejudicial overstepping of it" to constitute error: *Willard* v. *State* (1928) 195 Wis. 170, 217 N. W. 651. The view also has been advanced that "it would be startling to have such action held to be error, and error sufficient to reverse a judgment": *Allis* v. *U. S.* (1894) 155 U. S. 117, 15 Sup. Ct. 36. Some courts, however, have expressly stated that "whether the error is harmless or prejudicial depends on the facts of the case": *People* v. *Volub* (1929) 333 Ill. 554, 165 N. E. 196. Although this latter proposition has not been stated openly by the authorities in this particular branch, except in a few instances, it seems to provide a convenient means by which a case may be reversed and remanded, and it leaves the way open for reviewing courts to decide the question either way depending upon their version of the particular facts.

EDWARD S. ALTERSOHN.

CRIMINAL PROCEDURE — STATE'S RIGHT TO APPEAL WHEN AN INDICTMENT IS QUASHED.—[Illinois] The defendant was indicted for bigamy in the Criminal Court of Cook County. The trial judge quashed the indictment because it failed to describe the parties or subject matter with sufficient certainty. The state sued out a writ of error to test the constitutionality of an Illinois statute enacted in 1845 which prohibited the state from appealing or applying for a writ of error or new trial in a criminal case: Ill. Rev. Stat. (Smith-Hurd, 1931) ch. 38, sec. 747. *Held:* writ of error dismissed: *People* v. *Barber* (1932) 348 Ill. 40, 180 N. E. 633.

After upholding the constitutionality of the statute involved and arriving at the inescapable conclusion that the state had no right to appeal because of its existence, the court stated that any departure from the present law must be legislative and not judicial.

The question whether or not a state may appeal in a criminal case has been answered in a variety of ways, covering practically every possibility between the two ex-

tremes. At common law, the state could not appeal or sue out a writ of error to review a judgment for the defendant in a criminal case, even on demurrer, much less on a verdict of acquittal: *Clark* "Criminal Procedure" (1895) 393. A few jurisdictions, by judicial decision, forbid appeals by the state in all cases: *State* v. *Johnson* (1920) 146 Minn. 468, 177 N. W. 657; *Comm.* v. *Cummings* (Mass. 1849) 3 Cush. 212. In some instances, courts have declined to consider points raised by the state on appeal taken by defendants: *Prescott* v. *State* (1907) 52 Tex. Cr. App. 35, 105 S. W. 192; *Parks* v. *State* (1917) 21 Ga. App. 506, 94 S. E. 628. A few states permit appeals by the prosecution only in cases of major offenses: *State* v. *Adams* (1920) 142 Ark. 411, 218 S. W. 845. Others allow it only in cases of minor offenses: *Comm.* v. *Gritten* (1918) 180 Ky. 446, 202 S. W. 884. Some jurisdictions, even in the absence of statutes, allow the state to appeal from a judgment in favor of the defendant if it was rendered prior to verdict: *State* v. *Buchanan* (Md. 1821) 5 Harr. & J. 317; *Comm.* v. *Capp.* (1864) 48 Pa. St. 53. Connecticut adopts the view that jeopardy is a continuing one from the beginning to the end of the cause, and under a statute giving the state the same right as the accused to appeal on all questions of law arising in a criminal case has held that even after an acquittal the state may appeal, or in case of a reversal may bring the defendant into court again for a new trial: Conn. Gen. Stat. (1918) sec. 6648; *State* v. *Lee* (1894) 65 Conn. 265, 30 Atl. 1110.

Jurisdictions which permit an appeal by the state vary as to when this right shall be exercised. The Federal Criminal Appeals Act permits the government to appeal by means of a writ of error from a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded: (1907) 34 Stat. 1246, 18 U. S. C. A. 682. In twenty-three jurisdictions the state is authorized by statute to appeal from an order setting aside or sustaining a demurrer to an indictment; some like Michigan, on the same grounds as the Federal Act, and others on more liberal grounds: Am. L. Inst. Proposed Final Draft of Code of Cr. Proc. (1930) 499. This Federal practice, and the tendency of almost half of the states to allow on appeal by the state upon the quashing of an indictment, shows the need of modernizing the criminal procedure in Illinois to the extent of permitting the state to appeal upon the quashing of an indictment when jeopardy has not attached to the defendant, when the statute on which the indictment is founded has been declared unconstitutional or because of a formal defect in the indictment itself. The practical desirability of this reform already has been realized: Am. L. Inst. Proposed Final Draft of Code of Cr. Pro., supra, sec. 440, p. 148.

