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LIMITATIONS ON TRIAL JUDGE'S COMMENTING ON THE EVIDENCE IN SOUTH CAROLINA JURY TRIALS[1]

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Legislation pending in the Congress to regulate the giving of instructions in civil and criminal cases in the district courts of the continental United States would (if enacted) provide in part that "the form, manner, and time of granting instructions to the jury shall be governed by the law and practice in the State courts of the State in which such trial may be had," and that "the Judge shall make no comment upon the weight, sufficiency, or credibility of the evidence or any part thereof, or upon the character, appearance, demeanor, or credibility of any witness or party, except as comment is authorized in trials of such cases by the law and practice in the State courts of the State where such trial is had".[2]

South Carolina affords an interesting clinical study of the subject of this legislation, and particularly its application in derogation of the practice prevailing in jury trials in the Federal courts from the time of the adoption of the Constitution of the United States to the present day.

In the leading case of *Norris v. Clinkscales,*[3] the scholarly opinion of the late Acting Associate Justice W. C. Benet, himself a Circuit Judge, contains an extensive review of the transition in the functions of trial judges in charging juries in South Carolina. He sets out the practice prevailing under the common law practice (identical with that now followed in the Federal courts); under the limitations imposed in the State Constitution of 1868; and under the more stringent limitations presently in force under the Constitution of 1895.

Judge Benet said:

> "Until the adoption of the Constitution of 1868, under the common law and the practice of the courts of this State, our Circuit Judges had the power to charge juries upon the evidence as well as upon the law. After the case was closed on both sides, the Judge summed it up to the jury. In this 'summing

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1. From a paper read in the Judicial Conference for the Fourth Circuit, Asheville, N. C., June 27, 1952.
2. H. R. 287, 82nd Cong., 1st Session.
3. 47 S. C. 488, 505, *et seq.*, 25 S. E. 797, (1896).

up' — the old name applied to a Judge's charge, and the name still used in the English courts — it was customary to state to the jury the issues involved, to explain the law applicable to the case, and to recapitulate the testimony, so as to refresh the minds of the jurors and enable them to apply the law to the testimony, and to pass intelligently upon it. It was competent for the Judge to give the jury his opinion upon the facts as well as the law, provided he did not actually take the decision of the case from the jury, but left it to them to find a verdict according to their own opinions. This was the practice for many years throughout all the States, and it still obtains in the Federal Courts."

Among the excerpts quoted from decisions of the common law period is the following from *Kirkwood v. Gordon*:[4]

"This Court has acted on the maxim, *ad quaestionem legis, respondent judices; ad quaestionem facti, respondent juratores.* To preserve the latter branch of this maxim, it will hardly be contended that a Judge shall simply recapitulate the evidence, and play the part of a mere automaton, and not direct the attention of the jury to the relevancy and sufficiency of the evidence. * * * His experience should light their path and lead them to a correct conclusion, not controlled by his opinion, but by the evidence. * * * He must instruct the jury on the facts, not control their verdict; enlighten their understanding, not inflame their passions; and, above all, the discharge of judicial duties demands impartiality. * * * This tribunal cannot say, in the language of counsel, that the presiding Judge moulded the verdict."

Judge Benet adds:

"The pithy style of this decision recalls to mind, and tempts us to quote, the quaint advice given by Lord Bacon to Mr. Justice Hilton, in regard to summing up cases to a jury: 'You should be a light to open their eyes, but not a guide to lead them by the noses'."

In *State v. Casados*,[5] the Court held:

"* * * it is the right, and often the duty, of the presiding Judge, in the examination of questions of complicated facts, to

4. 7 RICH. L. 474 (S. C. 1854).
5. 1 N. & McC. 91 (S. C. 1818).

give the aid of his discrimination, experience, and judgment to the jury. If he finally and distinctly submits the question of fact to the jury as a matter within their peculiar province, and on which they have a right to determine for themselves, there can be no cause for this Court to interfere. There may be extreme cases, which I hope will never exist, where a Judge, becoming insensible to the duties of his high station, may forget that impartiality which he is sworn to practice — a quality which graces while it strengthens the authority of the bench. If, forgetting the duty of impartiality, a Judge becomes a partisan, this Court must interfere."

