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LIMITATIONS OF THE POWER OF COURTS IN INSTRUCTING JURIES

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THERE is a persistent idea among the members of the bar that Colorado courts are forbidden to comment on or "sum up" (as the English say) the evidence, or express any opinion concerning it or the case. But what is the actual law on that subject here?

The Legislative Assembly of 1861, Laws of 1861, p. 282, par. 28, enacted the following:

"The District Court, in all cases both civil and criminal, shall *only* instruct the petit jury as to the law of the case; * * *."

The whole Act of which this was a part was repealed by the practice Act of 1868, R. S. 1868, Chap. LXX, p. 520, n., and was reenacted as Sec. 28 of the latter Act, which in turn was repealed by the Code of 1877, Sec. 447. Nothing in the Code reenacts it, but Sections 173 and 410 of the Code of 1877 contain matter inconsistent with other parts of said Sec. 28.

That Code in substance (Sec. 167) and the present Code of 1921, Sec. 205, contain the following:

"Before the argument is begun the court *shall* give such instructions *upon the law* to the jury as may be necessary, which instructions shall be in writing and signed by the judge."

It seems clear that in omitting the word "only" the legislature must be deemed to have altered the meaning and intent of the statute and that now the court *must* instruct as to the law, but is not forbidden to follow the common law practice of courts in respect to the evidence.

This conclusion finds some support in Section 171 of the Code of 1877. "After hearing the *charge,* the jury may" etc. "Charge" is a word which connotes only the common law address of the court to the jury. The same provision still appears in Section 210 of our present Code.

It cannot be said then that there is anything in our present statutes to prevent the common law charge to the jury in a

civil case, provided it is made in writing. In criminal cases the old Section 28 of 1861 and 1868 is still in force, C. L. 1921, par. 7105, the Supreme Court having held that, so far as criminal causes were concerned, the repeal of the section was not within the terms of the title to the Code, viz: "An Act providing a System of Procedure in Civil Actions in the Courts of Justice of the State of Colorado." *Van Houton v. People,* 22 *Colo.* 53.

What have our courts said about this matter?

Sopris v. Truax, 1 *Colo.* 89, 91, was reversed because the court instructed the jury as to the sufficiency of certain evidence. Section 28 of the practice Act of 1868 was cited. This case, of course, decides nothing with reference to the rule under the Code.

In *Wall v. Livezay,* 6 *Colo.* 550, the Supreme Court declines to predicate error upon the fact that the lower court called attention to certain evidence favorable to plaintiff, intimating, however, that such practice was not to be encouraged and that it might have been erroneous if the lower court had omitted to call attention to evidence favorable to defendant, or if it had referred to disputed facts as established.

This, we believe, is the first case on the point in question, after the passage of the code.

In *Gilpin v. Gilpin,* 12 *Colo.* 504, 514, to call especial attention, in a divorce trial, to the conduct of defendant as asserted by plaintiff and his witnesses is said not to "meet the approval" of the Supreme Court but no ruling is based on the statement.

In *Rose v. Otis,* 5 *Colo. App.* 472, 476, it was held that a statement of a synopsis of plaintiff's evidence was not error.

In *Florence Oil Co. v. Huff,* a requested instruction which collated the evidence favorable to defendant but not that favorable to plaintiff was held to have been properly modified.

So far as we have found, these are the only Colorado cases which deal directly with references to evidence in instructions; there have been cases, however, which indirectly affect the results of such instructions; e.g. a line of decisions which condemns bare statements of the law and require or at least recommend that instructions be "concretely stated." *Motor Co. v.*

Walker, 71 *Colo.* 53. "Concretely" is not here a strictly definite term, but it must mean at least that the court should state the relation of the law to the facts which appear in evidence; and, since many cases forbid the court to instruct as to matters which do not appear in evidence, it necessarily follows that the court must consider and determine what the evidence shows or tends to show, and speak to the jury accordingly. It is clear also, from the trend of the decisions which condemn the mention of evidence favorable to one side without mention of evidence to the contrary, that a fair and impartial statement of the evidence on a given point is not prohibited.

These conclusions are reinforced by the cases which hold that undisputed matters should not be left to the jury. *Colo. Springs Co. v. Cohun,* 66 *Colo.* 149; *Heaton v. Nelson,* 69 *Colo.* 320; *Martin v. Carruthurs,* 69 *Colo.* 468; *Thayer v. Kirchhof,* 83 *Colo.* 480, 488-9; *Small v. Clark,* 83 *Colo.* 211, 215, and cases cited in 38 *Cyc.* 1667.

It follows, does it not, that the Court must determine and instruct the jury that certain matters are undisputed, and that they must take them as proved. A familiar example is a suit for goods sold and delivered where the defendant, though he traverses the sale and delivery, yet on trial relies wholly on a plea of payment or of confession and evidence. No Court would leave to the jury the question of the sale and delivery, but would instruct them that the only question for them was payment *vel non.*

A synopsis of testimony as in *Rose v. Otis,* 5 *Colo. App.* 472, 476, seems to be the same thing as "summing up," 38 *Cyc.* 1653, and this seems to be expressly permitted; it would seem too that some prudent and restrained comment on the evidence would not justify a reversal, but, although we have no final decision on the point in this state and although no statute forbids it, the impressions of the bench and bar are so strongly against the expression by the judge of his opinion as to the weight of evidence or as to the questions in the case that such expression would probably be held to be prejudicial error.

But what reason is there against full discussion and expression of opinion by the Court? It is done in England, most of the courts in the East, and in the United States courts every-

where. It is said to be arbitrary, but it is less so than many things which the Court does every day.

An example of comment on the evidence so common as to go almost unnoticed is a direction to disregard certain evidence, but this should, of course, be distinguished from commenting on the weight of the evidence and from analysis or summing up. It is, however, a more arbitrary act than either of the other two, and so more subject to objection, yet it is neither more nor less than sustaining an objection to evidence, which is a greater power than comment or expression of opinion. Yet the court can go beyond this and grant a non-suit or direct a verdict, and, more arbitrary yet, can set aside a verdict after it is rendered.

With these great powers freely recognized as proper to be exercised, what sound objection can there be to lesser ones along the same lines?

The fundamental question in regard to this matter, as to all other matters in trials is: what will further a right decision? Now any twelve men, outside a jury box, seeking a correct decision on any subject, would more surely reach it if they had the advice of an expert as to the evidence before them and the advantage of his trained powers of discrimination, analysis and logic. Why not, then, twelve men inside the box?

Does anybody really believe that a jury is more likely to render a true verdict without the advice of the Court than with it? Does any one believe that a jury in our federal court is less likely to reach the truth than in our state courts?