A defendant is not put in jeopardy by the mere reading of an indictment, as jeopardy attaches only when the accused has been arraigned and the jury sworn and impaneled: *People* v. *O'Donnel* (1906) 224 Ill. 218, 79 N. E. 639. Moreover, a nolle prosequi before trial has commenced does not preclude another indictment for the same offense: *Ibid.* It would seem,

then, that there is no good reason why the state should not be permitted to appeal from a trial court decision quashing an indictment.

Another argument in support of removing this restraint upon the prosecution may be found in the words of Chief Justice Taft in his comment upon the Federal Criminal Appeals Act of 1907: "The reason and policy of this statute is in the need for expedition in securing a final interpretation of new criminal statutes by the court of last resort, so that the government and those charged with violating the new law may have the earliest possible final interpretation of what the new law means, and long trials and convictions, which might subsequently be set aside because of a faulty interpretation of the statute, may be avoided. Expedition and uniformity in construction are thus the controlling considerations." *Taft* "The Jurisdiction of the Supreme Court Under the Act of Feb. 13, 1925." (1925) 35 Yale L. J. 1. This reasoning is equally applicable to a statute allowing the state to appeal upon the quashing of an indictment.

Where an indictment is quashed upon the ground that the statute upon which it is founded is unconstitutional and void, there is no way under the existing law by which the case can be appealed to the highest tribunal of the state for a final decision upon its constitutionality and, thus, whether the trial court is right or wrong its decisions become final: Comment (1927) 3 Notre Dame Lawyer 45. Though the rights of an accused must be safeguarded religiously, yet the legislature has a right, and not only a right, but a duty to look to the interest of the great body of people. Thus by allowing the state an appeal, an erroneous decision may be corrected without in any way infringing on the rights of the defendant. To anticipate the objection that the state may by prolonging the appeal deny the defendant a speedy and public trial guaranteed by the Constitution, the state could be made subject to the usual time limits governing any appeal in criminal cases.

It is hoped that the legislature will realize that the present statute has outlived its usefulness, and will bring Illinois into accord with the more progressive states, by amending the present statute or enacting another allowing the state to appeal upon the quashing of an indictment when jeopardy has not begun, and thus secure this much needed modernization in the administration of criminal justice.

ALFRED J. CILELLA.

ACCESSORIES AFTER THE FACT—PROSECUTION AFTER ACQUITTAL OF ALLEGED PRINCIPAL.—[Kentucky] A Kentucky statute provided that "accessories after the fact, not otherwise punished, shall be guilty of high misdemeanors—and may be tried, though the principals be not taken or tried": Carroll's Ky. Statutes (1922) ch. 36, sec. 1129. The Kentucky court in the instant case held that the prior *acquittal* of the alleged principal did not preclude the prosecution of a defendant as an accessory after the fact. Although it is necessary in such a prosecution to prove the guilt of the principal, the prior acquittal of the alleged principal is not *res judicata* as to his innocence in the subsequent prosecution of an accessory after the fact. This results from the established rule that the prior conviction of the prin-

cipal does not preclude an alleged accessory after the fact from showing in a subsequent prosecution that he is innocent: *Kentucky* v. *Long* (Jan. 24, 1933, Kentucky Court of Appeals) United States Daily, Feb. 9, 1933, p. 4.

The court in the instant case departed from the common law. At common law, an accessory, either before or after the fact, could not be convicted unless his principal had been convicted, or outlawed, which was the equivalent of conviction. The one exception was where the accessory consented to be tried before the principal. Therefore, the conviction of the principal was one of the essential elements in the trial of the accessory. If both were tried together, this remained true, for then the jury were required, first, to determine the guilt of the principal, and only upon so finding could they consider the guilt of the accessory: *People* v. *Beintner* (1918) 168 N. Y. Supp. 945; 1 *Brill* "Cyclopedia of Criminal Law" (1922) sec. 254.