The Constitution of 1868 provided:[6]

"Judges shall not charge in respect to matters of fact, but may state the testimony and declare the law."

Judge Benet observed:

"This provision superceded the common law in this regard. It took away from the Circuit Judge the right he formerly had — in the language of the cases just cited — 'to advise the jury on the facts;' or 'to instruct the jury on the facts;' or to 'direct the attention of the jury to the relevancy and sufficiency of the evidence;' or to 'intimate how he thought himself;' or 'to aid the jury in forming an opinion on the evidence,' by 'giving his opinion on the facts;' or 'in the examination of questions of complicated facts, to give the jury the aid of his discrimination, experience, and judgment'."

The effect of the 1868 constitutional provision was stated by the Court in *State v. Howell*,[7] as follows:

"We have construed this section to mean, that while trial judges may state the testimony, and so arrange it as to enable the jury to apply it to the legal points involved, yet that they cannot convey to the jury, either expressly or impliedly, their opinions as to the force of said testimony upon any question of fact at issue between the parties. In other words, that the jury must be left perfectly free in reaching a conclusion upon the testimony introduced, untrammeled by any intimation from the Judge as to whether a certain fact at issue has been proved or not."

6. S. C. CONST. Art. IV, § 26 (1868).
7. 28 S. C. 250, 5 S. E. 617 (1887).

Judge Benet's opinion refers to some 17 decisions under this constitutional provision in which instructions were held to be charges on the facts. A reading of these cases shows that the trial judges did not readily assume the role of "a mere automaton" recapitulating the evidence, without occasionally directing the attention of the jury to its relevancy and sufficiency, and thereby committing reversible error.

The Constitution of 1895,[8] took away from trial judges the permission to "state the testimony". It provides:

> "Judges shall not charge juries in respect to matters of fact, but shall declare the law."

As to this provision, Judge Benet's opinion holds:

> "It stands to reason that nothing has been taken from them with regard to the testimony, except the right 'to state the testimony' in their charges. Thus it would still be competent for the Judge to tell the jury in his charge, in a proper case, that there was no evidence bearing on a certain issue, if there was none. * * * On the other hand, it would still be error to charge there was no proof, if there was any evidence at all on the point. * * * It would seem, also, that a Judge would not be violating the constitutional inhibition if he, in his charge, repeated the testimony as to undisputed facts or admitted facts, or stated their legal effect, or pointed out the different conclusions which might be drawn from them, or the inquiries they would naturally give rise to.[9] * * * It has also been well settled by the decisions of this Court, that art. IV, sec. 26, was not violated when a Judge, in his charge to the jury, based his declaration of the law upon a hypothetical statement of facts. By doing so he was neither charging in respect to matters of fact, nor commenting on the testimony, nor stating the testimony. * * * He may not now say anything directly about the testimony, may not state what is in evidence, but he may prevent his charge from being a useless ceremony, by founding it upon a hypothetical statement of fact."

The law of South Carolina today, which the pending legislation would make applicable to District Judges trying jury cases in the Federal Courts sitting in South Carolina is that:

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8. S. C. CONST. Art. IV, § 26 (1895).
9. But see State v. Aughtry, 49 S. C. 285, 305, 26 S. E. 619 (1896).

"as it would be impossible to declare the law applicable to a case on trial without connecting the legal principles involved with some state of facts, actual or hypothetical, * * * the trial Judge in charging the law of the case should lay before the jury the law as applicable to a supposed state of facts * * * making no statement of the testimony, either in whole or in part. * * * A Judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the legal result. In so doing, if he can be careful not to repeat any of the testimony, nor to intimate, directly or indirectly, what is in evidence, he will be chargeable neither with stating the testimony nor with charging in respect to matters of fact."[10]

The Circuit Judges were as reluctant to give up their function of stating the testimony after the 1895 Constitution as they had been to forego directing the attention of the jury to the relevancy and sufficiency of the evidence after the 1868 constitutional limitation.

Judge Benet himself, who wrote the opinion in *Norris v. Clinkscales,* would appear to have been the first trial judge afflicted with nostalgia for the old days of stating the testimony. In *State v. Stello,*[11] he avoided direct statement of the testimony; he merely asked the jury whether a particular witness testified to certain facts, and whether another witness testified to other facts, and so on. The case had to do with the unlawful sale of alcoholic liquors, and one of Judge Benet's numerous interrogatories to the jury was:

"Does Cox say that Stello had poured out one glass and was pouring out another drink, and that three glasses were on the counter, and that he took the bottle out of Stello's hand, and that Stello knocked the glass over?"

The Supreme Court reversed the conviction, holding that the testimony cannot be stated by means of interrogative statements to the jury any more than it can by direct statements thereof.

Since the 1895 Constitution, there have been a number of cases reversed because the trial judge used language in his charge which was construed as intimating an opinion on the weight of the evidence or its sufficiency.

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10. Norris v. Clinkscales, *supra,* note 3, at p. 523 of 47 S. C.
11. 49 S. C. 488, 27 S. E. 659 (1897).

In *State v. Mitchell*,[12] the trial judge advised the jury how they might weigh the evidence, and as to the force to give to the contradictory evidence. The Supreme Court reversed the conviction saying:

> "But we are not called upon to pass upon the correctness of the advice given to the jury, but simply whether the Circuit Judge erred in giving *any* advice or suggestion to the jury as to how they might deal with the facts."

In *State v. Clark*,[13] the trial judge instructed the jury that it was unsafe to convict a party on the testimony of an accomplice, but that if the jury is convinced of the truth of the evidence beyond a reasonable doubt it may convict. He added that "a most outrageous crime may be committed, and if it were not for the fact that an accomplice may be used, criminals sometimes would be allowed to go free". The latter statement was held to be a charge on the facts.

In *State v. Sowell*,[14] the trial Court charged that if the testimony of an accomplice lacks corroboration it is weak, according to human experience. This was disapproved as being too favorable to the defendant, as being a charge on the facts.

In *State v. Smalls*,[15] the trial judge said:

> "I think I may say it, and I am going to say it anyhow, that alibi is always to be received with caution, the defense of *alibi*, but when it is made out then it is a complete defense."

This was held to be a charge on the facts, the Court saying that the juries "are to determine all questions of fact uninfluenced by the Judge and unbiased by his impressions".

In *Lawson v. Southern Ry. Co.*,[16] the trial judge undertook to tell the jury what constituted gross negligence, and the instruction was held to be a charge on the facts, as "The Judge has no right to tell the jury what would be gross negligence".

In *State v. Burns*,[17] a liquor prosecution under the State's quart a month law, the trial judge charged as follows:

> "I have just told you how a man might have as much as a

12. 56 S. C. 524, 35 S. E. 210 (1899).
13. 85 S. C. 273, 67 S. E. 300 (1910).
14. 85 S. C. 278, 76 S. E. 316 (1910).
15. 98 S. C. 297, 82 S. E. 421 (1914), ANN. CAS. 1918A, 718n, 14 A. L. R. 1427n.
16. 91 S. C. 201, 216, 74 S. E. 473 (1912).
17. 133 S. C. 238, 130 S. E. 641 (1925).

> quart of liquor in his possession lawfully. If you can get it lawfully, then you can have it today, as much as a quart of liquor in your possession. I will admit it would be a pretty difficult thing to get it lawfully. You might, by going through a great deal of red tape, get as much as a pint of liquor every ten days, I believe is the Volstead law," etc.