In some states, where by statutory provision those aiding and abetting the performance of a felony, or accessories before the fact, are made principals and may be tried and convicted prior to the trial and conviction of the principal, it is held, nevertheless, that a subsequent acquittal of the principal will entitle the accessory to a discharge: *McCarty* v. *State* (1873) 44 Ind. 214; *State* v. *Jones* (1888) 101 N. C. 719, 8 S. E. 147; *Bowen* v. *State* (1889) 25 Fla. 645, 6 So. 459; for further discussion of the effect of such statutory provisions and a similar holding in Illinois as to accessories before the fact, see comment (1932) 24 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 107. However, in other jurisdictions, under similar statutory provisions, the acquittal of the principal defendant does not operate to discharge the prior conviction of the accessory nor to bar his subsequent prosecution and conviction: *State* v. *Patterson* (1893) 52 Kan. 335, 34 Pac. 784; *Cummings* v. *Commonwealth* (1927) 221 Ky. 301, 298 S. W. 943; *Rooney* v. *United States* (C. C. A. 9th, 1913) 203 Fed. 928; but cf. *United States* v. *Crane* (C. C. Ohio, 1847) 4 McLean 317, Fed. Cas. 14,888. The same result logically is reached where the statute expressly provides that the acquittal of the principal shall not bar a prosecution against an accessory: *Gibson* v. *State* (1908) 53 Tex. Cr. 349, 110 S. W. 41. For further discussion and authorities, see *Sears* "Principals and Accessories" (1931) 25 Ill. Law Rev. 845.

Accessories after the fact often are dealt with separately, by the statutes, but where it is held that accessories before the fact, who frequently are considered as principals, can or cannot be prosecuted and convicted if the principal defendant is acquitted the rule should be the same for accessories after the fact. At least, there do not appear to be any cases to the contrary. In the instant case, the Kentucky statute permitted the trial of accessories after the fact, though the principal had not been taken or tried. In other states, under statutes which went farther by permitting the trial and conviction of an accessory after the fact, whether the principal had or had not been convicted, and although he had been pardoned or otherwise discharged from conviction, it was held that the acquittal of the principal did not bar the conviction of an accessory after the fact: *People* v. *Beint-*

ner, supra; State v. *Jones* (1909) 91 Ark. 5, 120 S. W. 154.

The Kentucky court in the instant case adhered to the common law requirement of the proof of the guilt of the principal in the prosecution of the accessory. It is generally held that the guilt of the principal must be shown: 1 *Brill* "Cyclopedia of Criminal Law" (1922) sec. 253; *Ray* v. *State* (1912) 102 Ark. 594, 145 S. W. 881: *People* v. *Jordan* (1910) 244 Ill. 386, 91 N. E. 482; *Rawlins* v. *State* (1905) 124 Ga. 31, 52 S. E. 1. This is true where the statute allows the accessory to be tried before the conviction of the principal: *McMahon* v. *State* (1910) 168 Ala. 70, 53 So. 89; *Gibson* v. *State, supra.* The acquittal of the principal, however, was held by the instant case not to be res judicata as to his innocence in the subsequent prosecution of an accessory after the fact. The authorities in this country seem to be divided on the question of the conclusiveness of the judgment as to the principal defendant in the trial of the accessory. Some courts hold that a judgment of acquittal as to the principal is conclusive proof on the trial of the accessory that the alleged principal did not commit the crime charged: *Ray* v. *State* (1882) 13 Neb. 55, 13 N. W. 2; *State* v. *Haines* (1899) 51 La. Ann. 731, 25 So. 372. Another view is that the judgment as to the principal is prima facie proof, but is not conclusive evidence of his guilt: *Commonwealth* v. *Minnich* (1915) 250 Pa. 363, 95 Atl. 565. A third holding, where the conviction or acquittal of the principal is immaterial to the prosecution and conviction of the accessory, is that neither judgment is admissible in the action against the accessory: *People* v. *Beintner, supra; State* v. *Gargano* (1923) 99 Conn. 103, 121 Atl. 657.

It is submitted that the instant case may be indicative of a trend toward a more complete and facile administration of the criminal laws. It is logically correct, perhaps, that in order for one to be guilty as an accessory after the fact there must be a guilty principal. The prosecution of one as an accessory though the alleged principal was acquitted does not, it seems, necessarily militate against this. An acquittal might not result from absence of guilt since it is but the verdict of one body of triers, and may have been wrongfully obtained. When the guilt of the principal is shown upon the trial of the accessory, it appears that the logical requirement is satisfied. The common law affords a guilty accessory the opportunity to thwart justice should his equally guilty principal evade conviction.

ROLAND W. SPANGENBERG.