This was held to be a charge on the facts, as indicating the trial judge's opinion on the issue in question. One Justice dissented on the ground that the remark related to a matter of such common knowledge that no prejudice could have resulted to the defendant, as the facts were known to everybody.

In *Gathings v. Great A. & P. Tea Co.*,[18] a charge that repetition of slanderous words evidences that the words were not the result of passion and shows a deliberate purpose to injure the plaintiff was held to be a charge on the facts, in that the jury was told what inferences to draw from the testimony.

In *Sumter Trust Co. v. Holman*,[19] the trial judge was held to have invaded the province of the jury while questioning a witness in the case. The questions put to a witness by the Judge showed that he disbelieved the evidence of the witness. Later he undertook to correct the mistake by saying to the jury:

> "I understand that the witness Clarke is one of the best citizens of the town but the judge did not know that."

The Supreme Court reversed the judgment, indicating that each party had a valid complaint that the trial judge had participated in the jury's findings, even though the occurrence did not happen in the charge to the jury.

In *Lusk v. State Highway Department*,[20] in passing on a motion to strike certain evidence as being irrelevant to the issues, the trial judge, the late honored and lamented Judge Thomas S. Sease, was held to have charged on the facts when he said in his ruling:

> "* * * he said it was the distance of this Court Room and I think it is closely enough connected for the jury to pass on it; a curve is a curve; you know it ain't twenty feet curve, they are one hundred and fifty and two hundred feet curves."

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18. 168 S. C. 385, 167 S. E. 652 (1933).
19. 134 S. C. 412, 132 S. E. 811 (1926).
20. 181 S. C. 101, 186 S. E. 786 (1936).

He was also held to have charged on the facts by commenting on the testimony of one of the witnesses. This witness, in response to a question by counsel, stated that he thought the driver of the car was drunk because the driver had been talking and arguing throughout the night in a poker game. Judge Sease was held to have committed reversible error by remarking, "I think that is natural over a poker game".

Other cases have resulted in reversals under the 1895 limitations, not only by reason of statements made by the trial judge in his charge, but also by reason of remarks which he made in rulings on the admissibility of evidence, in colloquies with counsel, and in questions addressed to witnesses, where it was felt that he may have intimated a view of the effect or weight of evidence.[21]

The South Carolina cases indicate the result of whittling down the functions of the trial judge in respect to the submission of a case to the jury. In great measure, legal principles have to be charged in the abstract, with little or no relation to the facts developed in the testimony. While hypothetical or supposed facts can be used, and if deftly employed may bear a more or less distinct resemblance to the facts of the case being tried, there is a tendency on the part of trial judges in practice to use supposed facts as far as possible from the facts developed in the evidence, for the danger of reversal is real. Everything the trial judge says during the course of a trial must run the gauntlet of the constitutional limitations, and today he may not safely be even "a mere automaton" who can recapitulate conflicting evidence in gross to recall it to the jurors' minds. His function under the present practice closely approaches in fact that of "a mere moderator,"[22] in giving instructions to the jury.

Since the present South Carolina practice is prescribed by a provision of the State Constitution, it obviously does not constitute a denial or infringement of the right to trial by jury guaranteed by the State Constitution.[23] It would seem open to serious question, however, whether a trial in a Federal Court governed by the limi-

21. The cases referred to are given to indicate the authorities which the Federal courts would find in looking to the State law for the practice prevailing in South Carolina. The examples given are not intended to be exhaustive, and no reference has been made to the many cases involving the refusal of requests to charge, or to cases where charges have been held to be on the facts although actually objectionable as incorrect statements of legal principles.

22. Herron v. Southern Pac. Co., 283 U. S. 91, 95, 51 S. Ct. 383, 75 L. Ed. 857 (1931).

23. *Cf.* Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575 (1934).

tations as to instructions prescribed by the State Constitutional provision now in force in South Carolina would accord the right of trial by jury guaranteed by the Federal Constitution.[24]

24. *Cf.* Herron v. Southern Pac. Co., *supra,* note 22; Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1933); Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.