CONDUCT OF JUDGE — EXAMINATION OF WITNESSES.—[Illinois] The defendants were convicted of robbery, after having waived trial by jury. Upon appeal the defendants alleged misconduct of the trial judge as ground for reversal. It was charged that the judge propounded more questions to the defendant's alibi witnesses than did the counsel for defense and prosecution combined. It was urged further that the judge subjected the witnesses to a severe cross-examination and showed hostility toward them. *Held:* affirmed. The extent to which a judge may indulge in the examination of witnesses rests largely within his discretion, although in the exercise of such discretion he must not forget the

function of judge and assume that of advocate. In this case the testimony of the witnesses was patently fabricated so that the judge had a right to act as he did: *People* v. *Giacomino* (1932) 347 Ill. 601, 180 N. E. 437.

The attitude of the American courts toward freedom of the judge in examining and cross-examining witnesses finds its source deep rooted in the English law. In the time of Bracton, when the jurors themselves were witnesses, the judge exercised considerable control over them: *Stephen* "General View of the Criminal Law of England" (1863) 18. Bracton reported that where a serious crime was involved, and the jurors wished to conceal it, the judge could separate them and examine each one individually so as to ascertain the truth sufficiently: *Bracton* "De Legibus et Consuetudinibus Angliae," Book 5, Vol. 2 of 1879 reprint, ch. 22, sec. 3. Lord Chief Justice Ellenborough once remarked that to say the judge on the bench may not put what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age: 25 *Hansard Parl. Deb.* (1813) 207 1 *Wigmore* "Evidence" (1904) sec. 784; 1 *Chamberlayn* "Modern Law of Evidence" (1911) sec. 539. Today in England the judge of his own volition may put on the stand and examine witnesses who are called neither by the prosecution nor by the defense. In order to clear up doubtful points the judge often interrogates witnesses during their examination by counsel, and he unceremoniously terminates any attempt on either side to substitute confusion for common sense: *Howard* "Criminal Justice in England" (1931) 376.

In sharp contrast is the attitude of appellate courts in the United States, which fear that any intercession by the judge will influence a jury. The general rule is that a trial judge has an undoubted right to interrogate witnesses for the purpose of developing the truth of the matter at issue, and he likewise has a discretion to determine when a necessity or propriety therefor exists. However this undoubted right and this discretion are construed quite strictly according to the circumstances of each case: *Andrews* v. *Ketcham* (1875) 77 Ill. 377, *Sparks* v. *State* (1877) 59 Ala. 82; *Long* v. *State* (1884) 95 Ind. 481; *Gordon* v. *Irvine* (1897) 105 Ga. 144, 31 S. E. 151; *Jones* "Evidence" (1914) sec. 815; 1 *Wharton* "Criminal Evidence" (10th ed. 1912) sec. 452; 1 *Wigmore* "Evidence" (1904) sec. 784; 8 *Encyclopedia of Pleading and Practice* secs. 71-73; *Bowers* "Judicial Discretion of Trial Courts" (1931) sec. 399.

In Illinois it always has been recognized that the judge has freedom in examination within the bounds of his own discretion: *Foreman* v. *Baldwin* (1860) 24 Ill. 299; *Dunn* v. *People* (1898) 172 Ill. 582, 50 N. E. 137; *People* v. *Schultz* (1921) 301 Ill. 601, 133 N. E. 379; *People* v. *Rongetti* (1928) 331 Ill. 581, 596, 163 N. E. 373. In each of these cases it is to be noted that the effect on the jury is the deciding factor which limits the discretion of the judge. Even the tone or inflection of the voice of the judge will indicate his opinion of innocence or guilt of the defendants, and for that reason it is felt that instances are rare and conditions exceptional which will justify the presiding judge in entering upon and conducting such an ex-

amination. The exercise of a sound discretion will seldom deem such action necessary or advisable: *Dunn* v. *People, supra; People* v. *Rongetti, supra; People V. Bernstein* (1911) 250 Ill. 63, 95 N. E. 50.

In deciding the instant case, which was a trial by a judge alone, the court cited only one authority on the subject at issue, and that was a case of trial by jury: *People* v. *Bernstein, supra.* The court passed over the distinction by saying that the principle in the two cases is the same. In view of the fact that the presence of the jury has been the predominating factor and has had such a pronounced effect in moulding and constricting the freedom of the judge and his discretion, it is most difficult to see how the absence of the jury leaves the situation unaffected, or the application of the rule unchanged. While the court is consistent with principle in upholding the judge in the instant case, the practice of applying a rule which grew up with jury trial to a case in which the jury is waived hardly seems logical. The chief cause for restriction is gone. With waiver of juries increasing, and the resultant weight of responsibility thrown upon the judge, it seems desirable to approach more closely the English practice in regard to judicial freedom, and to expand proportionately the previously strict construction of such discretion.

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